

**THE LAND SURVEYOR'S GUIDE
TO THE SUPREME COURT OF KANSAS**

**A REFERENCE TEXT SUPPORTING
THE CONTINUING EDUCATION
OF LAND SURVEYORS**

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**IMPORTANT, INFORMATIVE AND INTERESTING CASES
INVOLVING BOUNDARIES, DESCRIPTIONS,
SURVEYS AND RELATED PRINCIPLES
OF LAW AND EQUITY**

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Other works by this author:

The Land Surveyor's Guide to the Supreme Court of North Dakota (2010)

The Land Surveyor's Guide to the Supreme Court of Montana (2011)

The Land Surveyor's Guide to the Supreme Court of South Dakota (2012)

The Land Surveyor's Guide to the Supreme Court of Nebraska (2013)

INTRODUCTION

Although the typical modern land surveyor, being highly skilled and versatile, wears many hats and performs a wide variety of functions, serving many different purposes, the most basic role of the land surveyor in our society remains what it has always been, as the principal provider of a professional level of expertise on boundary location issues. The primary reason why the practice of land surveying is limited to those who have demonstrated that they are capable of functioning as professional decision makers is to eliminate the serious economic and social problems which can result from incompetent boundary surveys, by creating a group of qualified professionals, who can be counted upon to deal objectively and diligently with boundary issues. As all surveyors know, they can be called upon either to create new boundaries or to retrace and restore existing boundaries, and as we will observe, these represent significantly different functions, with very different legal implications. In either case however, land owners expect the surveyor to provide reliable results, because boundaries that they cannot rely upon are obviously of no value to them, and in fact can cause expensive problems, potentially resulting in serious liability for both the land owners and the surveyor. While the right of land owners to rely on new boundaries marked on the ground during an original survey is generally absolute, whenever existing boundaries are surveyed several important questions arise, such as the needs, expectations and responsibilities of the land owners relating to the survey and their boundaries, how well the land owners understand the legal effect of a retracement survey, and to what extent they are legally entitled to rely on the survey. Whenever a survey of an existing boundary is requested, it must be presumed that the land owner intends to rely on that boundary for an important purpose, and therefore expects the surveyor to locate and mark the boundary in a manner that the land owner can make use of with complete confidence, so the essential question becomes whether or not the survey will prove to be legally supportable, justifying the land owner's belief that the corners and lines marked on the ground for his use are genuinely reliable. Boundaries do not exist in isolation however, quite the contrary in fact, as we will learn on this historically oriented journey, many legal and equitable factors associated with title law are capable of exerting control over the fate of even the most well documented boundaries, thereby preventing both resurveys and original surveys from having their intended effect, while also presenting legal challenges which can have a negative impact upon the work of land surveyors.

The typical modern surveyor is a master of measurement science, at least as it applies to land, and is well equipped with superb technological tools for that purpose, so if boundaries were controlled entirely by measurements the law would not be a factor, and the surveyor would have no particular motivation to learn about the law. However, boundaries and related land rights issues that surveyors often encounter are controlled by evidence, making it essential for the surveyor to recognize the potential value of all the conditions observed on the ground by the surveyor as evidence, to appreciate the

importance of discovering all the evidence, and to understand which evidence is most likely to control the boundary location. Measurements themselves can be evidence, but as every surveyor should already know, measurements can become controlling evidence only in the absence of any of the many higher and stronger forms of evidence, which are seldom truly absent, although their presence may well go unrecognized. Many surveyors choose to take the position that they are measurement experts only, with no need or reason to learn the law, and of course they are entitled to make that decision, and no one can require a professional to do anything that the professional feels unqualified to do. Some surveyors believe that the practice of land surveying is strictly limited to applying existing numerical values of record to the ground, therefore measurement and computer skills are all the surveyor really needs, and indeed it is possible to have a full career in certain branches of the surveying profession based entirely on technical knowledge, so in fact there is no absolute necessity for every surveyor to know every aspect of land rights law. The surveyor who intends to participate as a professional in projects involving land rights however, should realize that all professionals bear a fundamental burden to operate in good faith, in all respects, at all times, toward all parties, which means respecting and honoring all land rights, both public and private. In order to carry that professional burden, the surveyor is obligated to protect the land rights of all parties by retracing and resolving existing boundaries in a manner that is legally supportable, so that the surveyed boundary holds real value, and the land can be safely developed without unfortunate consequences, which means that all boundary surveys must be based upon the best available evidence, rather than on measurements alone, in disregard for superior evidence. Developing a genuine appreciation for the value of all forms of boundary evidence, and developing the ability to recognize and properly utilize all such evidence, is essential to becoming a complete land surveyor, and is the hallmark of a truly dedicated professional surveyor. Since land rights of all kinds are controlled by evidence, the basic premise set forth herein is that the surveyor can clearly benefit from knowing what constitutes valid boundary evidence, and also from learning to spot potentially problematic conveyances.

It should be understood that the goal for surveyors, in learning about the law, is not to come to independent conclusions about the legal principles that are involved in land rights controversies, or attempt to apply those principles independently, but simply to objectively observe those principles in action, and thereby come to recognize their potential significance in any given situation. By observing how land rights conflicts are judicially resolved, the surveyor can develop a better appreciation of how the work of the surveyor interacts with the law, and a better understanding of why surveys sometimes control land rights and sometimes do not. Engaging in education of this type is not intended to make the surveyor an expert on the law, it is intended only to familiarize the surveyor with situations that are similar to those which the surveyor may encounter, so the surveyor can see how such situations typically play out, and can identify and note the possible presence of important legal factors that may determine the outcome, when the surveyor is confronted

with comparable circumstances. Learning about the law can enable surveyors to point out potentially problematic situations, and thereby be of greater assistance to both land owners and attorneys, who are entitled to expect the surveyor on their project team to be able to demonstrate a professional level of knowledge, the ability to understand such matters, and the ability to contribute relevant information and communicate about land rights issues effectively. Only judges and attorneys need to know the procedural aspects of the law that are applicable in the courtroom, but surveyors need to have a sound grasp of the principles of law and equity that are relevant to boundary control, in order to understand how and why land rights can be gained and lost, impacting boundaries, acreage and legal descriptions. The surveyor has no authority to adjudicate land rights, and should never set out to do so, but the surveyor does need to understand the rights of all parties, public and private, well enough to recognize those rights when they appear, in order to avoid damaging them. It is essential for the surveyor to realize that the primary role of the retracement surveyor is that of a gatherer of evidence, and nothing the surveyor does independently, such as laying out or staking a boundary of record, can have any binding effect on any land owners, since no surveyor has any authority to alter any established boundaries. Therefore, the prudent surveyor focuses first and foremost on fulfilling that responsibility to thoroughly and diligently acquire all the available evidence, rather than simply proceeding to treat the measured location of the boundary in question as an absolute demarcation of ownership. In summary, the surveyor is authorized only to honor and follow the law, and is therefore charged with knowing and respecting the law, the surveyor is not authorized to practice the law or question the wisdom of the law, and is ethically compelled to maintain a perspective on land rights issues which is completely professional and objective.

The purpose of this book is to review and discuss decisions of the Supreme Court of Kansas which have guided and influenced the development of those aspects of the law that matter most to surveyors, in order to provide insight regarding how the Court has dealt with land rights disputes, and to allow surveyors to see the legal and equitable factors which the Court regards as decisive in action. It should be understood that statements made by the Court are not intended to constitute an instruction manual for surveyors, and even when specifically discussing surveys, the Court typically has no intention of laying down technical rules of practice. The prudent surveyor may well observe however, those practices that find favor with the Court, and conversely, those practices that the Court consistently rejects or disapproves, from which the judicial view of the proper role of the land surveyor may be seen to emerge. Among the items that the prudent surveyor will take particular notice of, are the instances in which surveys are upheld as controlling, and of at least equal importance, the conditions and circumstances under which surveys do not control. As we will see, in some cases surveys were done which had no legal or controlling effect, while in many other cases surveys were not done when they clearly should have been, and the consequences of those failures to obtain surveys are highly noteworthy as

well. While there are some cases in which the Court has been critical of surveyors, there are at least as many cases that are affirmative of the value of surveys, particularly those in which all available evidence was taken into account and treated with a high level of respect. Many of these cases do not directly involve surveys or surveyors at all, but such cases can nonetheless be very enlightening to surveyors, since they drive home the important point that it is typically the acts of the parties themselves which ultimately control the legal status of their land rights. One elementary lesson to be learned here is that only the judicial interpretation of the statutes performed or approved by the Court governs the true meaning of each statute, and the Court is highly cognizant that statutory law is not to be applied in unintended ways which facilitate injustice, so the Court always strives to implement the law in a manner which achieves equity and justice. Another essential lesson to be gleaned is the intrinsic value of all actions taken in good faith, as only rarely does a party who endeavored to faithfully follow the spirit of the law not prevail, while many instances will be noted in which the party seeking a rigid application of the law meets with defeat. As we will discover, all of the powerful principles of law that can apply to land rights are of no avail to one whose actions run counter to the spirit of the law, or reveal an absence of good faith, since nothing in the entire realm of land rights law can overcome these most fundamental tenets, which govern human behavior in our society.

It should be understood that only reading objectively, with an open mind and with the intention of learning and appreciating the wisdom of the Court, rather than merely judging and criticizing the results of these cases based on personal preferences or inclinations, will result in a beneficial experience for the reader. Most surveyors are already aware that surveys do not always control boundary locations, and cannot control the ownership of land, but one primary goal of the surveyor in reading this book should be to develop an understanding of how the law limits the capacity of surveyors to engage in boundary determination and why such limitations are justified. The instincts and the training of surveyors typically cause them to feel that a party who obtained a survey should always prevail over a party who failed to do so, but one valuable lesson presented here is that the law treats surveys only as one of many forms of boundary evidence, therefore surveys can be negated and rendered ineffective, even when properly done. In addition, the reader should be aware that the circumstances of each case are unique, and it cannot be presumed that all similar situations are equivalent, since the presence or absence of even one subtle yet important factor can change the outcome. We will bear witness herein to numerous errors, made by both land owners and surveyors, and observe how the Court has historically handled the unenviable task of dealing with the legal consequences of ignorance, negligence, bungling and mistakes of every variety relating to boundaries and conveyances. The astute reader will observe that many decisions of the Court have driven and shaped the historical progress of Kansas law, and that virtually all of the decisions of the modern era rest upon a very solid foundation, judicially formed during earlier decades. The efforts of the Court to do justice and uphold time honored principles of equity are

richly displayed herein, for the benefit of all those who are interested, and each surveyor is free to decide how much of his or her time this learning exercise merits. It is truly amazing how much can be learned when reading with an open mind, so each reader is encouraged to read not for the purpose of scrutinizing, denying or rejecting the positions taken by the Court with respect to surveys and surveyors, but to understand and accept the wisdom of the Court. Those who find themselves consistently shaking their heads and lamenting that the Court was wrong, would be well advised to hit the reset button and start over, but not before letting go of any personal notions that run contrary to judicial wisdom, approaching this material as an exercise in learning, rather than an exercise in criticism. In addition, it will be seen that these cases are excellent examples of problem solving, so surveyors can and should learn from observing the organized and methodical thought process employed by the Court, and strive to develop their own problem solving skills along the same lines.

Land surveyors are often told that they need to know the law, yet they have been given little guidance on exactly how they can best accomplish such a substantial task, and they may rightly feel that there are relatively few well organized resources focused upon the specific matters which are of particular interest to surveyors. Learning about the law in Kansas is implicitly tied to history, because the true meaning and purpose of the law can only be well understood by those who have taken the time to thoughtfully observe the progress of the law throughout the era of Kansas statehood, and that premise is manifested in the layout of this book. Drawing conclusions about the law after reading only a small amount of case law frequently results in misguided opinions and positions, formed or taken in the absence of complete knowledge about the current status of the law, and how it developed to the point where it stands at any given time, so historical context is genuinely necessary. This book is intended to present those land surveyors who have an appreciation for history with the opportunity to learn how Kansas case law has grown over the first 15 decades of statehood, while offering those with less time for reading a handy reference source and a point of introduction, from which they can launch their own exploration of any particular branches of land rights law that may be of special interest to them. The law is readily available to everyone, and the fundamental principles of law and equity that drive judicial decisions are not nearly as difficult to comprehend as some have portrayed them to be, in fact those principles are all very solidly based upon common sense and natural justice, which is readily apparent to anyone who reads the law with an objective mindset. It is hoped that Kansas land surveyors will find this material interesting and thought provoking, as well as enlightening and useful, and perhaps some will even be motivated to take advantage of the citations provided herein to build a case law library of their own. The tapestry woven by the many decisions documented here is emblematic of the judicial perspective upon the perpetually evolving needs of our society, and reflects the wisdom of those who have been selected to guide the course of justice in Kansas. The consummate professional is forever striving, not only to achieve technical prowess, but also to better know and understand his or her proper role as a servant of society, and absorbing

the wisdom that is embodied in the resolution of these legal battles can help to insure that the practice of each professional land surveyor working in Kansas is in alignment with the law, and thus well serves the needs of his or her fellow citizens.

To a large extent of course, the activities of land surveyors in Kansas are mandated and guided by statutory law at the state level, especially the well known Minimum Standards administered by the Kansas Board of Registration, thus the performance of land surveyors is typically evaluated, and criticized or judged when necessary, in the context of the rules of professional practice embodied therein. While land surveying is inherently technical in nature however, there are many aspects of our profession which pass beyond the use of proper technical methods and procedures, and require the application of professional judgment. Judgment skills are far more difficult to objectively measure than technical knowledge or compliance with technical standards, yet such skills are widely acknowledged as being vital to long term professional success, and his or her ability to develop sound personal judgment can shape the career path of a land surveyor, ultimately determining his or her status and reputation, both within the profession and within the surveyor's own community. Each surveyor must decide what the extent of his or her own personal commitment to learning will be, and for those who elect to pursue advanced learning, this book provides an opportunity to embark upon an effort to obtain the wisdom which will support the development of sound judgment. While knowing the law well enough to practice it is the sole domain of the legal profession, observing how the law is implemented holds many highly valuable lessons for land surveyors, because only after having seen how land rights issues are resolved can one achieve a reasonably complete understanding of the proper role of the land surveyor in our society. No effort is made herein to instruct or direct the land surveyor, each reader is free to observe the results of the litigation documented here, focusing particularly on the relevant principles that come into play, and to note the conditions or circumstances under which those principles have been judicially exercised. From the cases presented herein, the thoughtful reader can gain great insight into the value of the many different forms of evidence that are pertinent to boundary resolution, which the typical surveyor is likely to encounter in the course of his or her career, and perhaps come to realize the importance of honoring all such evidence, by properly respecting and documenting it. If we are mindful of the significance of this precious historical information, each one of us can properly carry out our primary professional mandate, which is to objectively protect the land rights of all those with whom we interact in our professional capacity, by bringing sound judgment, as well as technical proficiency, to all of the work in which we engage.

It is hoped that even those with little concern for the law itself may find this book interesting from both a historical perspective and a human interest perspective, so to make this learning experience palatable, the cases are presented here in a manner that is intended to provide both enjoyable reading and enlightenment. As opposed to a dry and

tedious recital of statutes, each case presented herein is an interesting real life story, involving people from all walks of life, from the wealthy to the impoverished and desperate, which holds valuable lessons regarding the consequences of human behavior. Most of the cases are presented concisely, while 25 featured cases are more extensively treated, the objective being to thoroughly address the most significant judicial precedents, landmarks and milestones that fall within the scope of this book. Each of these featured cases begins with an introduction, followed by a timeline objectively presenting all the known facts relevant to the controversy at hand, and concludes with analysis of the crucial aspects of the legal proceedings and the outcome. Its always important to read the timeline quite carefully, with an appreciation for the potential significance of each factual item, and its also often critical to note the passage of time between successive events, which is quite dramatic in some cases, emphasizing the potentially great value of seemingly minor points of evidence originating in the distant past. These cases cover a wide range of physical conditions and circumstances, from urban scenarios to very remote locations, so those whose work takes place primarily in rural areas will discover stories about the kind of situations and controversies they can relate to, just as will those who are more familiar with issues involving platted city lots. Legal citations are not presented in footnote form within the content portion of the book, citations for all of the Kansas cases mentioned in the text are instead provided at the end of the book, and are indexed both alphabetically and by topic, so the surveyor can obtain the full text of any given case from any law library or other source of legal material. All interest in this book is genuinely appreciated, whether complimentary or critical, and all questions and other comments are most welcome. This effort merely opens a door upon the subject matter discussed herein, intended to introduce surveyors to the vast body of public information pertaining to the law, which may serve to broaden and fortify their existing professional knowledge. Any surveyors who are inclined to provide input that will expand upon this work, by contributing additional information which may serve to enhance the legal knowledge base of our noble land surveying profession, now or in the future, are most heartily encouraged and invited to do so.

Along our way on this educational journey we will find enlightenment on many questions pertaining to matters of potential concern to land surveyors, such as:

How does the Court regard PLSS evidence, and which forms of PLSS evidence have historically been accepted and treated as controlling?

Do surveys always control boundary locations, and if not, what conditions or factors can prevent a survey from exerting any such control?

What level or degree of respect has the Court shown for survey monumentation, and can objects that were not put in place by a surveyor ever have any controlling effect upon boundaries?

Do boundaries or record determine the extent of title or does the extent of title ultimately govern boundary locations, and how do these two closely related fields of law intersect?

How do equitable principles interact with legal principles, and can such principles have any impact on the validity or efficacy of surveys?

Does Kansas case law uphold or support the concept of mutual boundary agreement on the part of land owners, and if so, in what ways and to what extent?

Has the Kansas Supreme Court ever formally adopted or approved such widely known concepts of equity as practical location, recognition & acquiescence, or estoppel, as being relevant to boundary determination?

Has the Court always handled adverse possession cases in the same manner, and if not, how and why has the Court's position on adverse possession evolved?

How important is land use in the eyes of the Court, and can it ever have any controlling effect upon either title or boundaries?

How does the court view the acts of land owners in their roles as grantors and grantees, and can the acts of those who are now long gone, but previously owned the land, still be relevant today?

How has the Court viewed, interpreted and treated legal descriptions, does descriptive text always control, and if not, what can deprive a legal description of its controlling force?

Has the Court ever directly addressed issues concerning the platting of land, or the legal significance of a right-of-way, or the resolution of boundaries of riparian land?

Does the Court treat or regard public land any differently than private land, and has the presence or absence of public land, or land rights held by the public, had any effect upon the Court's decisions pertaining to title or boundaries?

Has the Court ever directly addressed or clearly defined its views on the proper role, or any of the specific duties, of county surveyors?

What role does the Court see as appropriate for the land surveyor in our society, and has the Court's view on this subject changed over the decades?

Upon completing this course of study, the attentive and diligent reader will have ample grounds upon which to reach informed opinions on all of these matters and many others that are fundamentally connected to the work of land surveyors, which may enable the surveyor to better serve the interests of the public and all private parties, to become recognized as a reliable source of wise and prudent guidance within his or her community, and hopefully to preclude the potential consequences of professional liability.

The 1860s - The First Decade of Statehood

Kansas was born amidst exceedingly turbulent times, during which the fate of our nation itself was far less than certain, and land rights were clearly not among the most pressing issues of the day. Even as our country was torn asunder by civil war however, the seeds of real property law began to sprout and grow in Kansas, forming an essential part of the foundation for the civilized society which the future would eventually bring. The Supreme Court of Kansas came into existence in 1854, when Kansas was granted territorial status, and in 1855 it began to function, as a panel comprised of 3 Justices, who were appointed by President Pierce. The earliest decisions of the Court, made during the territorial period, were not documented in an organized manner, but when Kansas achieved statehood in 1861 the Kansas Reporter was created, to compile the documentation produced by the Court, as it adjudicated controversial matters and forged the path of the law. The cases addressed by the Court during the first several years of statehood were obviously products of a time which was very different from today, and which is now very distant, so they may seem irrelevant to modern times and conditions, but that is not really the case. The same elementary principles which control the outcome of most land rights litigation today were present and were being utilized even during these earliest years, and in fact cases decided during the nineteenth century are still quite often cited by the Court during the twenty-first century, emphasizing the enduring wisdom that was embodied in much of the early work of the Court. So we will begin our review of Kansas case law by taking brief notice of some of the cases that brought certain land rights issues to the attention of the Court for the first time, thus giving the Court the opportunity to take initial positions on those issues and create a platform of law, which would play a highly important role in shaping the resolution of future land rights controversies.

The earliest Kansas case that may be worthy of note, due to its relevance to land rights issues, appeared on page 126 of the first volume of the Kansas Reporter. Elliott v Lochnane (1862) was a personal property case, and not a land rights case, in which Elliott filed an action as a result of damage that was done to his business, and in defending against Elliott's charge Lochnane and his fellow defendants maintained that the action was legally barred by a certain statute of limitation, because the time period specified in one such statute had passed, since the time when the damage took place. Elliott's legal counsel responded to this defense by challenging the validity of such statutes, asserting that the Kansas Territorial Legislature had no authority to pass statutes of limitation, on the grounds that such statutes operate to deprive citizens of their constitutional right to due process of law. Thus at this juncture the Court was compelled to take a stand on the validity of statutes of limitation in general, as a matter of principle. Numerous statutes of limitation had already been put in place by this time, and some of them had already been modified in various ways, including adjustments to the length of the time period required to bar any legal action. In this case, the Court determined that an 1859 reduction of the time period allowed for actions of this kind was inapplicable to Elliott's case, and therefore held that his particular action was not barred. In so doing however, the Court rejected Elliott's position on the legality of statutes of limitation, finding that they did not prevent the implementation of due process of law, and they could not be characterized as unconstitutional. As we will soon see, statutes of limitation are highly relevant to land rights, and they frequently come into play in land rights litigation, so this decision of the

Court, approving statutes of limitation in principle, and confirming that such statutes can be legitimately enforced, effectively opened the door to their future use, serving as a stern warning to all those who might be negligent enough to allow an excessive amount of time to pass before attempting to utilize or assert their rights.

About 6 months later, in *State v Hitchcock* (1862) the matter before the Court was the validity of a legislative enactment pertaining to the location of the county seat of Franklin County. Controversy evidently arose due to the fact that the legislative action in question was not passed by the Territorial Legislature until shortly after statehood was bestowed upon Kansas by the United States Congress, and those opposed to the location specified in that legislation apparently decided to attempt to use that fact as leverage in their effort to nullify it. The argument was thus made that the Territorial Legislature no longer had any authority once statehood was formally declared and the Kansas Constitution went into effect, so the suggestion that the existing approved legislation must be set aside and the matter must be revisited by the Kansas Legislature was thereby presented for consideration by the Court. This position was not welcomed by the Court however, and it declined to deem the legislative enactment at issue to be unconstitutional or otherwise invalid. Recognizing that the contested legislation was among many such items which had been hastily addressed in a flurry of urgent activity, the Court refused to strike it down on the mere basis that the Territorial Legislature had failed to complete and finalize their work prior to the arrival of statehood, which technically terminated the law making authority of that body. In so ruling, the Court observed and followed the time honored judicial standard mandating that the spirit of the law controls over the letter of the law, declaring that "it is not the purpose of the constitution to compel the legislature to accomplish an act sacrificing the spirit to the letter of the constitution". This fundamental principle, that technical or procedural flaws or shortcomings in documentation will not be permitted to stand in the way of justice, by defeating an agreement that has been properly reached for the accomplishment of a legitimate purpose, is one that would prove to be highly relevant to the resolution of many land rights issues, as we shall see.

Also appearing in the first volume of the *Kansas Reporter* is the case of *Bemis v Becker* (1862) which has been cited in over 40 subsequent cases, and marks the Court's first encounter with platting issues. Becker and his business associates were evidently merchandise dealers, while Bemis was the holder of a certificate entitling him to 10 lots in Wyandotte City. In 1858, Bemis purchased 394 sacks of flour from Stockton, who was one of Becker's partners, but instead of cash payment for the flour, Stockton and Bemis agreed that the 10 lots would suffice as compensation for the flour. It was subsequently discovered however, that no plat of Wyandotte City had ever been recorded, so the 10 unspecified lots did not yet even legally exist and their location could not be identified on the ground, thus the right held by Bemis existed only in a raw conceptual form, which was of little practical value, at least until such time as the plat was completed and recorded, and the 10 particular lots could be defined. Becker was apparently unsatisfied with the deal as a result of this, so he filed an action against Bemis, demanding cash for the flour, on the grounds that the 10 undefined lots could not be legally conveyed and were therefore essentially worthless. A statute known as the *Kansas town plat law* had been passed in 1855, which made the sale of lots prior to platting illegal, and imposed a fine upon such sales, and Becker relied upon that statute as the basis for his position. The trial court ruled in favor of Becker, but on

appeal the Court reversed that decision, holding that the 1858 transaction was entirely legitimate and was legally binding upon all of the parties. Noting comparable decisions from Missouri, New York and Ohio, the Court upheld the validity of the 1855 statute, but explained that the deal did not violate the statute, because the right to acquire 10 lots, which was held by Bemis, was a genuine and valuable property right, despite the fact that the lots in question had not yet been legally created and could not be specifically identified. No actual lots had been sold, the Court found, Bemis had simply transferred to Becker his right to acquire 10 as yet undelineated lots in the future, so the statutory prohibition on the sale of unplatted lots had not been violated. In addition, the Court indicated that even if an illegal sale of unplatted lots had taken place, the transaction would still be fully effective and binding, although it would be subject to the statutory fine, because it was not the intent of the statute to negate any such conveyances, the statute merely mandated the imposition of a monetary penalty. The strong inclination of the Court to uphold all agreements involving land rights was revealed by its approval of this problematic conveyance, making this case a harbinger of many future rulings.

The distinction between matters of law and equity was addressed by the Court in the case of *Chick v Willetts* (1864). Willetts was an apparently typical land owner, with several unspecified lots in Topeka, and in 1858 he mortgaged his lots to Chick. Willetts evidently made no payments on the mortgage however, so Chick filed an action against him in 1863, over 5 years after the date of the mortgage. Willetts raised the relevant statute of limitations in his defense, asserting that the action filed by Chick was thereby barred. In response, Chick argued that the statute of limitations was inapplicable, because the mortgage had effectively transferred ownership and control over the Willetts property to him. The Court disagreed however, and upheld the trial court ruling against Chick, confirming that the mortgage had been extinguished and the lots still belonged to Willetts. In so doing, the Court announced that in Kansas no distinction exists between actions at law and actions in equity, meaning that all matters concerning land rights can be judicially dealt with in any given case, provided that it is necessary or appropriate to do so, because the once prominent distinction between law and equity had already been conclusively abolished by this time, in the process of formulating the Kansas statutes. Statutes of limitation are therefore operative, the Court observed, regardless of whether the matter at hand is fundamentally legal or equitable in nature. Chick had not acquired an ownership interest in the lots at issue by means of the mortgage, the Court informed him, because a mortgage is not equivalent to a conveyance, the mortgagee obtains only the right to place a lien upon the subject property if the mortgage goes unpaid, and the mortgagor remains the owner of the land, with full control over it, including the right to sell it to anyone of his choosing. As we will see going forward, even though litigation has never been formally classified or divided along lines of law and equity in Kansas, legal principles and equitable principles operate in different ways, so even today, more than 15 decades later, the many important principles of both varieties continue to interact in the judicial determination of land rights, and the manner in which they interact often has a major impact on the resolution of both title and boundary issues.

Kykendall v Clinton (1864) represents the Court's earliest opinion on specific descriptive language. Clinton owned a hotel in Indianola, commonly known as "The Clinton House", and she filed an action against Kykendall, alleging that he had entered the hotel property by force. Whether Kykendall's presence was based on a claim that he held

some interest in the subject property, or he was merely a plain trespasser, is unknown, but that made no difference to the outcome of this action. When she filed her action, Clinton described her tract simply as "The Clinton House" together with all lots used in connection with the hotel building, making no effort to describe the location, size or shape of her property in any exact or formal terms. Legal counsel for Kykendall pointed this out, asserting that Clinton's case had to be dismissed, because she had failed to adequately describe the subject property. The trial court rejected this suggestion however, in the process of deciding the matter in favor of Clinton, and on appeal the Court agreed that the description provided by Clinton was legally sufficient to support her action, so Kykendall was required to vacate the premises. Here for the first time the Court took the position that any descriptive language which identifies a unique property is a legally valid description, even if the support of extrinsic evidence is required to clarify that description, meaning information of any kind that is not found within the descriptive text itself. The Court thus revealed it's willingness to approve the use of very minimal descriptions, which do not expressly or precisely define or outline the land being described. The adoption of this principle by the Court, holding that the use of extrinsic evidence to complete and validate a description which would otherwise be incomplete and inadequate, due to the absence of relevant details, represents an important moment in early land rights litigation, and the Court would later refer back to this case when ruling upon the validity of legal descriptions in subsequent cases. Although this case did not involve any conveyance or transfer of title, the Court concluded it's review of this description's validity by stating that it was a fully acceptable legal description, suitable for use even in a deed of conveyance, provided that the physical extent of the property could be ascertained by reference to other documentation, such as the legal description of record. It may be suggested that such a description would surely be deemed invalid today, given modern description standards and improved technical capabilities, making more complete descriptions typical in modern times, but as we will see, the Court has consistently upheld the validity of many other very minimal legal descriptions, even in recent cases.

The earliest Kansas litigation focused upon the work of a particular surveyor is *McCarty v Bauer* (1865) which brought the Court an opportunity to take an initial position on the issue of surveyor liability. As is often the case, the text provided by the Court lacks numerous details which any surveyor would consider vital and would certainly want to know, when evaluating any survey, but important principles can be seen in operation nonetheless. Bauer was apparently the owner of a typical platted lot in Leavenworth and McCarty was the city engineer. McCarty staked Bauer's lot in 1862, and Bauer placed some buildings on the lot, evidently putting them right on the lines staked by McCarty. It was later discovered, by some unknown means, that the lines staked by McCarty were off by about 2 feet, and Bauer was presumably compelled to move his buildings as a result. Bauer filed an action against McCarty, in which Bauer sought compensation for the consequences of the survey error, and because McCarty was employed by the city, Bauer argued that the city was also liable. The trial court ruled in favor of Bauer, but the Court reversed that decision, on the grounds that the proper standard of review had not been applied. The Court held that the city could bear no liability relating to the survey, even if it was genuinely defective, because McCarty was not acting as a city employee when he surveyed Bauer's lot. The Court also clarified that scrutiny of survey work done for public purposes differs from that applied to private surveys, because public officers can only bear

liability if they are found guilty of fraud or negligence, while a surveyor functioning in a private capacity can be liable for mere incompetence, even in the absence of any fraud or negligence. Complete correctness, the Court added however, is not required of a private surveyor, so it cannot be presumed that every survey error represents either negligence or incompetence. Thus the Court adopted the widely accepted position that all surveys are presumed to be correct, and the burden of proof rests upon the party alleging that a survey was erroneous in some respect, to show that the error resulted from either incompetence, negligence or fraud. In this instance, the Court drew no specific conclusions regarding the alleged survey error or the validity of the survey, it simply returned the matter to the lower court for further proceedings, allowing Bauer another chance to prove incompetence or negligence on the part of McCarty, so whether or not McCarty ultimately escaped liability is unknown.

The case of *Bayer v Cockerill* (1865) marks the earliest occasion upon which the Court gave significant consideration to the value of the occupation and use of land and set forth its views on that subject. Hughes was the owner of a group of typical platted lots in Leavenworth, but she evidently lived elsewhere and did not use the lots herself, and her husband verbally conveyed the Hughes property to Clarkson, who was their tenant. Clarkson occupied the property until 1858, when he deeded it to Todd, who continued the use of the property, but he mortgaged it to Cockerill. In 1860 Todd left the property, but he left it in the possession of Urel, who was his tenant. In 1863 however, Scribner, acting as an agent for Bayer, went to Hughes seeking to acquire the property in question. Hughes informed Bayer that her husband had given the property to Clarkson, and she no longer had any interest in it, but Scribner insisted that she still owned the land, whereupon she gave Scribner a quitclaim deed, purporting to convey the lots to Bayer, who then visited the property and evicted Urel. Todd had evidently never paid his mortgage, so Cockerill filed an action against Bayer, in order to clarify the true ownership status of the subject property, which was necessary to facilitate his effort to foreclose his mortgage upon it. The trial court ruled in Cockerill's favor and the Court upheld that decision, finding that Bayer had acquired nothing by virtue of his quitclaim deed, because Hughes was no longer the owner of the property after she and her husband acquiesced in the oral transfer of the lots to Clarkson. Although the conveyance to Clarkson was undocumented, and was not a matter of public record, the Court explained, Clarkson had become the equitable owner of the lots, leaving only the bare and empty legal title in Hughes, and an equitable owner has the capacity to convey the land at issue, as Clarkson had done, so Todd was the true present owner of the land, and Cockerill was entitled to take control over it by means of mortgage foreclosure. Bayer held no interest in the land at issue, the Court indicated, because Hughes had no title left to convey in 1863, as a result of her acquiescence in her husband's verbal conveyance of her lots to Clarkson. Thus the Court confirmed that a grantee acquires equitable title to the land conveyed to him upon taking physical possession of it, even under an undocumented conveyance, and thereby obtains full control over the land. In addition, the Court stated, the fact that the land was in open use by others operated as notice to Bayer that it may no longer be owned by Hughes, and with that acknowledgement the Court effectively adopted the concept of physical notice, which was destined to play a crucial role in a great many land rights battles, as we shall see.

The value of land use was once again clearly on display in *Stebbins v Guthrie* (1868) a case which is emblematic of the many problems that can result from conveyances

of land stemming from unpaid taxes, which are often bungled by inept local officials. In 1864 a certain lot in Atchison was sold due to tax delinquency, and in 1866 a tax deed for that lot was issued to Stebbins, who erected a substantial building on it and began making typical use of it. Subsequently however, Guthrie, who was an attorney, discovered by some unknown means that the tax deed held by Stebbins was invalid in some unspecified respect, so he proceeded to acquire the same lot, and he then filed an action against Stebbins, seeking to have his right to eject Stebbins from the property judicially confirmed. The trial court agreed that Guthrie was the true owner of the lot, so he was free to legally throw Stebbins off the land and take control of the Stebbins building. On appeal however, the Court reversed that ruling, pointing out that Stebbins qualified for protection under the Occupying Claimants Act (OCA), which had been enacted in 1862. Under the OCA, any party who made productive use of land, while operating in good faith under a mistaken belief that he owned the land, could not be forced to vacate the premises without first being compensated for his loss by the land owner who was ejecting him. The OCA embodied the legislative intent, the Court observed, that all adverse claimants who have made good use of land, but hold ineffectual title to it, should be treated as innocent occupants, rather than mere squatters or trespassers. Guthrie protested that the tax deed held by Stebbins was void, so Stebbins was entitled to nothing, even if he was innocently ignorant of the fact that his deed was worthless, but the Court disagreed, and held that the OCA was intended to cover all forms of productive land use, and to protect those who had invested their time, effort and money in making improvements to land. The OCA was both constitutional and applicable to the present scenario, the Court concluded, so the matter was returned to the lower court, for determination of the amount to be paid by Guthrie to Stebbins for the lot. Once again, just as in the Bayer case, the Court had recognized the equitable value of land use, and had blocked an effort by an interloper to seize control over land which had been improved through the honest efforts of an innocent party. The Court's inclination to gravitate toward strong protection of all acts of land use executed in good faith was revealed here, marking the origin of a powerful theme, which we will see greatly expanded upon, by both the Court and the Kansas Legislature, as the subsequent decades unwind.

The case of *Eaton v Giles* (1869) contains the first reference to adverse possession in Kansas, and serves to illustrate the original purpose and early use of adverse possession, as a means of resolving title conflicts. Few factual details were presented by the Court in the course of reaching its decision, because reciting such details proved to be unnecessary, but it appears that Eaton was the record owner of a typical platted lot in Topeka, and Giles obtained a tax deed to Eaton's lot, thereby giving rise to a controversy over title to that lot. Which party was actually using the lot in question was unclear, both of them evidently claimed to have used it, so presumably both of them had used it in some unknown way at different times. In defending against Eaton's action to quiet title, Giles pointed out that Eaton had not proven that he held a clear and complete chain of title to the lot, and Giles sought to leverage this shortcoming on the part of Eaton to prevent Eaton from successfully quieting his title. While confirming that Eaton could not prevail, and upholding the lower court ruling against him, since he had neglected to produce sufficient evidence supporting his own title to the lot, the Court took advantage of this opportunity to briefly review some of the historically established requirements that pertain to quiet title actions. Among the obstacles faced by a party seeking to quiet title, the Court explained, is the fact that all land use peacefully made is presumed to represent title, thus a party who is not in actual

possession of the land at issue bears a heavy burden, to prove that his own title is truly superior to that of the current possessor thereof. In this case, Eaton failed to show a clearly superior title vested in himself, so he could not legally prevent Giles from using the lot in contention, regardless of whether Giles had ever really used it, or in what way he may have used it, or how long he may have used it. So even though Giles was unable to prove any of the elements of adverse possession, he prevailed, because as the defendant all he had to do in order to prevail was demonstrate that Eaton, as the plaintiff, had not met his burden of proof. The statute of limitations which provides the foundation of adverse possession, after 15 years of sufficient land use by any adverse party or parties, was already in place at this time, but 15 years had not passed since its enactment, so it was not yet possible for an adverse claimant to successfully employ that statute to secure title, but many adverse holdings were already underway of course, and we will later learn how some of them played out.

One of the most unusual subjects within the realm of land rights law is slander of title, very few cases addressing this issue exist in Kansas and that is also true in most other states, since it carries an especially high burden of proof. Slander of title generally emerges only in the most bitter land rights disputes, and it is often used in desperation, typically by a party who feels that the actions of their opponent amount to a personal attack upon their ownership of their land. The case of *Stark v Chitwood* (1869) provides a good example of the high level of difficulty met by those who seek to prove that slander of title has taken place. Stark was apparently the record owner of an unspecified tract, and presumably he was either occupying or using his land in the manner of a typical land owner. The Stark property evidently became involved in another legal action, presumably without Stark's knowledge and quite possibly through a plain mistake of some kind. As a result of this, a judgment was issued in favor of Chitwood at the conclusion of that other litigation, which ordered Chitwood's opponents in that action to convey the Stark tract to Chitwood, and they obediently did so, even though they did not own the Stark tract. This development obviously created a legal cloud upon Stark's title to his tract, so when he learned what had happened he filed an action against Chitwood, alleging that Chitwood knew that the tract in question was owned by Stark, and Chitwood was therefore guilty of slandering Stark's title. Chitwood apparently did not deny the truth of any of Stark's factual accusations, and he conceded that what Stark described had in fact happened, but Chitwood maintained that the circumstances did not reveal any proof that he had slandered Stark's title. The trial court agreed with Chitwood, and the Court upheld the dismissal of Stark's action, on the grounds that Stark could not prove that anything Chitwood had done amounted to slander. In so holding, the Court adopted the widely accepted position that slander of title requires proof of malice, one cannot be deemed guilty of slander unless it can be shown that the acts in question were executed with genuinely malicious intentions. Once again here, the Court applied the important legal presumption that all actions taken with respect to land rights are taken in good faith, thus the legal burden of proof always falls upon the party asserting that any such actions were taken in bad faith, and the accuser must carry that burden in order to prevail.

Both title and boundary issues represent legitimate and independent branches of the law unto themselves, yet they can often also become important factors in controversies of other kinds, such as cases resulting from an accident, or a crime, or some other form of damage, since both the location and the ownership of the land where such an event took

place can be pivotal to the outcome of many forms of litigation. As we have already seen, in the McCarty case of 1865, negligence is typically very difficult to prove, and the case of *Caulkins v Mathews* (1869) illustrates that same vital point, in a very different context. *Caulkins and Mathews* evidently owned adjoining quarter sections in Bourbon County, and at least part of the *Caulkins* tract, upon which *Caulkins* maintained a house and a well, was fenced. *Caulkins* went away however, apparently to become a participant in the Civil War, and while he was gone his fences were not maintained and they became broken down, or they at least partially collapsed. An unfortunate horse, which was owned by *Mathews*, evidently wandered onto the *Caulkins* property one day, stepping over the broken fence, and was killed when it fell into the open well. After finding his horse dead in the *Caulkins* well, *Mathews* decided to file an action against *Caulkins*, charging him with negligence, for failing to maintain secure fences. The trial court awarded victory to *Mathews*, but *Caulkins* prevailed on appeal, as the Court decreed that *Caulkins* could not be found guilty of negligence, because the horse was trespassing when it met its fate, and therefore reversed the lower court ruling. This decision of the Court again emphasizes that proof of negligence must be both clear and strong in order to prevail, and the existence of a well defined duty or responsibility to a specific party or parties must generally be proven, in order to support the recovery of damages on the grounds of negligence. In addition, this case also shows that while fences were still fairly rare on the vast and sparsely populated prairie at this time, they were rapidly becoming increasingly important, and as we move forward we will observe numerous occasions upon which fences were central to the outcome of litigation over boundaries.

The case of *Stone v Young* (1865 & 1869) came before the Court twice, and it presents us with the first land rights issue upon which we have seen the Court change a position that the Court itself had previously taken. In 1858, *Young* acquired 2 adjoining platted lots in South Leavenworth from *Willhite*, who had acquired the lots from the parties who platted the land, and *Young* began using the property in the manner of a typical land owner. Apparently unknown to these parties however, the land which had been thus subdivided into typical lots had never been patented, so the United States was still the record owner of the land, which was situated in an area that was held by the United States as Delaware Indian trust land. *Young* evidently made no payments on his acquisition, so in 1859 *Willhite* deeded the same lots to *Stone*, but *Stone* wanted the money from *Young*, rather than the land itself, so *Stone* promptly filed an action against *Young*, demanding payment from *Young* for the lots at issue. The trial court dismissed the case presented by *Stone*, and in 1865 the Court upheld that decision, on the grounds that none of the conveyances which had taken place were valid, holding that unpatented land cannot be conveyed. The patent in question was eventually issued however, and upon reconsideration of the matter in 1869, which most likely included other evidence that had been missing in 1865, the Court took the contrary position, ruling that land can be conveyed prior to being patented, by a party who is in fact entitled to a patent, because the patent relates back to the date of origin of the land rights that are associated with it, and thus serves merely as a confirmation of land rights which are already in existence, even prior to the date of the patent. All of the conveyances that had been made were thus validated by the Court, and *Stone* was therefore finally able to successfully demand payment for the 2 lots from *Young*. This case not only established the right of entrymen to sell their land while they were still waiting for a patent to be issued, it also marks the

Court's adoption of the principle of after-acquired title. Under the after-acquired title rule, a party can sell land that he does not yet legally own, the land simply passes automatically to his grantee once the grantor completes his own acquisition. This rule of conveyancing, which has come to be widely followed, and is in effect in most if not all states today, operates primarily to the benefit of grantees, by preventing a grantor from claiming that his grantee does not actually own land which was deeded to him by the grantor, merely because the grantor did not yet own that land at the time he deeded it to the grantee.

The 1870s - Merging Law and Equity

As we have seen, the Court was engaged in building a foundation for the future during the earliest years of its existence, focusing primarily upholding the constitutionality of certain laws, as challenges to them emerged, while also adopting views and positions that would become the bedrock upon which more advanced subject matter would later be adjudicated. Even at this point in time, the Court was already open to the concept of balancing law and equity, being enabled in that regard by the statutory mandate abolishing the once clear partition between legal and equitable forms of action, as previously noted. In the arena of land rights, this confluence of law and equity meant that numerous equitable factors, such as those associated with physical evidence of land use made in good faith, could often have a meaningful influence on the Court's interpretation and application of the law, as it appears in statutory form. During the second decade of statehood this trend continued, and as the settlement of the land comprising Kansas became widespread, one of the most basic and powerful equitable factors began to emerge as a controlling force in the judicial determination of land rights. The concept of physical notice, stemming from visible land use or the physical presence of people or objects upon the land, has historically been recognized as an important factor, worthy of consideration by all courts, and when present it typically plays a crucial role in guiding the Court's judgment, particularly with regard to the critical balance of good faith between the litigants in any given case. As we will see in this chapter, the knowledge of the parties, which comes to them by way of their ability and their responsibility to observe all uses of land that are actively and openly being made, plays a distinct role in shaping the way the Court regards and treats their actions, and can thus have a major impact upon the way in which the Court construes and applies the written language of the law.

Bowman v Cockrill (1870) was destined to become one of the most frequently referenced land rights cases of this period, as on this occasion the Court upheld and defined the parameters of an 1862 statute of limitation, as revised in 1866 and 1868, which restricted all litigation relating to the validity of tax deeds to a 2 year window. Cockrill was the owner of a typical platted lot in Leavenworth, which was apparently vacant, but he evidently neglected to pay the taxes on it, and in 1865 the lot was conveyed by tax deed to Brown, who promptly recorded his deed. Brown and his wife then built a house on the lot and began occupying it in the typical manner, but Brown died in 1866. After Brown's death, his wife continued to live on the lot, and at an unspecified date she apparently conveyed it to Bowman. In 1869, Cockrill presumably visited the area, or checked on the present status of the lot, and he thereby discovered what had happened, so he filed an

action against Bowman, alleging that the tax deed was void, due to multiple technical flaws that appeared within it, so Bowman had acquired nothing. Bowman pointed to the 2 year statute of limitations in his defense, but the trial court accepted Cockrill's assertion that the statute was inapplicable, and upon finding that the tax deed was void, ruled that Cockrill was still the owner of the lot at issue. In reversing that ruling, the Court declared that neither the specific statute in question nor any other statutes of limitation represent unconstitutional takings of land, as Cockrill contended, and clarified that the closure of the 2 year window, which runs from the date upon which the tax deed was recorded, is absolutely conclusive, and thus prevents any issues whatsoever, such as those brought to light by Cockrill, from being raised after that point in time. In so holding, the Court indicated that the notice provided to Cockrill by the presence of others upon his land, for a full 2 year period, supported the conclusive effect of the statute, permanently foreclosing his right to claim that he still owned the lot. In effect, as the Court interpreted and applied it, the statute had created an opportunity for holders of tax deeds to complete adverse possession in just 2 years, based upon the fact that a tax deed, even if technically invalid, provides a legitimate basis for land use made in good faith. Both the accrual and the loss of land rights, the Court observed, is governed primarily by the acts and the omissions of the parties themselves, which provide context for the application of all statutory law. Statutes of limitation are to be regarded favorably, the Court also concluded, because they operate to combat the negative effects of negligence on the part of delinquent land owners, such as Cockrill in this instance, while placing land rights in a beneficial state of repose. At this early juncture, the Court sagaciously outlined the operation of the principle of limitation, which would eventually come to define modern adverse possession, as follows:

“... statutes of limitation ... bar actions, and can never operate to disturb vested rights ... they can never operate except where rights have already been disturbed. The effect of the statute of limitation ... is to take away a cause of action already created by acts of one or both of the parties ... to leave rights and property just where the parties themselves have voluntarily chosen to leave them ... statutes of limitation simply say ... now we will allow it to remain in the same place, and in the same condition, forever.”

Like the Bowman case, just previously reviewed, *Edwards v Fry* (1872) was a highly seminal case, presenting the initial position of the Court on the statute of frauds, which as most surveyors already know, requires written documentation to support the legality of any conveyance of land, and to make any transfer of title binding at law. Equity can, and frequently does, control land rights law however, and here the Court established that the statute of frauds is subject to equity, so it can have its intended legal effect only when allowing it to do so violates no principles of equity. In 1866, Edwards acquired a certain quarter section, through which a railroad line passed, and at that time Fry was occupying a portion of that quarter, which was physically cut off from the rest of the quarter by the track, comprising a triangular parcel of about 10 acres in the southeast corner of the quarter. Fry was using her parcel only as a tenant of the prior land owner, and when Edwards met her she requested that Edwards allow her to remain on the land and acquire the area southeast of the track from him, so he verbally promised to convey the triangular parcel to her, although no date of transfer was established and there was no

written evidence of this oral agreement. Subsequently, Fry went to Edwards and offered him the price they had agreed upon for the land at issue, but he refused to deed it to her, so she filed an action against him, seeking a decree compelling him to do so. The trial court, relying upon the testimony of Fry, and the absence of any denial of the agreement from the testimony of Edwards, ordered Edwards to deed the triangle to Fry, and the Court upheld that decision, over the contentions of Edwards, who maintained that he was under no obligation to honor the verbal conveyance agreement, because it represented a violation of the statute of frauds. Noting that Edwards had allowed Fry to occupy, utilize and improve the area in question, the Court informed him that he was bound in equity to complete his conveyance agreement, and he could obtain no shelter from the statute of frauds. The Court thus carved out what has come to be known as the performance exception to the statute of frauds, which provides that substantial land use made by an oral grantee, with the knowledge of the oral grantor, effectively validates an oral conveyance, and negates the operation of the statute of frauds. Edwards further protested however, that the disputed area had never been adequately described, to which the Court simply responded that "there will be no difficulty in determining what land is covered by the decree", while indicating that the description proposed by Fry, "10 acres of land situate on the south side of the Kansas Pacific railway track ..." was a sufficient description, on the grounds that the boundaries of the occupied area were all physically well defined.

The Court typically strives to approve all legislation, and to allow it to serve its intended purpose, by upholding its constitutionality, as we have already seen, but the Court also has the capacity to strike down legislation as unconstitutional, and here we will take note of one such rare occasion. *Commissioners of Franklin County v Lathrop (1872)* also brings the topic of dedication to our attention for the first time, and illustrates both the gravity of dedication and the importance of platting in the establishment of public land rights. The town of Ottawa was platted in 1865, and a certain block was left undivided and was labeled on the plat only as "Courthouse Square". Over the next few years, the area presumably developed in the typical manner, but that block remained unused and plans were apparently made to build a courthouse elsewhere. In 1871, the Kansas Legislature passed a law stating that the county was free to sell the block in question, and the commissioners promptly did so. Lathrop was the owner of one of the many typical platted lots facing that block, and she objected to the proposed elimination of the dedicated block, so she filed an action seeking to halt the private development of the dedicated area. The trial court agreed with Lathrop that the block had been formally and legally dedicated, and therefore could not be used for any private purpose. The Court upheld that ruling, declaring that under the existing Kansas statutes all such areas, which are dedicated to public use by means of a plat, are owned in fee by the county, but that fee ownership is not absolute, because the land is held in trust for the public. The Court then found the 1871 legislation to be null and void, since it represented an unconstitutional taking of established land rights without compensation to all of the relevant parties, such as Lathrop. The recorded plat, clearly showing the block at issue as dedicated land, the Court pointed out, created a permanent public trust relating to that particular block, and the land rights thus created were appurtenant to all parties, including Lathrop and her fellow lot owners, who acquired their properties in legitimate reliance upon the integrity of the plat. Such land rights cannot be terminated without compensation, so Lathrop was right, in her belief that she held the power to prevent any unintended use of the dedicated block, and even the

legislators had no authority to nullify the dedicated status of that land. As we will see, the Court has never varied from the path upon which it embarked here, mandating strong protection of the right of reliance upon dedication. Any platted dedication creates a land rights trust, the extinction of which necessarily requires the agreement or consent of all parties who hold any interest in that trust, and we will later review cases involving this process, which is known as vacation, but on this occasion the Court gave ample notice that any attempts to make private use of unvacated land would be judicially prevented.

In *Wood v Missouri, Kansas & Texas Railway* (1873) the plaintiff Wood sought to have his occupation of a certain quarter section, and his use of the land as a homesteader, judicially validated, in order to confirm his ownership of that quarter. Because the area in which he had settled was Osage land however, which had been ceded to the United States by means of a treaty, and subsequently granted to the railway company, he failed in that attempt, as both the trial court and the Court agreed that the land he had chosen had never been open to homesteading, so he had acquired no land rights, regardless of how long his occupation had lasted. In so deciding, the Court took advantage of the opportunity presented by this controversy to describe the process which we know today as adverse possession for the first time. The 15 year Kansas statute of limitations, which still supports adverse possession today, was already in place at this time, but it had not yet been utilized, thus it's operation was still poorly understood. One initial consideration relating to land use, which can hold significance in determining whether or not the land use can be properly characterized as being genuinely adverse in nature, is the question of whether or not the party using the land holds any form of documentation supporting their use of it. Legally effective documentation is known as title, while legally ineffective documentation is known as color of title, meaning that it has the appearance of genuine title documentation, but it is legally defective in some respect, and is therefore insufficient, in itself, to bestow legal land ownership upon it's holder. Any legally inadequate deed can represent color of title, but at this time bungled tax deeds were the most common form in which color of title appeared. Wood was destined to lose, because he was occupying federal land, and adverse rights cannot accrue upon any land comprising part of the public domain, under the ancient concept of "Nullum tempus occurrit regi", meaning "Time runneth not against the King". Nonetheless, on this occasion the Court saw fit to outline it's vision of how adverse possession would function, and the Court deemed it appropriate to include even those who were plain squatters or trespassers, and held no color of title whatsoever, such as Wood, among the potential beneficiaries of adverse possession:

"A mere trespasser, without color of right or title, who has been in the actual possession of real estate for 15 years, claiming title thereto, becomes the owner of the property, by virtue of the statute of limitations ... possession ... may be said to be an incipient or inchoate title, for such a possession will in time ripen into a complete, perfect and absolute title."

Legal descriptions are required to support documents of many kinds, in addition to documents of conveyance, and a description of real property which appeared in an insurance policy became a source of controversy in *American Century Insurance v McClanathan* (1873). McClanathan acquired a lot fronting upon the intersection of Second Street and Elm Street in Leavenworth in 1859, and he built a house and a barn on his

property, which he occupied along with his family henceforward. In 1871, McClanathan obtained an insurance policy to cover his property from American Century, and in 1872 his house burned, so he filed a claim with the insurance company. American Century refused to cover the damage however, and pointed out to McClanathan that the insured property was described in his policy as being situated at the corner of Second Street and Vine Street, which was one block away from the actual site of his home. The American agent had incorrectly noted the location of McClanathan's lot, and had thus mistakenly described its location in his policy, but the company informed McClanathan that the written contract was legally binding, and the company was not obligated to pay for damage to any property other than the described lot, so he was forced to file an action against American, to have the company judicially compelled to compensate him. The trial court decided the matter in favor of McClanathan, and speaking through future United States Supreme Court Justice Brewer, the Court concurred, informing the litigants that extrinsic evidence is acceptable for purposes of description clarification, verifying that such evidence was appropriately used to identify the description in question as erroneous. Rejecting the allegation of American, that the description which appeared in the written contract must control, and applying the law pertaining to descriptions appearing in land patents, the Court informed the litigants that "the contract is not void for uncertainty ... if there be a repugnant call, which by the other calls in the patent clearly appears to have been made through mistake, that does not make void the patent". Thus the Court reinforced the position which it had previously set forth in the Kykendall case of 1864, reiterating that an inadequate or mistaken legal description can be validated and effectively rectified through the application of extrinsic evidence.

As we have already seen, the Court took a highly liberal stance on the validity of legal descriptions right from the outset, approving the use of very minimal descriptions and accepting the correction of description errors as a routine matter. Land surveyors are typically inclined to draw a distinction between corrections to the survey data which appears in a legal description and changes to other language, which appears either elsewhere in the description or in other portions of a deed. The case of Claypoole v Houston (1873) demonstrates however, that the Court makes no such distinction, and it applies the same basic principles to description reformation of all varieties, treating all of the contents of any contractual document, such as a deed, as being equal in importance, and therefore equally subject to rectification. Claypoole was evidently the owner of an unspecified amount of land, and upon his death his land was partitioned and deeded to various parties, including Houston, using legal descriptions of unknown origin. Subsequently, a dispute apparently arose at an unspecified point in time between Houston and the heirs of Claypoole over the acquisition made by Houston, and it was discovered that a certain bearing in the legal description that was used in Houston's deed was erroneous. Houston was thus compelled to file an action against Claypoole's son, who was a minor, seeking to have the description error corrected, and to have the legitimacy of Houston's acquisition judicially verified. Houston prevailed in the trial court, but the Court reversed his victory, on the grounds that inadequate notice of his acquisition had been provided to Claypoole's son. Nonetheless, although Houston lost the case, the Court expressly approved the way in which the trial court had handled the discrepancy appearing in his legal description. The description as written called for a bearing of "seventy degrees and thirty-nine minutes", but it was shown that the intended bearing was actually "seven degrees and thirty-nine

minutes". The Court confirmed that the trial judge had correctly allowed this numerical error to be rectified through description reformation, because any text or number used in a deed which fails to fulfill the "intention, agreement and understanding" of the parties is subject to correction. This position taken by the Court was destined to become the foundation of description reformation in Kansas, and this decision would later be cited by the Court in several similar cases, as the origin of the important principle that any information in a deed which runs contrary to the true intentions of the parties, and thus amounts to a mutual mistake, can be judicially corrected.

Just one year after establishing the principle that an oral conveyance agreement will be upheld, despite the statute of frauds, if other evidence verifying the existence of the agreement is presented, the Court again applied that rule in a slightly different context, in the case of *Gregg v Hamilton* (1873). In the *Edwards* case of 1872, the same parties who made the verbal agreement were present and were the litigants, but in this case both of the parties who had made the agreement were no longer present, and the litigants were their successors. Harryman owned an unspecified amount of rural land, and at an unspecified date he orally conveyed a certain quarter section to Koone, who then entered, used and occupied the quarter in the typical manner, for an unspecified length of time. After establishing a presumably typical farm on the quarter at issue, Koone sold his interest in that property to Gregg, and Gregg asked Harryman to deed that quarter to him, but Harryman refused, and proceeded instead to sell the entirety of his property, including the Koone quarter, to Hamilton. Hamilton also refused to deed the Koone quarter to Gregg, so Gregg filed an action against Hamilton, seeking to have Hamilton compelled to honor the undocumented conveyance agreement between Harryman and Koone. The trial court ruled in Hamilton's favor, in observance of the statute of frauds, but the Court reversed that ruling, on the grounds that sufficient evidence of the contested conveyance agreement existed to prove that Koone had become the equitable owner of the quarter in question, thereby negating the statute of frauds, and leaving Harryman powerless to sell that quarter to anyone else. Hamilton had acquired the legal title to that quarter only in trust for Gregg, the Court held, and he was bound to complete his predecessor's conveyance commitment, although it was unwritten, since the use of the land by Gregg was visible to Hamilton, and that land use placed him on notice that Gregg held a potentially valid and binding interest in the contested quarter, which Hamilton was not entitled to ignore. As can readily be seen, the Court here applied the basic concept that a grantee simply steps into the shoes of his grantor, so the grantee can acquire no rights in excess of those held by his grantor, and each grantee is required to honor any obligations that his grantor has made, pertaining to the land being acquired. Were this not the case, the Court well realized, grantors would be free to engage in wanton chicanery, because they could place any number of burdens upon their land, as Harryman had done, thereby deriving various benefits, and then escape all such obligations simply by disposing of their land.

In the case of *Haynes v Heller* (1874) the principal question before the Court was whether or not a deed must be deemed void due to the absence of certain descriptive items which typically appear in a legal description, and which are generally recognized as being among those items that are vital to a proper description. This case also provides a good example of the kind of simplistic mistakes that were often made in preparing tax deeds in the early days, due to the ignorance, carelessness or plain incompetence of the public employees who were assigned the task of handling tax conveyances, and who frequently

failed to appreciate the legal significance of property descriptions, thereby creating numerous problematic situations. A certain presumably typical platted lot in Topeka was sold for unpaid taxes, and a tax deed for that lot was issued to Johnson in 1866, who then conveyed that lot to Haynes. At an unspecified date, Heller acquired the same lot, presumably directly from the tax delinquent owner of record, and he then confronted Haynes, instructing him to vacate the premises. Haynes refused to concede that his tax deed was void however, so Heller was compelled to file an action against Haynes, seeking to have him judicially ejected from the lot. Heller pointed out that the legal description used in both the tax deed and the subsequent deed to Haynes was inadequate, since it described the lot only as "Lot 241 on Kansas Avenue in Topeka". The trial court agreed with Heller that this description, providing no subdivision name, no section number, no county and no state, was legally insufficient and was clearly void, but the Court rejected that position and reversed the lower court decision, upholding the validity of the acquisition made by Haynes, and finding that Heller had acquired nothing, even though Heller's legal description was presumably correct and complete. Noting that the county and state names both appeared elsewhere in the deed, the Court determined that this description adequately identified a genuinely unique location, and no property other than the lot occupied by Haynes could possibly have been the intended subject of the tax deed, thus the descriptive portion of that deed was "ample and complete", despite the obvious absence of certain typically key components of a legal description, such as section and subdivision information.

Having already established, as we have seen, that the statute of frauds cannot be used by an oral grantor to nix a typical agreement involving a sale of land made by him, on the mere grounds that the agreement was undocumented, the Court extended that rule to a somewhat more complex scenario, in the case of *Holcomb v Dowell* (1875). *Holcomb* and *Dowell* were evidently both typical land owners, and it appears that they both owned multiple properties, including both farmland and city lots. At an unspecified date, they entered a written agreement to exchange certain properties, but they apparently changed their minds, and they verbally agreed not to complete the written land exchange. Under their verbal agreement, *Holcomb* was to sell one city lot and also a 12 acre rural tract to *Dowell*, and *Holcomb* deeded the lot to *Dowell*, but not the 12 acre tract. *Dowell* nonetheless took possession of the 12 acre tract, with the knowledge of *Holcomb*, and *Dowell* made substantial improvements to that tract, over an unspecified period of time. When *Dowell* later asked *Holcomb* to deed him the 12 acre tract, for the orally agreed price, *Holcomb* refused, and he then proceeded to file an action seeking to have *Dowell* ejected from the 12 acre tract. The trial court upheld the oral conveyance agreement, and the Court agreed that *Holcomb* was bound to deed the 12 acre tract to *Dowell* for the agreed price, despite the absence of any documentation supporting the relevant oral agreement, because *Holcomb* had allowed *Dowell* to take extensive action, significantly improving the land at issue, in open reliance upon that agreement. The parties were free to verbally terminate their original written agreement, as they had done, the Court decided, and they were bound in equity to complete their obligations under their subsequent undocumented agreement as well, since the acts of the parties adequately evidenced the existence of that agreement, and there was no denial that it had been made. On this occasion, the Court thus approved the concept that an oral agreement involving land rights can not only become binding, under the performance exception to the statute of frauds, it

can also effectively operate to overcome and supercede a prior written conveyance agreement. As one can readily observe, here the Court exercised and enforced the important equitable principle that no party will be allowed to leverage his own failure to put proper documentation in place, as a means of negating a conveyance agreement, once the agreement has been relied upon and physically carried out.

The potential importance of properly ascertaining the legitimacy of the origin of any chain of title was displayed in the case of *Lemert v Barnes* (1877). Chouteau was a member of the Osage tribe, and an occupant of a certain tract lying within the Osage lands, who was the holder of a head right, descending from an 1865 treaty, which entitled him to obtain a patent for his tract. In 1867, Chouteau quitclaimed his tract to Giltenan, who then occupied and began utilizing that tract in a presumably typical manner, erecting substantial improvements upon the land. In 1870 however, Chouteau received his patent for that tract from the United States, and in 1872 he deeded the same tract to Lemert. When he learned that Lemert claimed to have acquired the tract that he was occupying, Giltenan filed an action seeking to quiet his title, but the trial court quieted Lemert's title to the tract instead. On appeal, the Court was unsatisfied with that decision however, due to a lack of evidence supporting it, and so remanded the case of *Giltenan v Lemert* (1864) back to the trial court for further proceedings. Giltenan subsequently died, but Barnes, acting as the administrator of the Giltenan estate, kept the matter alive, and upon the second trial the lower court again ruled in favor of Lemert, leading to the return of the controversy to the Court in 1877. This second time around Lemert provided sufficient evidence supporting the validity of his 1872 acquisition of the tract in question, thereby allowing the Court to uphold the lower court decision in his favor. Under this scenario, the Court found the after-acquired title principle, which it had employed in deciding the case of *Stone v Young*, previously reviewed herein, to be inapplicable. Because Giltenan had obtained only a quitclaim deed from Chouteau in 1867, at which time the tract at issue remained unpatented, the title acquired by Chouteau in 1870 did not pass as after-acquired title to Giltenan, and Chouteau was therefore free to deed that tract to anyone, so Lemert's deed was in fact the first conclusive deed executed by Chouteau, and Giltenan's deed, although senior to that of Lemert, was worthless. The Court thus acknowledged and followed the principle that a quitclaim deed conveys only the interest held by the grantor at the moment of the conveyance, it carries no title that the grantor may later obtain, so acquisitions made by means of quitclaim represent exceptions to the after-acquired title rule. In so ruling, the Court did however decree that Lemert must compensate the Giltenan estate for the value of all of the improvements to the contested tract which had been made by Giltenan, because Giltenan had occupied and improved the land in good faith, under a legitimate though mistaken belief that he owned it.

The case of *Scarborough v Smith* (1877) captures the essence of the transition from the arcane procedures of law and equity, as separate and distinct entities, to the modern judicial system, under which all actions involving both legal and equitable factors or considerations are effectively combined, heralding the dawn of the era of unified civil actions. Smith and Scarborough were co-owners of a presumably typical parcel located in the business district of Atchison, each of them holding a half interest in that parcel, but Scarborough maintained the property and collected all of the rent from the tenants of the building situated upon it for an unspecified length of time, while Smith apparently took no active interest in the parcel. Smith eventually sought to have the rights of the parties

partitioned, but Scarborough objected, so Smith was required to file an action against him, to enable the partitioning process to proceed. Rather than simply filing a partition action however, Smith sought to quiet his title, and to have Scarborough ejected from the premises, and to have the parcel partitioned, all in a single action, which had not previously been done in Kansas, and which was not feasible under traditional judicial procedures. Smith prevailed, and the partitioning of the parcel, as requested by Smith, was approved by the trial court, leading the Court to cogitate upon whether or not such diverse actions could be properly addressed all at once. The Court held that nothing prevented litigants such as Smith from setting forth any number of different objectives in a single action, and any mixture of legal and equitable matters, questions or issues, such as those presented by Smith, can be properly and successfully adjudicated, all at the same time. Concluding that "by the plaintiff's action ... he can virtually quiet his title and possession and remove said supposed cloud from his title ... the action of partition is legal as well as equitable, and the action of ejectment is equitable as well as legal" the Court here essentially defined the modern legal landscape, featuring combined actions of law and equity. As we will see moving forward through the decades, the unification of all forms of civil action was destined to have a major impact upon judicial treatment of title and boundary issues, no longer would boundary law stand as a separate and distinct legal forum, independent of the multitude of equitable factors that can control title, and we will observe the manner in which the intrusion of title law into the realm of boundary law has gradually eroded the ability of boundaries to limit title.

Here at last we reach our first case involving boundary issues, and here we will see the Court take an initial position on the restoration of PLSS corners, in *Everett v Lusk* (1877). Everett owned the NE/4 of a certain Section 9 in Barton County, while Lusk owned the NW/4 of the adjoining Section 10, and the locations of both the relevant section corner and the relevant quarter corner were in dispute between them. No further details relating to the nature or the origin of this dispute were presented in the text provided by the Court, but multiple surveys had evidently been done in the area, and the litigation appears to have been precipitated by a survey done by the county surveyor, upon which Everett based his position. The trial court was evidently unimpressed with this survey however, and declined to uphold it, awarding victory instead to Lusk. On appeal, the Court found the survey at issue to be generally palatable, and verified that the work of county surveyors typically carries a presumption of correctness, which for unknown reasons the trial judge had neglected to apply, yet the Court also commented that the work of the county surveyor was "not as extensive as it should have been", and therefore returned the whole matter to the lower court, with instructions to hold a new trial. Importantly, in so doing, the Court set forth a basic list of evidentiary priorities, to be observed when analyzing the legitimacy of PLSS resurveys, which nonetheless remains cogent and relevant even today. On this occasion, the Court formally acknowledged GLO monumentation as the "primary and best evidence" of PLSS corner locations, and ranked witness trees or objects as the second level of controlling PLSS boundary evidence. As the third best alternative form of evidence, the Court specified PLSS monument location testimony, while placing measurements derived from the GLO field notes on the fourth and lowest level of evidence, and making no reference to GLO plats whatsoever. These priorities accurately reflect the long established emphasis of all courts on both physical and testimonial evidence relating to boundary locations, as being fundamentally superior to numerical evidence emanating from any

source, and this judicial assessment of PLSS evidence has stood the test of time in that regard. The specific knowledge of the members of the Court during the early years of statehood regarding boundary and survey issues, such as the proper application of PLSS restoration principles, is a matter which is open to conjecture, but it is well known that even the GLO itself observed widely varying and sometimes even conflicting rules concerning the treatment and use of PLSS evidence during the nineteenth century. It would therefore be unrealistic to expect the Court to display advanced knowledge on these relatively obscure subjects, particularly at this early date, but we will look on as the Court's knowledge of boundary evidence gradually increases over the passing decades.

The interaction between law and equity, in the context of land rights, was perhaps ideally illustrated in the case of *School District No. 82 v Taylor (1877)*. Griswold was the owner of a presumably typical rural quarter section, and in 1872 he deeded one acre within that quarter to the School District for use as a school site. The school officials immediately had a school building erected, which was promptly put into use, but they neglected to record the deed, setting the stage for controversy. In 1873, Griswold mortgaged his quarter to Taylor, without making any reference to the school site, and when Griswold subsequently failed to make his mortgage payments, Taylor filed a foreclosure action upon the Griswold quarter. The School District protested, and brought forth the 1872 deed, showing that it had legitimately acquired the acre at issue, but the trial court held that deed to be worthless, because it was unrecorded, awarding the entire quarter to Taylor and allowing him to move the school building off the land. The basis for that ruling was a statute dictating that "no instrument ... shall be valid ... until the same shall be deposited with the register of deeds". The Court accepted the directive put in place by the statute, but announced that it was limited in efficacy, to only those situations in which the unrecorded document was the sole basis for the claim of ownership being made, and decided that the statute had no application to any situations such as the one presented here, in which the deeded land had been put to actual use. Open use of land, the Court explained, provides notice of land rights just as well as does information appearing upon the public record, so land use must be regarded as equivalent to recordation for purposes of notice. The spirit of the law, which had driven the creation of the statute, the Court recognized, was simply the need to provide public notice of transactions involving land rights, the statute was never intended to destroy any legitimately acquired land rights. As a subsequent grantee, the Court found, Taylor was bound to observe the existing physical conditions upon the land in which he was acquiring an interest, which of course included the openly visible school site. His decision to rely solely upon the public records, as a source of information about that land, was both unwise and unjustified, because he bore a burden of inquiry, the Court stipulated, requiring him to take notice of the existing rights associated with the school building, even though no such rights had been recorded. Thus here the Court expressly exercised the principle of inquiry notice, carving out a prominent exception to the recordation statute, while reversing the lower court decision, and upholding the unrecorded deed. The "bare naked legal title" acquired by Taylor was inferior and subordinate to the rights held by the School District, the Court concluded, because the use of the land was visible to him, and he would have "had to shut his eyes not to see it". The powerful equitable principle of inquiry notice represents one of the primary burdens borne by all grantees, who have a duty to complete their acquisitions with both prudence and diligence, and as in this instance, when any party or entity engaging in land

acquisition fails to properly carry that burden, the rights being acquired stand in peril of being lost, either in whole or in part.

The problems created by some of the early school site acquisitions in Kansas were once again on exhibit, less than a year after the Taylor case, just previously reviewed, as was the Court's determination to provide strong protection for school property, in the similar scenario presented by the case of Clayton v School District No. 1 (1878). The townsite of Great Bend was patented in 1872, in the name of the mayor of that city, and later that year the townsite company sent the School District a letter donating a particular platted lot for school purposes, but no deed was prepared to document this transaction, and a school building was then erected on that lot, which went into operation in 1873. The mayor formally conveyed all of the platted lots comprising the townsite to the townsite company in 1874, and the company began deeding the lots to individuals, such as Clayton, who acquired the lot bearing the school building in 1875. Clayton then filed an action against the School District, alleging that it had never legitimately acquired the lot which was being occupied by the school, and demanding that the school building be relocated. The trial court initially agreed with Clayton, that the School District had no right to the lot, but then decided to allow a second trial to be held, and ultimately held that the School District owned the lot, rejecting Clayton's position. The Court acknowledged that the School District had not properly acquired clear title or legal ownership of the lot in question, but nonetheless upheld the lower court ruling, on the grounds that the use made of that lot as a school site provided clear notice to all parties, including Clayton, that the School District held an active interest in the lot, thereby creating a set of openly observable physical conditions which no one was entitled to simply ignore. Just like Taylor, Clayton's undoing was manifested in his false assumption that he was legally entitled to rely solely upon the ownership status of the lot which was indicated by the relevant public records, and his equally erroneous belief that he had no obligation to take notice of the existing use of the land that he was acquiring. Although the School District had never acquired any legal title to the lot at issue, the Court declared, it had acquired valid equitable title to that lot, which was superior in nature to the acquisition made by Clayton, and which thus effectively negated that subsequent acquisition. Clayton could not prevail, the Court concluded, because he had failed to prove that he was the holder of the superior title, and if he had acquired anything at all by virtue of his deed, it was a mere legal title, which he took in trust for the School District, holding him bound to relinquish the land in contention to its equitable owner. An occupant of land who has established an equitable right to it, through open land use, the Court thus reiterated, is the holder of a paramount interest in that land, and cannot be ejected from it by an interloper, who subsequently acquires a conflicting interest therein, after failing to take proper notice of the existing use of the land.

Our final case of the second decade of statehood, *Kansas Central Railway (KCR) v Allen* (1879) represents a significant milestone in Kansas land rights adjudication, which held highly extensive implications, that we will see play out in several later cases. In 1877, KCR sought to create a right-of-way 100 feet in width, passing through an unspecified number of properties, by means of condemnation. One of the properties crossed by the railroad was a presumably typical quarter section in Jackson County, which was owned by Allen. The proposed right-of-way was successfully condemned, but the company was required by the trial judge to compensate Allen for a taking of the relevant portion of his land in fee, and the company elected to appeal the magnitude of the monetary award,

which had been granted to Allen on that basis. KCR maintained that there had been no taking of any land in fee, it had sought and had been awarded only an easement through Allen's land, so the right-of-way did not represent a fee strip, slicing Allen's farm into two separate parcels, it was merely an easement resting upon the land of Allen, all of which he still owned in fee, and therefore the monetary award to Allen was excessive, since he had lost no land. On appeal, the Court found itself in complete agreement with KCR, the trial judge had erred, the Court observed, in his examination and application of the law pertaining to condemnation. An 1864 Kansas statute had bestowed upon railway companies the right to condemn land in fee for any and all railroad purposes, but that statute had been revised in 1868, the Court noted, and in fact KCR was right, all condemnations of railroad right-of-way in Kansas after 1868 created only a right-of-way easement, leaving fee title to the underlying land in the hands of the condemned party. Therefore, the Court struck down the monetary award to Allen, and remanded the case back to the trial court, instructing the trial judge to compute that award again, based on the taking of an easement, as opposed to a taking of land in fee. The importance of this decision to land surveyors is clear and self-evident, since it points out the potential need for diligent research into the origin of any right-of-way that the surveyor may encounter, either passing through or bounding the subject property, in the course of performing a boundary survey, the most fundamental objective of which is of course to accurately and reliably depict the true location of the fee boundaries of the land being surveyed. In addition, the Court's approval of the concept that a condemned right-of-way comprises only an easement, was destined to play a pivotal role in numerous subsequent land rights cases featuring the presence of a right-of-way, by bringing the principle of reversion into the legal equation, and we will look on as the consequences of reversion exert a major influence upon the outcome of many future legal battles, in the context of both title and boundaries.

The 1880s - Broadening the Spectrum of Land Rights Adjudication

The rate at which cases came to the Court accelerated dramatically during the third decade of statehood, making it clear to legislators that something needed to be done to ramp upward the Court's ability to burn through it's caseload. In 1887, a team of special commissioners was installed, to assist the Court by handling many of the cases, as the expanding population, along with the rapid advances made particularly in communication and transportation, continued to bring forth an ever increasing number of issues requiring adjudication. As we will see, issues stemming from the steadily rising demand for public land rights, to satisfy the needs of a busy and mobile populace, began to emerge as a major theme at this time, and the Court was called upon with increasing frequency to forge an appropriate balance between public and private land rights. Title issues, as we have seen, were at the core of nearly all of the major early land rights cases decided by the Court, few of which contained any reference to boundary issues, and resolving title conflicts by leveraging an appropriate combination of legal and equitable principles continued to be the primary focus of the Court with respect to real property law during this period. Survey issues gradually began to emerge however, as the completed PLSS surveys soon began to

suffer degradation through obliteration, which of course is inevitable with the passage of time. The need for an organized and systematic approach toward resurveys had already been recognized, and the laws defining the statutory resurvey process had just gone into effect in 1879, marking an event which would precipitate much litigation focused upon the validity and the controlling force of resurveys with regard to their impact upon title, beginning here and extending through all subsequent decades. The dominant theme of land rights litigation during the 1880s however, remained the development of a complete set of parameters for the resolution of title issues, and the Court continued to render precedent setting decisions on certain detailed aspects of the law pertaining to land ownership and conveyancing, several of which still stand as acknowledged milestones along the pathway to modern justice in Kansas.

The legal significance of surveys and the proper interpretation of PLSS descriptions were matters under consideration by the Court in *Board of Commissioners of Jefferson County v Johnson* (1880). Johnson was the holder of a tax deed, which he had obtained in 1874, by which he had acquired title to an area that was evidently equivalent in practical terms to a quarter section, although it was described in an unusual manner. In 1878 he was apparently informed by some unknown party that his deed was void and worthless, because it contained an invalid legal description, and Johnson reacted to this news by filing an action against Jefferson County, demanding the return of the taxes he had paid on the land, convinced that he did not own it and that he would soon be forced to vacate the premises. The tax deed described Johnson's tract only as "SW 1/4 Survey 18, 170 acres, K. H. B. I. L., Jefferson County, Kansas". Apparently unknown to Johnson, and possibly unknown to those who had advised him as well, his land lay within an area known as the Kansas Half Breed Indian Lands, which was presumably surveyed by the GLO in a manner that differed in certain respects from standard PLSS surveys, yet the original survey of that area apparently followed the general PLSS scheme. The trial court, evidently also engulfed in the same state of ignorance as Johnson, agreed with him, holding that he had been given a worthless deed and he had been cheated by the county. Superior knowledge however, enabled the Court to come to the rescue of the County, reversing that lower court decision, while also reassuring Johnson that his description was in fact legally sufficient, and informing him that he was the holder of valid title to his tract, so his alarm had all been unjustified, and his concerns were without merit. Survey 18, referenced in the tax deed, the Court noted, was evidently a perfectly legitimate GLO survey, so Johnson's legal description was in actuality nothing more than an unusual PLSS description. What had happened, the Court observed, was that the GLO had left the interior of the area defined by Survey 18 unsubdivided, and in 1867 that area had been subdivided, into what nominally amounted to quarter sections, by the county surveyor, whose work was fully acceptable, adequately defining the boundaries of Johnson's tract on the ground. Johnson therefore had no valid basis for concern, because his land was as physically well outlined as that of any typical PLSS entryman, despite the non-typical and cryptic nature of his legal description. In so ruling, the Court upheld the work of the county surveyor as presumptively correct, applying the principle that land can be legitimately and fully described solely by reference to a survey, while also again indicating that any legal description which identifies a unique lot, parcel or tract is a valid legal description. In addition, the Court emphasized that extrinsic evidence, including all forms of survey evidence, is inherently vital and necessary to description interpretation and analysis, and in

the course of expounding upon PLSS descriptions and surveys, expressed it's view that any lines which were never run on the ground by the GLO cannot be properly characterized as "government lines":

“... descriptions may be made in any form or in any manner which the parties may choose ... if they can be made sufficiently definite by the aid of matters or things had in contemplation by the parties, then such descriptions will be held to be sufficient and valid ... descriptions are never absolutely perfect ... they always need the aid of something outside of their own expressed terms ... if the description refers to a section line, then the location of this section line must be ascertained ... the government intends that each section shall be a square ... yet they never in fact reach such perfection ... yet there can be but little difficulty in making good and valid descriptions founded upon such surveys ... the NW 1/4 of the SE 1/4 of the NW 1/4 of a certain section of land would be a good and valid description ... although such a piece of land would not touch a government corner nor a government line, and no one could tell, without a survey, it's exact location ...”

As we have previously noted, the 15 year statute of limitations governing adverse possession already existed in Kansas by this time, but other statutes of limitation that were highly relevant to land rights also existed, which were much more commonly utilized, and the case of *Young v Walker* (1881) serves as a fine example of the typical enforcement of such statutes by the Court. Sarah Kizer was the daughter and sole surviving heir of her father Michael, who died in 1865, at which time she was still a minor, but she was apparently not living with her father, presumably she was living elsewhere with some other relatives. A member of the Young family was appointed as the administrator of the estate of her deceased father, and in 1866 the administrator sold all of the land held by the estate, which consisted of a single 160 acre tract, to Clark, without providing notification to Sarah. Shortly thereafter, Clark sold the former Kizer tract to two other members of the Young family. In 1873, Sarah became an adult, and at an unspecified date she became Sarah Walker, by means of marriage. In 1879, Sarah somehow learned that her late father's land had been sold, and that it was now being occupied or used by the Young family, which she had evidently never previously known. Upon making this discovery, she filed an action against the Youngs, alleging that the deed executed by the administrator in 1866 was void, because it had deprived her of land in which she held a right of inheritance. Upon finding that the 1866 deed was indeed void, the trial court ruled in favor of Walker, but her victory was not destined to stand. Noting that Walker had become an adult in 1873, and she had not filed her action until 1879, the Court reversed the lower court decision, pointing out that a 5 year statute of limitations, which was applicable to deeds issued by administrators, controlled this situation, and barred all consideration of the action launched by Walker. Sarah had been an adult, subject to the operation of statutes of limitations, for 6 years when she filed her action, so she had acted 1 year too late, and her action therefore had to be dismissed, which result effectively validated the originally invalid title to the tract at issue that was held by the Youngs. As can be seen, this was technically not a case of adverse possession, but the statute employed here functionally served as a shortened equivalent to

adverse possession, which operated to the benefit of parties who held or used land in good faith, as indicated by their possession of a deed purporting to represent a valid conveyance of the land in contention. This case ideally illustrates the primary purpose of statutes of limitation relating to real property, which is to play a curative role with respect to all errors made in the process of enacting land transfers by deed, thereby silencing all complaints or protests pertaining to those errors, once the statutorily allowed period has passed.

A strong argument could be made that our next case, *Wood v Fowler* (1882) is in fact the most influential, and quite possibly even the most important, land rights case ever decided in Kansas, due to the fact that as the only early Kansas case addressing riparian title, it went on to become a central reference point, controlling the outcome of scores of riparian rights cases, and charting a judicial course which was followed in handling virtually all subsequent riparian issues. The facts of this case are highly simplistic, but the impact of the decision made here by the Court on the highly controversial issue of navigability set Kansas on a path toward becoming one of the most ardently pro-public states in the country, with regard to the ownership status of riverbeds. In 1880, Wood acquired a tract which was bounded on one side by the Kansas river, lying near its junction with the Missouri River. During the winter, Wood planned to harvest ice from the river, but when he set out to do so, he found Fowler already engaged in taking ice from the portion of the river bounding Wood's tract. Wood then filed an action against Fowler, accusing him of trespassing and stealing ice that belonged to Wood, but the trial court dismissed Wood's action, deeming the river to be public and open to all, so Wood could not successfully claim to be the owner of any river ice. As can be seen, the fundamental issue was ownership of the water, in the form of ice, and not the ownership of the riverbed, yet while upholding the lower court decision, the Court elected to take this opportunity to declare that all streams which were meandered during GLO surveys must necessarily be regarded as being navigable by definition, for purposes of title to the bedlands lying between the meander lines, and all such areas therefore constitute real property which is owned in fee by Kansas, rather than the owners of the adjoining land. The basis for the position taken here by the Court was not destined to stand the test of time, as it is now well understood that meander lines were never intended to form or represent boundaries, nor were they ever intended to be indicative of navigability, but navigability was still a very obscure and poorly understood subject in 1882, and no clear test of navigability had yet been forged, so the Court's position, though clearly flawed, is highly understandable. The decree handed down by the Court on this occasion provided Kansas with a tremendous windfall, as the state gained the right to assert control over all bedlands in Kansas which had been meandered by the GLO, and consequences stemming from this ruling would eventually lead to legislative action addressing the disposal of all such bedlands by the state, as we will subsequently note. In the following terms, the Court explained the rationale relating to navigability determination which it found to be suitable for Kansas and thus adopted into law at this point in time:

“... the Kansas is a navigable stream ... official records of United States surveys showing that the stream was meandered ... the Kansas is the largest river wholly within the limits of the state ... in early territorial history it was in fact navigated ... it is capable of being used for navigation ... the lines of

the United States surveys do not cross the channel, the stream was meandered ... we may assume that the Kansas is ... a navigable stream. The stream having been meandered ... the patents from the United States passed title only to the bank ... title to the bed of the stream is in the state ... all rights were in the public ... the doctrine of riparian ownership to the center of the stream ... is recognized in some states ... but the better and more generally accepted rule is to apply the term "navigable" to all streams ... where the lands have been surveyed and patented under federal law ... a riparian proprietor has no title to the ice. The title to the soli being in the state, and the stream being a public highway ... he would have no more title to the ice than he would have to the fish.”

The case of *McAlpine v Reicheneker* (1882) presented the Court with an opportunity to comment upon the proper procedures to be followed when errors are discovered in a prior division of land. A tract of unspecified size and shape, located in Wyandotte County and lying along the Missouri River was partitioned in 1868, between the 7 children of the deceased land owner, and 7 lots were thereby created, but there was no evidence that any surveyor was engaged in creating the 7 lots, and how the lot lines were originally marked on the ground is unknown. Reicheneker eventually acquired the 2 southernmost lots and by 1881 various other parties, including McAlpine, had come to own the other 5 lots. What transpired between 1868 and 1881 is unknown, the conditions on the ground may or have not have changed materially, items such as buildings or fences may have come and gone or been relocated, and the river may have migrated somewhat, but for unknown reasons by the end of that period Reicheneker had come to suspect that his portion of the partitioned area was not as large as it was intended to be. Reicheneker therefore filed an action against McAlpine and his other neighbors, seeking a decree awarding him full control over the area which he believed constituted the 2 lots that he had acquired, as they had been described in the partition proceedings and in his deed. At the trial however, the defendants pointed out that their lots were also smaller than they were described to be, suggesting an overall acreage shortage in the whole original tract, but the trial court rejected their testimony, and Reicheneker prevailed as a result. Recognizing the injustice in that ruling, the Court struck down the lower court decision, and sent the whole matter back to the trial court, directing a new trial to be held. In an effort to provide sound guidance for the trial judge, the Court advised him that any lot corner monuments or other boundary markers set in the course of partitioning land are genuine original monuments, which control boundaries, regardless of any measurement errors that they may later be discovered to contain. Distributing original measurement error in a proportionate manner is an equitable practice, but doing so is appropriate only in the absence of any physical evidence of original boundary locations, the Court also stipulated, and testimony supporting the validity of physically established boundary locations represents valid boundary evidence, which is not to be ignored. In addition to approving and adopting those widely accepted boundary principles, here the Court also clarified that no gaps or overlaps involving adjoining properties can ever exist, if the relevant lots, parcels or tracts were created in a simultaneous fashion, because under such circumstances each land unit necessarily forms a portion of the boundary of each other land unit, and no gap or overlap

can ever exist in a location where none was intended to exist. Thus the Court wisely highlighted the concept which supports the principle of monument control, by emphasizing that original measurements cannot be allowed to control when superior evidence is present, because doing so would result in the creation of countless unintended gaps and overlaps, due to the well known prevalence of errors in original dimensions.

As we have already seen, in reviewing the Kansas Central Railway case of 1879, railroad condemnation cases can produce landmark rulings of the Court on land rights issues, as in that instance the Court announced its approval of the concept that a railroad right-of-way obtained through condemnation must always be classified as an easement. Similarly, the case of *Atchison, Topeka & Santa Fe Railway (ATSF) v Patch (1882)* marks the Court's initial statement on the important principle of reversion, which becomes relevant whenever any right-of-way is either abandoned or vacated, potentially impacting multiple titles, and under certain circumstances relocating boundaries as well. Patch was the owner of a group of typical platted lots in Topeka, and an unused platted street which bordered her lots was formally vacated by the city in 1881. Shortly thereafter, ATSF filed a condemnation action against several property owners, including Patch, in order to create a railroad right-of-way, and the property owners were all given monetary awards for this taking of either all or part of their lots. Patch was unsatisfied with her award however, because she realized that she had not been compensated for the portion of the ATSF right-of-way occupying the area which had comprised the vacated street adjoining her lots, so she filed an action seeking a larger payment from ATSF. The trial court ruled against Patch, holding that she had acquired nothing by virtue of the vacation, and she owned only the area defined by the platted dimensions of her lots. Pointing out that this question had just been addressed in an 1881 statute, the Court reversed that lower court decision, agreeing with Patch that upon completion of the vacation she had automatically and immediately become the owner in fee of the portion of the former street abutting her lots, so she was right that ATSF was obligated to compensate her for any use of that area as a railroad right-of-way, as well as the use of her platted lots for railroad purposes. In so deciding, the Court explained that the vacation process, as it is statutorily outlined, is analogous to the principle of accretion, since the vacated area legally attaches to the abutting lands, just as does accreted land along a stream. Upon vacation of such a platted street under the relevant statute, the Court observed, the centerline of the vacated right-of-way becomes the mutual boundary of all abutting properties, no gap is left between the properties, no independent tract is created, and the fee title of each property owner simply extends to the vacated centerline. Additional details and complexities involved in the operation of the principle of reversion were left unaddressed by the Court at this time, but more advanced issues relating to vacation and reversion would eventually be encountered and dealt with in subsequent cases, which we will also review.

The 2 year statute of limitation pertaining to actions involving tax deeds was once again in focus in *Corbin v Bronson (1882)*. As shown by the *Bowman* case of 1870, this 2 year statute created a relatively short time period during which tax deed issues can be contested, thereby providing an opportunity for any tax deed holder, who recorded his deed and also made typical use of the deeded land for the ensuing 2 years, to conclusively secure his title and thereby prevent the tax delinquent owner of record from ever successfully asserting that the land had been improperly taken from him. As our present case shows however, the broad and open language used in the 2 year statute also allowed

the land owner of record, and potentially other parties as well, to leverage the 2 year statute against the tax deed holder. Bronson was the owner of a tract of unspecified size, shape and location, which he had owned and occupied or used for many years, but the Bronson property became tax delinquent and a tax deed for that tract was issued to Goddard by Bourbon County in 1875. Goddard evidently made no use of the tract however, which continued to be occupied or used by Bronson, and Goddard soon sold the tract to Corbin. In 1877, Corbin apparently realized that 2 years had passed since the tax deed was executed, rendering it void due to lack of use under the 2 year statute, so he sought and obtained from the county another tax deed covering the same tract, in the hope that doing so would have the effect of renewing or reviving the lost land rights contained in the 1875 tax deed. Corbin then filed an action against Bronson, seeking to have him ejected from the land, and to have the 1877 tax deed judicially validated. The trial court recognized what Corbin had done however, and rejected the 1877 tax deed as worthless, leaving him with nothing. The Court upheld that lower court decision, confirming that the failure of either Goddard or Corbin to make any use of the Bronson tract, within the 2 year window which began to run in 1875, during all of which period Bronson continued to maintain sole control over the relevant area, had effectively eradicated the tax conveyance, and left Bronson still the owner of the tract at issue. A tax deed holder who fails to make any use of his deed within 2 years, the Court held, thereby conclusively loses his opportunity to secure his title, and he cannot create a new 2 year period, for his own benefit, by requesting a second tax deed for the same land. The second deed was a nullity, the Court agreed, with no legal force or effect, because by allowing Bronson to remain in control of his property for a full 2 years, after the first tax deed was recorded in 1875, Goddard and Corbin had relinquished any and all rights that they may have acquired under the 1875 deed, making it's original legitimacy a moot point, and no subsequent duplication of that deed could bring those lost rights back into existence. Having taken the position that all statutes of limitation concerning real property are fundamentally linked to the actual use of the land, the Court was fully comfortable applying the policy that any adverse land use which endures for the statutory 2 year period, whether it is made by the tax deed holder or by a party opposing the tax deed holder, operates to bar any litigation concerning the validity of the tax deed.

Our next case pertaining to the topic of boundary evidence is another one in which only highly minimal information is provided, leaving it's value perhaps somewhat limited in that regard, yet it contains and expresses some particularly important boundary principles and is therefore worthy of note, although the lack of relevant survey details may leave the typical surveyor feeling unsatisfied. The litigants are never mentioned at all by the Court in it's review of *Tarpenning v Cannon* (1882) presumably they were holders of adjoining properties, separated by a section line, but exactly what lands they may have owned is unknown. Cannon filed an action against Tarpenning, seeking to have a survey which had been done by a county surveyor in 1880 deemed to be incorrect and nullified. The survey in question apparently involved the retracement of at least 3 miles of section line, running northward from the southeast corner of a certain Section 33 to the northeast corner of the corresponding Section 21. Nothing is known as to how this resurvey was conducted, but it appears that the county surveyor made the classic error of ignoring original boundary evidence, and executing an essentially independent resurvey based solely upon record dimensions and his own measurements. This practice was commonplace

throughout the west at this time, as many surveyors were operating under the false impression that correcting all measurement errors in prior survey work was their primary duty, being untrained or poorly trained for the most part, and thus being entirely ignorant of the legal operation of the principle of monument control. The trial court struck down the survey at issue, in which the surveyor had apparently placed a new and straight series of section lines on the ground, while disregarding all physical evidence of the location of those lines per the GLO survey, quite possibly even including authentic GLO monuments. The Court upheld that lower court ruling, and agreed that another survey would need to be done, during which any relevant physical boundary evidence would need to be respected and allowed to control. Here the Court reiterated the elementary principle that original monuments control, and are not subject to relocation based on measurements, regardless of any lack of precision manifested in the original monumentation, while also indicating that numerical data appearing in field notes becomes relevant to boundary resolution only in the absence of original survey evidence on the ground. Acquiescence in physically established boundaries, the Court also stated, can represent legitimate evidence of original boundary locations, which must not be disregarded during resurveys, following the widely revered doctrine enumerated by Justice Cooley of Michigan, in recognition of the fact that lines of occupation are typically established in accord with original survey monumentation, through the efforts of the original entrymen to properly locate and mark their boundaries in good faith. In addition, the Court also reminded the litigants that testimony identifying original monument locations is superior in controlling force to dimensions of record, and to any corners that have been relocated during resurveys, through the use of contemporary measurements, based upon a false assumption that dimensions of record represent primary boundary evidence.

1883 marks the advent of the Pacific Reporter, which embraces cases from all of the western states, and is acknowledged as the principal reference source for western case law, so all citations from this date forward refer to the Pacific Reporter. Since surveyors are often required to evaluate and deal with right-of-way issues, here we will briefly note 3 important and closely related decisions of the Court on that subject. A statute dictating that any public right-of-way which went unused for 7 years after being created would then legally cease to exist was enacted in 1879, and was first addressed by the Court in *Wilson v Janes* (1883). Janes, who was a typical land owner, filed an action against Wilson, who was the Reno County road overseer, alleging that Wilson was attempting to construct a public road through the land of Janes, but had no right to do so. The public right-of-way in question, which crossed the Janes tract, had been legally created in 1873, but no action had been taken to facilitate public use of it for over 7 years, so Janes argued that it had been vacated, by virtue of the 1879 statute, and no longer existed. The trial court awarded victory to Janes, agreeing that the right-of-way at issue had gone more than 7 years without being opened to public use by any form of action on the part of any public officials. The Court reversed that decision however, declaring that any right-of-way which is not physically obstructed, in a manner that prevents anyone from using it, must be deemed to be legally open, and since Janes had never barricaded the right-of-way or erected any structures blocking it, the right-of-way had in fact been open at all times, despite the absence of any action by the public authorities, so the 1879 statute was inapplicable, and Janes could derive no benefit from it, in his effort to shed the public burden borne by his land. In so holding, the Court virtually eviscerated the statute in question, rendering it

nearly useless in practicality, while staunchly upholding the principle that public land rights cannot be lost to the mere passage of time, so a public right-of-way, once legally created, never ceases to exist until it is properly vacated. The same issue soon came before the Court again, in *City of Topeka v Russam* (1883) the only significant difference from the *Wilson* case being that the road protested by Russam ran within a section line right-of-way. Here the Court once again forcefully rejected the argument set forth by the private land owner, reversing the lower court decision in his favor, and protecting the public right-of-way from destruction by the 1879 statute. In *City of Osage City v Larkins* (1888) which features the tragic story of a girl who was mangled and crippled for life while walking through a platted public alley, the same issues were in play. A dedicated alley had long gone unused for travel, and had become cluttered with junk, due to the use of the area by adjoining lot owners as a trash dump, and the alley had also been partially cut off and converted into a dead end, by the construction of a railroad track. Despite the fact that the dedicated alley had never been used for its intended purpose, and local officials had never done any work on it or even cleaned it up, the Court decreed that it still remained a legally open public right-of-way, so Larkins was fully entitled to make use of the alley, as she was doing when she was injured, thus Osage City was guilty of negligence for failing to keep the alley in a decent condition, and Larkins had a valid liability claim against the city.

As we have previously observed, a 2 year statute of limitation pertaining to tax deeds had existed in Kansas since 1862, which along with possession of land sold for tax delinquency, functioned as an abbreviated form of adverse possession, eliminating the need to hold land for 15 years to secure title to it, in controversies centered upon a tax deed. In 1876 however, the Kansas Legislature enacted another statute of limitation, with a 5 year operational period, which was also specific to land conveyed by means of a tax deed, and in a series of cases, *Coonradt v Myers* (1880 & 1883) and *Myers v Coonradt* (1882) the Court provided clarification of the functional difference between these 2 year and 5 year statutes. Myers was the record owner of an unspecified amount of land, all or part of which became tax delinquent in 1870, and a tax deed for a certain tract of unspecified size within the area owned by Myers was issued by Miami County to Coonradt in 1875. This tract was vacant however, and Coonradt did not attempt to make any use of it until 1879, at which time Myers learned that Coonradt claimed to own the tract, and he erected a fence, preventing Coonradt from accessing the area. Coonradt then filed an action seeking to have his tax deed deemed to be valid, and to have Myers required to allow Coonradt to utilize the tract in question. The trial court dismissed this first action, finding that Coonradt had failed to prove that his tax deed was valid, and the Court upheld that decision against him in 1880. Coonradt apparently persisted in his efforts to take control of the tract at issue however, leading Myers to file an action against him, and in this second action Coonradt prevailed, but Myers chose to appeal, returning the matter to the Court in 1882. In reversing this lower court decision, the Court explained to Coonradt that the 2 year statute was of no use to him, because he had neglected to make any use of the tract at issue within the relevant 2 year period. Since the land was left vacant by both parties for more than 2 years after the tax deed was recorded in 1875, neither party could benefit from the 2 year statute, the Court indicated, which brought the 5 year statute into play. The 5 year statute differed from the 2 year statute, the Court informed the litigants, because the 5 year statute can only benefit a tax deed holder, while the 2 year statute can be employed by whichever party made physical use of the land, to extinguish the land rights of the other. In this instance

however, neither party had used the land for 2 years, and the 5 year period had not yet expired when Myers fenced the disputed area, excluding Coonradt from it, so Coonradt could obtain no benefit from either statute. Ironically, Myers was alerted to Coonradt's claim, and halted the progress of the 5 year statute, only as a result of Coonradt's attempt to put the vacant area to use, which caused Myers to assert physical control over that area before the 5 year period had elapsed, if Coonradt had waited just 1 more year, the 5 years would have expired with the land still in a vacant state, thereby validating his tax deed. The third and final action between these parties reached the Court in 1883, and on that occasion the Court upheld an order of the lower court refunding the taxes paid by Coonradt on the disputed area to him, while again upholding the ownership of the subject property by Myers. Thus the Court drew the important distinction between these 2 very similar statutes, while highlighting the fact that land use is highly relevant to both of them, because the use made of the land can either trigger or halt their progress.

The Court continued it's efforts to establish and clarify the operational parameters of the statutes of limitation relating to tax deeds in *Belz v Bird* (1883) which was a contest between 2 parties who were both tax deed holders. During the early decades of statehood, a myriad of problems and disputes over title and ownership arose from the issuance of tax deeds, but over time it became clear that 2 typical scenarios needed to be addressed. Under one scenario, professional tax pirates illicitly obtained tax deeds and then attacked the ownership of the innocent occupants of the land, effectively forcing those occupants to defend themselves as adverse possessors. Under a second common scenario, the heirs of parties who had lost their land for non-payment of taxes many years earlier attacked the ownership of an innocent tax deed holder, who had been using the land for many years, essentially converting the occupant into an adverse possessor. So there was a need to protect certain tax deed holders, but at the same time there was also a need to restrict the opportunities available to tax pirates, and the position taken by the Court on the varying functionality of the 2 year and 5 year statutes of limitation reflects this situation. As these statutes were construed and implemented by the Court, the 2 year statute served primarily to protect innocent owners of record from tax pirates, while the 5 year statute served solely to protect well established tax deed holders. This was accomplished by the Court by treating these statutes as being dependent upon land use, and historically a party in possession of land was typically the party being attacked, placing that party in the role of a defendant, but that was about to change. Belz acquired a typical lot in Atchison by tax deed in 1864, but what use he made of that lot, if any, is unknown, and Bird obtained a tax deed to the same lot in 1880. Bird then successfully quieted his title to that lot against the tax delinquent owner of record, but not against Belz, since Bird was apparently unaware of the existence of the 1864 tax deed. When Belz learned that Bird claimed to own the lot, he filed an action against Bird, in which Belz conceded that his 1864 tax deed was invalid, yet he nevertheless maintained that he had become the owner of the lot, under the statutes of limitation. The trial court rejected the position of Belz and found Bird's tax deed to be valid, awarding the lot to him on that basis. The Court agreed that Bird was the holder of the superior title, but reversed the lower court decision with respect to the rights of Belz, and remanded the case back to the lower court, with instructions to require Bird to reimburse Belz for the many years of tax payments he had made, or to order the lot to be sold, if necessary to reimburse Belz. In so ruling, the Court confirmed that the statutes of limitation can be utilized by plaintiffs, such as Belz in this instance, as

well as by defendants. This position of the Court, communicating the fact that it was highly open to the employment of the statutes of limitation, not just as a defense but by all parties, was destined to have a major impact upon adverse possession litigation going forward. As we will observe in traversing the coming decades, adverse possession in both the title context and the boundary context has been leveraged by plaintiffs to secure their land rights at least as often as by defendants in Kansas, due in large measure to the fact that the Court has long regarded statutes of limitation as statutes of repose, which are highly beneficial to society and must therefore be available for use by all parties.

The case of *Hollenbeck v Ess* (1883) appears to represent the first occasion upon which the Court employed the 15 year statute of limitations, which forms the statutory basis for adverse possession in Kansas, in a dispositive manner. No details pertaining to the use of the contested land by Ess, who was evidently the occupant of a certain tract in Shawnee, were mentioned by the Court in outlining this case, because the doctrine of adverse possession did not yet exist as such in Kansas at this time, so no rules or standards with which to analyze and assess the value of particular forms of land use for title purposes had yet been established in Kansas. The passage of time itself was the sole factor to be considered, so a mere absence of any use of the subject property by the owner of record for the statutory period was potentially conclusive, regardless of how much or how little the adverse claimant may have used the property in dispute. Prior to 1860, Ess acquired his tract from Holmes, and from 1860 to 1880 Ess was regarded in the community as the owner of the subject property, even though he evidently had no deed, because it had been destroyed when Shawnee was burned during the Civil War, and Ess apparently saw no need to take any steps to rectify that situation. During the 1870s, Hollenbeck, who was evidently one of the many land sharks roaming the frontier, apparently discovered that Ess had no documentation with which to support his ownership of his tract, so Hollenbeck obtained a tax deed to that tract, which he presumably supposed would enable him to evict Ess from the premises, and in 1880 he ordered Ess off the land. Ess responded by filing an action against Hollenbeck, in which Ess pointed out that he had maintained sole control over the subject property for well over 15 years, undisturbed by anyone, therefore he had fully satisfied the requirements of the 15 year statute. The trial court ruled in favor of Ess, and the Court upheld that decision, on the strength of testimony from Holmes, who corroborated the destruction of the deed in question in 1862. In so holding, the Court treated Ess as an adverse possessor, despite recognizing that his use of the land at issue was clearly made in complete good faith, being founded upon an authentic conveyance, while indicating that the 15 year statute was enacted to protect the title and land rights of parties such as Ess. As this case very well demonstrates, the concept of adverse possession is not based upon aggression and is not intended to reward parties who set out to acquire land which they know belongs to others simply by squatting upon it. Quite to the contrary, adverse possession is intended only to negate the ill effects of the passage of time upon title to land legitimately held by innocent parties, who originally entered their land upon some valid basis, which they can no longer prove, due to either the loss of their documentation or the presence of some obscure and long unobserved technical flaw in that documentation.

One of the most elementary questions confronting county surveyors was addressed by the Court in *John v Reaser* (1884) which presented a challenge to the constitutionality of the 1879 law that outlined the statutory resurvey process. Nothing is known about the parties to this case, or what lands they may have owned, or the nature of

their dispute, because the Court saw no need to relate any such details in adjudicating this controversy. Clearly however, they were in disagreement over the location of their mutual boundary line, so a statutory resurvey was done, and the results of that survey were protested, on the grounds that by giving county surveyors authority to establish property corners, the 1879 statute unconstitutionally enabled them to rob land owners of a portion of the land to which they held title. The fundamental question therefore, was simply how much authority county surveyors can legally be allowed to exert in connection with original GLO surveys. The presentation of this question itself suggests that a perception of abuse existed, and indeed there is substantial evidence that many county surveyors, not just in Kansas but throughout the west at this time, were poorly trained and often made poor decisions or applied incorrect procedures during resurveys. In any resurvey, then as now, the sole objective of course, is the restoration of the original corners and lines, thus nothing potentially representing original boundary evidence can ever be legally ignored, dismissed or bypassed by the retracement surveyor, because doing so would deprive property owners of land to which they are legitimately entitled. This concept was poorly understood however, with the result that genuine original boundary evidence was frequently discarded, in favor of corner locations established through the use of measurements in an independent and sometimes deliberately corrective manner, which was clearly unjustified. Nonetheless, on this occasion, just 5 years after the creation of the statute in question, the Court elected to provide it with full judicial support, flatly rejecting the premise that it was unconstitutional. Undoubtedly, the Court correctly recognized that a practical and workable process by which boundary certainty and property security could be obtained by land owners was genuinely needed, and that was just what the statutory resurvey process offered, by allowing the work of county surveyors to become absolutely conclusive, if not protested within the statutory appeal period. Over the subsequent years, the Court very consistently adhered to the position on the legitimacy and controlling force of statutory resurveys which it had first taken here. In *Swarz v Ramala* (1901) for example, the Court expressly reiterated that the statutory resurvey process cannot be characterized as unconstitutional, because it contains a provision for appeal, so at least in theory any incorrect resurvey can and will be struck down. In the view of the Court, this opportunity to protest and overturn any bogus resurvey adequately protects the rights of all title holders from any negligent or otherwise deficient work that may be done by county surveyors. Even as it so ruled however, the Court also reminded the parties that evidence of title ultimately controls boundaries, so any boundary determination made through the use of survey evidence alone is subject to negation, through the application of the equitable principles that are applicable to the resolution of title conflicts, and as we will note going forward, this theme would prove to be one which the Court was intent upon upholding with great consistency as well.

The Court's first opportunity to evaluate and address the relative value of platted GLO boundaries and acreage figures came in the case of *Armstrong v Brownfield* (1884). In 1860, the NW/4 of a certain Section 2 was patented to Craighead. The relevant GLO plat evidently indicated that the 2 northernmost platted units lying within the NW/4 each exceeded the 40 acre aliquot unit standard, and they were labeled accordingly, in the typical manner, bearing acreage figures of 42.05 and 42.21, thus the entire quarter was platted as 164.26 acres. In 1858 however, Craighead and Weddle had verbally agreed that they would split this quarter, and Weddle wanted the southern portion of the quarter, but

he also wanted the excess acreage, so Craighead deeded the south half of the quarter to Weddle, describing that half as containing 84.26 acres. These 2 men then commenced using their respective portions of their quarter, and in so doing they evidently established a crop line, which served as their boundary and remained stable in position over the ensuing years, even after these 2 properties were sold and put to use by their successors. In 1877, the north half of this quarter was deeded to Armstrong, by means of a deed which described that half as containing 80 acres. Then in 1881, the south half was deeded to Brownfield, by means of a deed in which that half was described as 80 acres, and both of these parties simply perpetuated the land use pattern established by Weddle and Craighead. In 1883, a survey was done, which evidently revealed that the acreage being occupied by each party did not correspond to the platted acreage. Contrary to the plat, the south half, as defined by the line of occupation, contained all of the excess acreage, while the north half contained only 80 acres. Upon learning this, Armstrong filed an action demanding that Brownfield relinquish the excess acreage to him, on the grounds that it had clearly been intended by the GLO to be part of his north half of the quarter in contention. The trial court rejected Armstrong's position however, and upheld Brownfield's ownership of the entire Weddle tract, extending northward to the physically established boundary, disregarding both the platted sixteenth line and the platted acreage figures. The Court agreed that none of the acreage figures, either on the plat or in the relevant deeds, could control the location of the boundary in question, because platted PLSS boundaries control over representations of acreage, even those which appear on the plat itself, so the platted sixteenth line was in fact the boundary location intended by the GLO. The Court then went on to explain however, that the intent expressed on the plat had been rendered irrelevant by the intent of the original parties themselves, since the evidence clearly indicated that they intended to abandon the platted boundary and establish another line, pursuant to their 1858 oral agreement. The boundary physically created on the ground by the predecessors of the litigants, the Court held, was binding upon all of their grantees and successors, upholding the lower court decree awarding the contested area to Brownfield. The actual use to which the land had been put was the strongest evidence of the true intent of the entrymen regarding the location of their mutual boundary, the Court concluded, making both the contents of the plat and the acreage figures that were recited in their deeds superfluous, thus Brownfield had acquired equitable title to the entire area conveyed to Weddle by Craighead, as that area was defined on the ground, and Armstrong had acquired no rights to any portion of that area.

Many plats had already been created in Kansas by this point in time, subsequent to the initial platting done by the GLO, and numerous cases involving platting issues would soon begin to pour down upon the Court requiring resolution. A great many cases involving platted easements have been decided by the Court over the decades, and such cases can often be informative or useful to land surveyors, but most of them are outside the scope of this book, so we will take note herein of only the small number of landmark cases which involve broader issues pertaining to platting, such as *Brooks v City of Topeka* (1885). Horne was the owner of a certain quarter section which adjoined the Topeka city limits, and in 1859 he platted the northern portion of his land, as Horne's Addition to Topeka, the south boundary of which was formed by Eighth Avenue. In 1861, Horne sold the remaining southern portion of his quarter to Lakin, and the north boundary of the Lakin tract, which was described by metes and bounds, ran down the center of Eighth

Avenue. In 1862, Horne filed his plat and numerous lots were sold with reference to that plat over the ensuing years. Lakin never objected to the use of Eighth Avenue as a public roadway, even though part of it was within the area described in his deed, and the public use of it gradually became substantial. In 1867, Lakin sold his tract to Brooks, who decided to challenge the right of the public to use Eighth Avenue, so he filed an action against Topeka, alleging that Eighth Avenue had never been dedicated, and that he therefore had the right to close his half of the road. The trial court rejected the position set forth by Brooks however, and the Court upheld the lower court decision against him, finding that the entire width of Eighth Avenue had in fact been dedicated, and Topeka therefore held full control over it. In so deciding, the Court agreed with Brooks that no statutory dedication had taken place, but informed him that no such dedication was needed, because an informal common law dedication is just as acceptable under the law as a formal statutory dedication. Horne had executed a common law dedication of the northerly portion of Eighth Avenue, by selling platted lots fronting upon that right-of-way, but he was no longer capable of dedicating the southerly portion of it, the Court confirmed, after he sold the south tract in 1861, because a dedication can only be executed by the owner of the area in question. Nevertheless, the Court found that Lakin had dedicated the south half of the platted right-of-way, simply by allowing the public to make use of the portion of the roadway lying within his tract without interruption or disturbance. Even if Lakin never knew that his tract extended northward into the roadway, which is quite possible, his inaction operated as a binding dedication on his part, which had been conclusively accepted by virtue of the public road use, so Brooks had never acquired clear title to any portion of the platted right-of-way, even though part of it was within his deeded boundaries. Thus on this occasion, the Court applied the equitable concept that any acts of a land owner, including even a mere failure to act, can result in a conclusive common law dedication, and here the Court also adopted the widely accepted principle that using a plat in support of a conveyance operates as a binding common law dedication of any areas which are depicted as being public in nature on the plat.

Although the Court found the statutory resurvey process, which went into effect in 1879 as we have already noted, to be entirely acceptable and worthy of judicial support, and the Court also deeply appreciated the value of physical evidence of original surveys, as we have also seen, the Court remained highly skeptical toward certain forms of survey evidence, and this is amply demonstrated by the case of *Shaffer v Weech* (1886). The construction of a certain public roadway in Lincoln Township in Linn County was proposed in 1870, and in 1871 that proposal was approved and the road was built. This road ran more or less along an unspecified portion of a township line, extending an unspecified distance to the east and to the west. It appears however, that while the road was initially intended to precisely follow and rest upon the township line, that plan was not followed when the road was built, so a portion of the road deviated southward from that line, in order to utilize a convenient existing creek crossing, rather than construct a new crossing in the apparently less suitable spot where the township line crossed the creek. The width of this right-of-way had been established at 56 feet, so the land owners on both sides of the road planted their hedges 28 feet from the center of the road, soon after it was built, and the right-of-way was thus physically defined for several years. By 1883, Weech had become the owner of a tract of unspecified size lying along the north side of the road, and at that time Shaffer, who was a township officer, ordered the deviant portion of the road to

be relocated northward, to the actual township line. In the process of straightening the road, the hedge running along the south side of the Weech tract was plowed out by the township road crew, and Weech reacted to this by filing an action against Shaffer, seeking compensation for the destruction of the hedge, but Shaffer maintained that no compensation was due to Weech, because his hedge had been illegally placed within a public right-of-way. The issue, as can be seen, was simply whether the location of the public right-of-way was controlled by the physical location in which the road had been built, or by the documented township line location, as presumed and asserted by Shaffer, but the trial court decided that question in favor of Weech. In upholding that lower court ruling, the Court reiterated the same basic principles pertaining to the relative value of survey evidence that it had set forth in the earlier boundary cases which we have reviewed, making it clear that the Court recognized physical survey evidence as primary, and deemed testimonial evidence of original corner and line locations to be secondary, while viewing numerical data appearing on plats and in field notes as the least reliable form of survey evidence. On this occasion however, the Court went beyond it's usual level of criticism relating to survey work, expressly stating that all survey documentation must be regarded as inconclusive, and that all survey evidence appearing in documentary form must bow to the alignment that was actually surveyed on the ground:

“The map and field notes ... do not constitute the fact of the survey, nor the fact of the location, but are merely statements by the surveyor ... the surveyor's map and field notes are merely statements made by him as to where the survey was made ... and are at best only evidence of such facts ... such evidence has never been held to be conclusive ... while it is controlling in the absence of other and more satisfactory evidence, yet it must always give way ... when the real facts ... are shown by other and better evidence, the map and field notes can no longer control ... the existence and location of monuments and lines may be proved and determined like other facts ... their former existence and location can be shown by the parol testimony of witnesses ... no one will claim that the map and field notes of the surveyor amount to a judicial determination ... surveys are always inaccurate ... largely from the natural infirmities inherent in all men ... and also largely from negligence and carelessness. No two surveys are ever alike, and while the map and field notes of a survey may purport to show the exact elements of the survey ... yet they never do so and never can. Hence the necessity for relying upon the actual survey as made upon the ground, and not conclusively upon the map and field notes of such survey.”

The case of *Winn v Abeles* (1886) marks the Court's first encounter with adverse possession in the context of boundaries, and thus represents a major landmark in the development of Kansas land rights law, as the position which the Court took on this occasion set a distinct judicial course, to which it would very diligently adhere for several decades, before finally relenting, and allowing adverse possession to enter the realm of boundary law. Prior to this point in time, adverse possession had long been acknowledged

and utilized nationwide as a means of resolving title conflicts, but it had never been used in Kansas as a means of adjusting, altering or otherwise negating existing boundaries of record, and most other states had also not yet allowed adverse possession to develop into a means of judicial boundary control. Historically, adverse possession controlled only matters of title, and since the sole objective of any quiet title action was always the legal extinction of all but one of the competing titles, the entirety of the property in question was always ultimately awarded to the victorious party, without any regard for any of the boundaries thereof. Adverse possession was never intended to facilitate the division or fragmentation of existing lots, parcels or tracts, nor was it intended to produce any new boundaries, yet modern adverse possession has become a primary force in judicial boundary resolution, and it now typically results in the creation of new original boundaries, but starting here we will trace the course of the key events through which that transpired in Kansas. Abeles was the owner of a typical platted lot in Leavenworth, bearing a brick store building, which was built in 1865, and in 1881 Abeles leased his property to Winn, who operated the store until the building collapsed in 1883. The building fell as a result of excavation done by Colyer, who was the owner of an adjoining lot, yet Winn filed his action against Abeles, rather than Colyer, seeking compensation for goods that were damaged in the collapse. Winn charged that the building was actually located partially on the Colyer lot, therefore Abeles, rather than Colyer, was responsible for the collapse, because it was caused by excavation of the portion of the adjoining lot which Abeles had acquired through adverse possession, due to the presence of part of his building upon that portion of Colyer's lot for over 15 years. The trial court flatly rejected Winn's assertion that a building encroachment could ever represent a valid basis for adverse possession however, and the Court upheld that decision. In so ruling, the Court examined the parameters of adverse possession which had been established in other states, and decided to align Kansas with those states, including Missouri, which had taken a hard line stance against the use of adverse possession as a tool for the adjustment or relocation of record boundaries, stipulating that it must be strictly limited to the resolution of title issues. Thus the Court formally adopted the mistake doctrine, which provides that the subjective intent of the purportedly adverse party controls the legal effect of their actions, therefore no mistaken opinion or belief regarding any boundary location can ever support adverse possession, or enable any boundaries to be created, adjusted or otherwise impacted through land use resulting from a mistake:

“... the strip had been occupied by the Abeles building for more than 15 years, but possession alone is not sufficient to confer title ... there must ... be an intention ... to claim the land ... the occupancy of Abeles was not taken under claim or color of title, nor was there any purpose to oust or dispossess Colyer ... Abeles ... does not own or claim the narrow strip upon which his wall had been inadvertently placed ... there was no adverse possession ... mistake or ignorance ... did not work a disseizin ... possession ... without intention ... was not adverse, and would not give title ... misapprehension as to the true lines ... will not ripen into statutory title ... in a question of boundaries, possession does not count ... accidental and inadvertent encroachment ... will not constitute an adverse possession.”

The value of testimony as evidence of boundary locations has long been a controversial subject, and the specific question of whether or not certain testimony constitutes worthless hearsay, that can simply be disregarded, is very often at the focal point of that controversy. In striving to protect and uphold all original boundaries however, the courts of most western states were highly open to virtually all forms of testimony during the second half of the nineteenth century, accepting it as genuinely valuable boundary evidence, as the case of *Stetson v Freeman* (1886) well illustrates. An unspecified number of lots were platted as part of Blue Rapids in 1871, lying between the Big Blue River and a road, which apparently ran more or less parallel with the river and about 230 feet away from it, in an area which was adjacent to the site of a dam. Most of these lots were evidently sold and put to use over the ensuing years, and several buildings were erected on them, such as a paper mill, a gypsum mill and a power plant. A certain lot was acquired by Hathaway in 1878, by means of a sheriff's deed, pursuant to a judgment which she had obtained against the Blue Rapids Town Company, but it appears that she never made any use of that lot, and she subsequently sold it to Freeman at an unspecified time. The same lot was deeded by the company however, to Stetson in 1879, so Freeman was compelled to file an action against Stetson, in an effort to clear his title to the lot. The relevant plat was apparently poorly made, containing little if any information defining the location of the lot lines, and there was no indication that any lot corner monuments had been set when the area was platted, so the location of the lot at issue was highly unclear to all of the parties. Freeman filed a metes and bounds description of the area he was claiming, but Stetson maintained that Freeman's description was both inaccurate and legally inadequate, leading to the introduction of testimony which supported Freeman's description, and the trial court awarded victory to Freeman on the basis of that testimony. On appeal, Stetson argued that the testimony supporting Freeman's description of the lot in question amounted to hearsay and should have been rejected, but the Court disagreed and upheld the lower court ruling in favor of Freeman. Observing that the use of hearsay testimony for purposes of boundary resolution had been approved by the United States Supreme Court, the Court pointed out that ambiguously described boundaries can be conclusively resolved on the basis of testimonial evidence alone, while holding that testimony is subordinate only to physical evidence of original boundary locations, and is typically superior to measurements as boundary evidence:

“That boundaries may be proved by hearsay testimony is a rule well settled ... landmarks ... pass away with the generation in which they are made ... they are often destroyed ... hearsay and reputation should be received to establish ancient boundaries ... reputation is admissible for the purpose of showing ... the boundaries of lands of individual proprietors ... the admission of this testimony was not error ... it must be held sufficient to uphold the judgment.”

Both a boundary agreement and the work of a county surveyor were among the matters before the Court in *Finley v Funk* (1886). Finley owned the SE/4 of a certain Section 26 in Labette County, and Funk owned the SW/4 of the same section, but how or when they had acquired their respective quarters is unknown. For many years, the location of the south quarter corner of this section was unclear, and in 1884 Finley and Funk, along

with others, who owned land in the north half of the section, entered a written boundary agreement, adopting a certain hedgerow, which ran northward from the southerly section line, as their mutual boundary. The locations of both the southeast and the southwest corners of this section were evidently known to the parties, and those points were accepted by all parties as being legitimate, so as part of their settlement Funk agreed to pay Finley an amount to be determined through arbitration, since the hedge was found to be closer to the east section line than it was to the west section line. Finley had long maintained that the quarter corner at issue was located midway between the 2 accepted section corners, but at this time he agreed to relinquish any claim he may have had to any land west of the hedge. When the arbitrator announced the amount to be paid to Finley by Funk however, Funk deemed it to be excessive, and refused to pay, forcing Finley to file an action against Funk to have him judicially compelled to honor their agreement. A survey was done by the county surveyor, in which the quarter corner was placed at the midpoint of the south section line, but both parties refused to accept the surveyed corner location, Finley took the position that the agreed line must control, and therefore Funk was required to pay, while Funk also maintained that the agreed line must control, but insisted that the amount he was ordered to pay was unjustified. The trial court rejected the boundary agreement and held that the line in question was controlled by the quarter corner set by the county surveyor, but the Court reversed that ruling and remanded the case back to the lower court, with directions to conduct a new trial. Regarding the validity of the boundary agreement, the Court explained that "agreement is looked upon by the courts with favor ... it is the policy of the law to allow parties to settle and adjust doubtful and disputed facts ... the court should seek to uphold it". Turning to the question of whether or not the work of the county surveyor was conclusive, and prevented or negated the boundary agreement, the Court stated that "the surveyor proceeded with the survey ... showing that the corner was established on the evidence ... instead of upon the agreement ... the line was established by the agreement, which is here held to be valid ... the action of the surveyor was ... not binding." Thus in the course of pointing out the appropriate pathway toward resolution of this dispute the Court verified that land owners have the authority to enter binding boundary agreements, and that such legitimately agreed boundaries have the capacity to render subsequent surveys which are based solely upon boundary information of record moot and idle.

As we have already observed, the Court was highly inclined to accept and to validate questionable and even dubious legal descriptions during the early years, and that trend continued to prevail at this time, as the case of *Seaton v Hixon* (1886) well demonstrates. Hixon was the owner of a construction company, and he was evidently involved in the erection of a building upon land which was owned by Seaton. In 1880, Hixon obtained a lien upon the property of Seaton, which was located in South Atchison, and in 1882 he commenced an action, seeking to foreclose upon the subject property, since Seaton had declined or failed, for unknown reasons, to fulfill his payment obligation to Hixon. The trial court determined that the lien was valid, and thus issued a judgment requiring Seaton to either pay Hixon or relinquish the subject property. On appeal however, Seaton maintained that the lien must be deemed to be invalid, because the subject property was inadequately described therein. The legal description supporting the contested lien described the tract at issue only as "Lots 15 & 16, Block AA, corner Q and South Fourth Streets". Nonetheless, the Court upheld the lower court decision in favor of

Hixon, finding the description in question to be legally sufficient, even though it made no reference whatsoever to any section, or any particular existing subdivision, or any city, county or state. Once again, the Court indicated that any legal description which identifies a unique lot, parcel or tract is a valid description, just as it had in the Haynes case of 1874, which also involved a description from which several of the same typically essential elements were missing. The fundamentally incomplete nature of such descriptions was a matter of only secondary concern to the Court, the primary question being whether or not the information found in the description under examination could be applied to multiple locations, and upon recognizing that it could not, the Court was fully satisfied. The intended property "may be easily ascertained upon inquiry" the Court noted, adding that "such a description, when it can be aided by existing facts, is always sufficient", so one who has tacitly approved such a description, by participating in a transaction that was based upon it, cannot later deny it's efficacy, in an effort to escape the consequences of a contractual agreement. Since it was conceded by both litigants that the subject property was situated in Atchison, and there was only one "Block AA" in that city, and the plat of the relevant area revealed that the named streets did in fact border that block, which contained lots bearing the stated numbers, the Court concluded that the subject property was adequately defined, again approving the use of extrinsic evidence to enhance and support an otherwise patently deficient legal description.

In the case of Beebe v Doster (1887) the Court conducted a detailed analysis of the operation of the statutes of limitation pertaining to tax deeds, with the objective of further clarifying how they interact, and how important land use is to their operation, which apparently remained unclear to many people at this time. Tuttle was the owner of a tract of unspecified size, shape and location, which was evidently vacant, and during the early 1870s he allowed it to become tax delinquent. The Tuttle tract was sold for the unpaid taxes by Marion County to Beebe, who was a resident of Ohio, and Beebe's tax deed was recorded in 1875. Beebe never moved to Kansas, but he did visit his Kansas land at least once a year, and he sometimes camped on the property for months, yet it apparently remained unused for part, if not most, of each year. In 1884, Tuttle executed a quitclaim deed covering his tract to Doster, who then promptly filed an action against Beebe, alleging that the 1875 tax deed was invalid. Beebe made no effort to argue that the tax deed was valid, instead he pointed out that the 5 year statute of limitation had expired in 1880, so Doster was barred from attacking the validity of the tax deed. Doster maintained however, that the 5 year period had not run, because Beebe had not made use of the land for a full 5 years, and because he was absent from Kansas during most of the statutory time period. The trial court agreed with Doster that Beebe could not benefit from the 5 year statute, because he was not a Kansas resident, and thus held that Doster's deed was valid, so he was the owner of the tract at issue. The Court reversed that decision however, and in so doing, provided further clarification regarding both the 5 year and 2 year statutes focused on tax deed transactions. The 5 year statute, the Court informed the parties, begins to run when the tax deed is recorded, even if the land is unused, and the tax deed, if invalid, is perfected upon completion of the statutory period, unless the land is put to use in a manner which is adverse to the tax deed holder during that period. In this instance, the Court found, Beebe was the only user of the land in question, neither Tuttle nor anyone else made any use of it, so the 5 year window had run and had closed, and the tax title held by Beebe had been thereby perfected, regardless of his absence from Kansas, and regardless of his minimal

use of the contested land. Tuttle could have halted the statutory period, at any time between 1875 and 1880, the Court pointed out, simply by taking physical control over the land, and if he had made physical use of his tract and maintained control over it for a full 2 year period, then his use of the land would have rendered the tax deed worthless, since the 2 year statute, unlike the 5 year statute, can operate either for or against a tax deed. The 2 year statute required land use for the full statutory period, the Court indicated, while the 5 year statute did not, but land use was relevant to both statutes, because use of the land could prevent or interrupt the operation of either one of them. Statutes of limitation are fundamentally linked to land use, the Court thus emphasized, and no such statute can ever operate against any party who is in physical possession of the subject property, but some such statutes can function even where the subject property simply lies vacant, since both parties reside in other locations.

One of the most fundamental questions in the arena of land rights is what determines whether a deed can be safely relied upon or not. A great many deeds that appear to be fully legitimate and reliable are in fact invalid, for a wide variety of reasons, and with the case of *Stone v French* (1887) we will begin our observation of the most basic and crucial principles which have been applied by the Court when evaluating the validity of deeds over the decades. A 200 acre tract situated in Neosho County was owned by Francis French, who was a single elderly man, with 7 living brothers, when he died in 1879. Before he died, he executed a deed, in the presence of the local Justice of the Peace, conveying his entire tract to his brother Dudley, and he then placed the deed in a drawer in his bedroom, inside an envelope which was marked "to be placed in the recorder's office at Erie, Kansas, for record". When Francis died, the envelope was found, and the deed was given to Dudley, who proceeded to record it, following the written directions of his late brother, and in 1882 Dudley deeded the property to Stone. In 1884 however, Luther French, who was a brother of Francis and Dudley, along with the other 5 French brothers, filed an action challenging Stone's ownership of the subject property. The group of 6 French brothers represented by Luther alleged that the deed held by Stone was invalid, because Francis had died without ever conveying his tract to Dudley. Stone insisted that the deed executed by Francis was accurate, complete and entirely legal, but the trial court deemed it to be invalid, and the Court upheld that ruling, agreeing that the deed in question was void, so neither Dudley nor Stone had ever acquired the entirety of the tract, and Luther was correct in his assertion that the tract must be partitioned between the 7 surviving brothers of Francis. Although the intention of Francis to convey his entire tract to Dudley, and to leave none of his land to any of his other brothers, was crystal clear, the Court found that Francis had neglected to perform the one act that is most vital to any conveyance, and that is the physical delivery of the deed. Francis had properly executed the deed, but because he had never physically handed it over to anyone, and he had kept it under his own personal control, it never became legally effective, so it was utterly void, despite being accurate and complete in all respects. In addition, the Court specified, the fact that the deed in question had been recorded by Dudley was of no significance, because recording a deed does nothing to enhance its validity, since the purpose of recordation relates solely to the entirely separate issue of notice. Thus on this occasion the Court adopted the widely observed rule that a physical deed delivery, performed by the grantor in person, is absolutely essential to the validity of any deed, and in the absence of evidence of a genuine delivery, even an innocent grantee, such as Stone, can be left holding a

worthless document. In this case however, Dudley was the only party left with nothing, as the Court held that he had conveyed his seventh of the tract to Stone, while the other 6 French brothers each got one of the other sevenths, as heirs of Francis.

Among the most prominent statute of frauds cases decided in Kansas during the nineteenth century was *Hollis v Burgess* (1887) in which the Court established judicial standards that were subsequently often followed, relating to both the legal description requirement and the application of the performance exception to that statute. Hollis was the owner of an unspecified amount of farmland in Norton county, and in 1885 he asked Marsh, who was his real estate agent, to find him a buyer for the SW/4 of a certain Section 21, which was locally known as the Snow farm, and which comprised just a small portion of the large Hollis estate. Marsh located Burgess, who agreed to pay the price set by Hollis, and Marsh notified Hollis of this by letter, since Hollis lived elsewhere, whereupon Hollis responded by letter, confirming that he would deed the Snow farm to Burgess. Also then offered to buy the entire Hollis estate however, and Hollis proceeded to deed all of his land to Alsop, even though Burgess had already occupied the Snow farm, and had begun making improvements to it. When Burgess found out what Hollis had done, he filed an action seeking to have Hollis compelled to honor his conveyance agreement with Burgess, but Hollis insisted that "there is nothing binding about a sale of land until the papers or deed is signed". The trial court decided the matter against Hollis however, and while upholding that lower court ruling the Court informed Hollis that his confirmation letter to Marsh was equivalent to a contractual agreement to deed the land in contention to Burgess, which Hollis could not retract. Hollis then argued that even if the letter in question constituted a contract, it could not be enforced, because no valid legal description appeared in that letter, as required by the statute of frauds. The Court responded that the phrase "Snow farm", which Hollis had written, was a valid and legally binding description, applying the rule that any descriptive text which can be clarified or completed through the use of extrinsic evidence represents an acceptable description for conveyance purposes, so Hollis could not leverage the minimal description, which he had employed purely for his own convenience, to terminate his conveyance commitment to Burgess. In addition, the Court also noted, even if no written evidence of the conveyance agreement between Hollis and Burgess existed, and Hollis had only verbally consented to deed the quarter at issue to Burgess, he would still be bound to complete that conveyance, under the performance exception to the statute of frauds. Since Burgess had entered the tract in question, under the authority of Hollis, and had invested time and money in improving that tract, the Court observed, Burgess had become the equitable owner of the land, precluding Hollis from selling it to anyone else. Thus the Court made it clear that even minimal correspondence can represent a legally binding contract, minimally descriptive text appearing in a letter can legally take the place of a typical legal description, and land use by a grantee can prevent his grantor from revoking their mutual agreement regarding the land, even in the absence of any formal contract or deed, and even though no payment for the land has been made.

An alleged building encroachment, resulting from an inaccurate legal description, confronted the Court in *Critchfield v Kline* (1883 & 1888) a case which came to the Court twice. Critchfield was the owner of a parcel situated in Oskaloosa which was 40 feet in width, comprised of one typical lot, platted as being 30 feet in width, along with the north 10 feet of the next platted lot to the south. In 1875, Critchfield had a building

placed or built upon his parcel, and he directed that the building, which was 22 feet wide, be placed on the north end of his parcel. Critchfield then sold the north 22 feet of his parcel, operating under the presumption that he had sold the portion of his land which was occupied by the building. The building parcel was then put to use as a store, and it was sold an unspecified number of times, before being acquired by Kline, at an unspecified date. In 1881, after Kline had acquired the building parcel, Critchfield decided to place another building, which was 18 feet wide, on the remainder of his tract, but he was informed by his carpenter and his surveyor that the new building would not fit on his remaining land. The carpenter told him that he had only about 16 feet of land left, south of the first building, and the surveyor informed him that the northeast corner of his original parcel was about 2 feet north of the northeast corner of the existing building. When Critchfield discovered that the existing building was not on the north 22 feet of his original parcel, as he had believed, he filed an action against Kline, claiming that Kline did not own the land beneath the south 2 feet of that building, and charging that Kline's building was encroaching on Critchfield's remaining land, seeking to have Kline required to move it 2 feet north. The evidence presented by the parties during the first trial was deemed to be inadequate by the Court in 1883, so the case was sent back to the trial court, and the second time around the trial judge resolved the controversy by reforming Kline's legal description to describe the south 22 feet of the north 24 feet of the original Critchfield parcel, thereby making that description conform to the footprint of the building. Critchfield protested this outcome, maintaining that the trial judge had no authority to alter any existing legal descriptions, but the Court upheld the lower court ruling, fully approving the reformation of the description at issue. Recognizing that it was the negligence of Critchfield which had created the problem, the Court refused to allow him to successfully accuse Kline of encroaching, and instead saw fit to protect and confirm Kline's ownership of the entire area covered by the building. The primary intent of the original parties in 1875, the Court found, was clearly to create a parcel to accommodate the building, and to transfer that particular parcel, no more and no less, so description reformation was the appropriate remedy, to make the inaccurate description match the intended area, which was best defined by the physical location of the building itself. Thus the Court here upheld the principle of description reformation, as being applicable whenever it can be shown that an existing legal description contains a mistake which was mutual in nature, and therefore fails to properly outline the truly intended area, and this can be done even after the bogus description has been used to support multiple conveyances.

The value and benefit to private land owners of having solid personal knowledge concerning land rights law, rather than simply trusting assertions made in ignorance by others, including even representatives of local government, was on display in *City of Belleville v Hallowell* (1889). Hallowell and Phillip were the owners of lots 4 & 5 in Block 17 of Belleville, and a short platted alley, 20 feet in width, ran between their lots. When the area was platted, how long these parties had owned their lots, and whether or not this alley was ever used by anyone for purposes of travel, are all unknown, but these factors all proved to be irrelevant to the outcome of this controversy. In 1886, the Belleville city council passed an ordinance officially vacating this alley, and Hallowell and Phillip then proceeded to fence the alley in with their adjoining property, making any use of it by the public impossible, but just one month later, another ordinance was passed, repealing the order of vacation. Belleville then instructed Hallowell and Phillip to remove their fence, but

they refused to do so, and they responded instead by filing an action against Belleville, seeking to have the city officers ordered to cease and desist from their efforts to clear the alley for public use. The trial court enacted the injunction against the city, as requested by the plaintiffs, but Belleville chose to appeal, maintaining that the order of repeal was just as valid as the order of vacation, so the alley still existed and the plaintiffs had no right to occupy it. The Court upheld the injunction, finding that the plaintiffs had in fact become the owners of the alley, by virtue of the vacation, and the city had no authority to repeal any properly completed vacation. In so holding, the Court explained that "When the alley was vacated by the ordinance it was the same in legal contemplation as if it had never existed, as if it was a town lot, and not an alley. The land reverted to the owners of Lots 4 & 5 ... 10 feet in width of it's entire length became the absolute property of the owner of Lot 4 ... and the remaining 10 feet ... became the property of the owner of Lot 5". Thus the Court stipulated that the legal effect of a properly executed formal vacation is both immediate and absolute in nature, all existing public rights within the subject area are immediately vaporized, and the vacated area passes automatically and directly into private ownership, making the centerline of the vacated strip the new boundary of each abutting property. Hallowell and Phillip prevailed because they had better knowledge of the law than did the local officials, and the Court agreed with them that Belleville was barred by estoppel from retracting the order of vacation, so the order of repeal was void and without any legal effect. Belleville could still regain control over the 20 foot strip and open the alley to public use, the Court noted, but only through proper completion of the condemnation process, and that would of course require the city to pay the plaintiffs for the taking of that portion of their land, which had been conclusively stripped of it's dedicated status, and all public rights associated with it, by the hasty and unwise action of the city council in vacating it.

As we have already seen, the Court maintained a justifiably skeptical position during the nineteenth century on the value of resurveys, including even those done by county surveyors, and the case of *Reinert v Brunt* (1889) represents one of the most emphatic statements ever made by the Court on the importance of the evidentiary role of the retracement surveyor. Reinert was the owner of land in the south half of a certain Section 36 in Lincoln County, and she was engaged in a dispute with her neighbor, who owned land in Section 1 in the township lying directly to the south, as to the location of the township line forming their mutual boundary. Brunt, who was the county surveyor, was therefore called upon by the parties, and he surveyed a straight line all the way from the northeast township corner to the northwest township corner, deeming the monuments at those 2 points to be the only acceptable evidence defining the boundary between these two townships. The Brunt line ran well to the north of Reinert's south boundary, as it had long been established through land use, so she naturally chose to appeal the results of the Brunt resurvey, but the trial court upheld the Brunt line, forcing her to bring her appeal before the Court. Recognizing the injustice of this situation, the Court reversed the lower court decision, and proceeded to inform Brunt of the reasons why his survey could not stand. Clearly cognizant of the need to employ all potentially original boundary evidence, in order to preserve the rapidly vanishing original PLSS boundaries established in Kansas, the Court criticized Brunt's effort to straighten the township line, pointing out to him that he had wrongly neglected to identify and give due consideration to both physical and testimonial evidence of the specific section line that he was tasked with retracing. Resurveys which simply bypass original boundary evidence on the ground cannot control,

the Court advised him, because physical boundary evidence is primary in nature, and the principal objective of the retracement surveyor is always to diligently ascertain the linkage between the existing physical evidence and the original survey, in order to protect all land rights that were acquired under the GLO surveys. Even county surveyors, the Court indicated, are not authorized to relocate boundaries for any reason, and they have no authority to engage in corrective activities, which result in a line that differs in any way from the original boundary location. In addition, the Court reiterated here, long recognized boundaries can represent valid evidence of original boundary locations, acquiesced in by the parties because they were established in accord with original monumentation, at a time when that monumentation was still clearly evident to all, making any testimony which sheds light on the origin of such visible boundaries an essential component of proper boundary resolution:

“This was a controversy ... over the correctness of a survey made by Brunt ... no attention was paid by him to any monuments other than the two township corners ... no attempt was made to find the lost corners ... the evidence tended to show that the true section corner at the northwest corner of Section 1 was ... a prairie dog hole ... there is not sufficient evidence in the record to sustain ... the survey of Brunt ... the report says ... he found no section corners, but does not show he sufficiently attempted to search for the original or lost corners ... he did not take any evidence in the community or neighborhood as to the lost lines or corners, and paid no attention to hunting for monuments or corners ... bearings and distances must be disregarded, if the monuments on the ground for the corners, as originally established, can be found, or if lost, their original location can be ascertained ... Brunt, in his survey, seems to have wholly disregarded the rule ... that a boundary line, long recognized and acquiesced in, is generally better evidence of where the real line should be than any survey made after the original monuments have disappeared ... such a survey is incomplete and cannot be approved as a true and correct determination of the boundaries and corners as originally established by the government.”

Sheldon v Atkinson (1887)

Our first featured case serves to demonstrate how adverse possession was adapted by the Court, from its original role as a doctrine relating solely to title resolution, which was therefore applicable only to conflicts over the ownership of whole tracts of land, into a potentially controlling factor in the realm of boundary law. As we have already observed, the Court has always fully understood that boundary and title issues are fundamentally different in nature, since title issues have no location component, and boundary issues come

into play only when questions regarding location arise. The Court had established a bright line between title law and boundary law, which is exemplified by the Winn case of 1886, previously reviewed herein, at which point in time the Court clearly indicated that it would not allow adverse possession to control the adjudication of boundary issues. Nationwide however, adverse possession was gradually coming to be increasingly utilized to silence boundary disputes and place them in repose, in those states where the more appropriate equitable doctrines and principles relating to boundary resolution, such as practical location, physical notice, acquiescence and estoppel, were either unexplored or had been expressly rejected. Many states had already begun by this time to allow adverse possession to operate in an expanded manner, treating it as an umbrella, which could cover not just title conflicts, but other forms of controversy over real property as well, including boundary disputes. As this trend progressed, the more obscure boundary resolution doctrines withered and died out in some states, such as Nebraska for example, leaving adverse possession as a prime option for judicial boundary determination, due primarily to the simplicity of use and the conclusiveness which it embodies. In addition, in Kansas, as was the case nationwide at this time, a strong judicial trend toward combining all legal and equitable matters was underway, so the ancient jurisdictional and procedural obstacles which long prevented different forms of action, such as actions for boundary and title purposes, from being merged, were being steadily swept away. It was amidst this climate that our present case reached the Court, and here we will watch as the Court carves out an important exception to the rule that adverse possession cannot alter, negate or have any impact upon boundaries, enabling it not only to secure titles, but also to physically expand titles, and to thereby deprive record boundary locations of their controlling status.

Prior to 1868 – Lathrop & Jenness each owned tracts which were situated in the NE/4 of a certain Section 2 situated near Ottawa, and both of these tracts were bounded on the east by the east line of that section. How and when these tracts were acquired by these men is unknown, and how they were described is unknown as well, but all of the land in this area remained vacant and unused prairie, although a railroad passed through the NE/4, west of these tracts. The Jenness tract was about 400 feet in length from north to south, and about 600 feet in width east to west, and it was bounded on the north by the Lathrop tract, which extended about 400 feet west from the east section line. Whether or not any of the corners of these tracts had ever been set is unknown, their boundaries may or may not have ever been marked on the ground in any way, with the exception of the section line, which was presumably marked by the GLO when the township was subdivided, at an unspecified date.

1868 – Atkinson acquired the property of Lathrop at this time and shortly thereafter he met Jenness. These 2 men apparently had a conversation, while standing on or near the section line and viewing their lands. Jenness planned to sell

his tract, while Atkinson evidently planned to put his land to typical agricultural use, so they agreed to establish a boundary line between their tracts. After making some measurements running northward along the section line, from an unspecified point that they found at or near the southeast corner of the Jenness tract, which they evidently believed to be reliable, Jenness drove a stake on the east section line, in an effort to mark his northeast property corner, and Atkinson agreed that the staked location was acceptable to him, as his southeast property corner. Both men understood that from the point which they had staked their mutual boundary ran due west, so they made no effort to mark that line, but they agreed that a fence would be built running westward from the stake that they had set at some time in the future, and that fence would then be regarded as the boundary of both properties. This agreement was entirely verbal and undocumented.

1869 – Jenness sold his tract to Hedrick, who then sold it to Dickey shortly thereafter. Whether or not either of these parties made any use of their land is unknown, but one of them built a fence running west to the railroad from the point which Jenness and Atkinson had agreed upon. When Atkinson noticed that the fence had been built, he proceeded to plant a hedgerow along the north side of it, satisfied that the fence properly marked his south boundary. Whether Atkinson ever met or communicated with either Hedrick or Dickey in any way is unknown.

1870 to 1883 – The Jenness tract was sold an unspecified number of times during this period, but whether or not any physical use was ever made of it is unknown, and there is no indication that any structures were ever erected upon it. There is no indication that Atkinson ever resided upon his tract, but he evidently cultivated his land and he maintained the fence and the hedgerow along his south boundary. There is no evidence that anyone ever questioned this physically established boundary during this period, or that anyone other than Atkinson ever made any use of the land north of it.

1884 – Sheldon acquired the Jenness tract and shortly after doing so he ordered a survey. Although nothing is known regarding how this survey was conducted or what evidence it was based upon, it indicated that the boundary of his tract was about 36 feet north of the line formed by the fence and hedge, so Sheldon filed an action against Atkinson, seeking to have him compelled to move the fence and hedge to the surveyed line.

Sheldon argued that the 1868 agreement between Atkinson and Jenness was not a genuine or complete boundary agreement and it could not be deemed to be legally binding, so his tract legally extended northward beyond the fence and hedge, to the record location of his north boundary, as that line was defined by his survey. Sheldon did not expressly argue that the agreement represented a violation of the statute of frauds, but he maintained that he had no way of knowing of the existence of any such agreement, since it was unwritten, so it could not have any impact upon his land rights, even if it did represent

a legitimate agreement of a personal nature, between the particular parties who had made it. In addition, while Sheldon did not argue that Atkinson's use of the land was insufficient to support adverse possession, he took the position that no adverse possession had occurred, asserting that his survey was the only valid evidence of the location of the boundary in question. Atkinson made no effort to dispute the accuracy of the survey presented by Sheldon, and he made no claim that Jenness had accurately marked the east end of the boundary in contention, he simply set forth the proposition that he had made sole use of all the land north of the fence, in reliance upon his agreement with Jenness, and that his use of that area was adverse in nature, so he had acquired the strip in dispute under the 15 year statute of limitation. The trial court decreed that Sheldon was entitled to the west 200 feet of the 36 foot strip at issue, lying to the west of the Atkinson tract, while Atkinson was entitled to the east 400 feet of the contested area, which constituted the portion of the disputed strip adjoining the described south line of the land that had been deeded to him.

As we have previously noted, the Court had not been open to the use of adverse possession to resolve boundary issues prior to this time, but the scenario presented here made the implementation of adverse possession in the boundary context highly inviting. The Court openly considered approving the physically established boundary on the basis of agreement alone, but did so only briefly before dropping that option, and turning to adverse possession as the most expedient solution. Since the 1868 agreement was entirely oral, and was never documented in any way, declaring it to have been legally binding, without requiring the passage of any amount of time, would have been antagonistic to the statute of frauds, making the Court uncomfortable with that possibility, so the Court declined to accept that potential solution, although it could have been justified on equitable grounds. Instead, the Court elected to create an exception to the rule which prevents adverse possession from supporting mistakes made with regard to boundaries, known as the mistake doctrine, by differentiating between mistakes of a purely unilateral nature, and mistakes which are agreed upon. The mistake doctrine, the Court realized, dictates that any kind of mistake made by land owners in locating their boundaries cannot result in adverse possession, because when a mistake is made no intent to recognize or adopt any boundary other than the boundary of record exists, so any land use resulting from a boundary mistake is not adverse in nature. At the core of the mistake doctrine, is the even more elemental doctrine of subjective intent, which simply mandates that intent is essential to adverse possession, so no land use can be adverse in the absence of a conscious intention, held subjectively in the mind of the adverse party, to hold the land that they are using in an adverse manner, meaning a genuinely, deliberately and knowingly hostile possession of land, which of course can never occur through mere accident or mistake. Although Jenness had clearly made a plain mistake in attempting to mark his northeast property corner, the Court recognized that more than a mere mistake had taken place, the mistake had been reinforced by mutual agreement, and most importantly, the agreed line had been clearly and openly marked and relied upon. On this occasion therefore, the Court set out to explain why circumstances of this kind justified deviating from the mistake doctrine, and allowing adverse possession to control the boundary location in controversy:

“The authorities ... generally agree that if a division line is marked out and acquiesced in by joining proprietors for a period equal to the statute of

limitations it is thereby conclusively established ... the construction of a fence ... extending from where the corner was established, running directly west ... and the planting of a hedge upon this line ... support the general finding of the court that the corner and division line between the lands of Atkinson and Jenness were established by the parol agreement of these parties ... the fixing of the corner necessarily established the boundary line ... as a period equal to the statute of limitations had expired between that time and the commencement of this action ... we conclude that the corner and the division line then established and now existing must be regarded as the corner and division line ... the boundary line between their lands was not known ... the true line of division between their pieces of land was a subject of settlement between Atkinson and Jenness. They met together, and after a measurement, expressly agreed upon a corner between their lands, and from that time ... a line running west from the corner thus established by them was considered the true line ... the object of Atkinson and Jenness ... was to settle and fix a definite corner and boundary ... the construction of the fence ... is evidence that the parties understood where the corner and boundary line were established, and acted upon that knowledge ... all persons purchasing after the establishment of the corner ... had notice ... when Sheldon purchased, Atkinson had ... adverse possession of the strip.”

Since the statute of limitations had elapsed, about a year prior to the arrival of Sheldon on the scene, he was powerless to raise any issues concerning the established boundary, the Court decreed, so his survey was of no use to him, making the correctness of the survey a moot point, and he was statutorily barred from challenging the title of Atkinson to any of the land on Atkinson's side of the fence. The passage of the statutory period had effectively expanded the area covered by Atkinson's title, while reducing the size of the Jenness tract, even though in reality Atkinson had never intended to acquire any additional land, he had simply accepted the agreed boundary location, as it was proposed to him by Jenness in 1868, innocently assuming that Jenness had properly identified the relevant corner of his land. In making this landmark decision, the Court adopted the position that the existence of an undocumented boundary agreement sets the stage for land use which qualifies for adverse status, even though that use was actually made in complete innocence, without any truly hostile intentions. Land use made pursuant to an agreement, the Court determined, is not equivalent to mistaken use, because a boundary agreement necessarily carries the implication that both parties intend to claim title and ownership up to the agreed line. The presence of evidence of a boundary agreement, the Court concluded, signifies a mutual intention to rely fully and permanently on the agreed line, and when occupation or possession of the land subsequent to the agreement confirms this intention, the parties stand in a fundamentally adverse position toward one another, so an adverse condition exists between them, even if their agreement was based on a mistake. Here, as can readily be seen, the Court approved the concept that adverse possession can create new original boundaries, which effectively overcome existing boundaries of record, rendering them irrelevant, thereby setting an important precedent in Kansas, which was destined to

serve as a springboard, facilitating the use of adverse possession in the boundary context going forward. In addition, while unwilling to allow acquiescence alone to control boundary locations, here the Court incorporated acquiescence into the definition of adverse possession, making it available as a factor supporting adverse possession, and we will see it repeatedly referenced in that manner in future cases. Its also important to note that the Court had no criticism for the failure of Jenness and Atkinson to consult a surveyor in 1868, even though they clearly needed the assistance of a surveyor, and a survey would have been highly beneficial to them, at that point in time. Instead of penalizing Atkinson for failing to ever have his land surveyed, the Court viewed the successors of Jenness as the culpable parties, because they were each placed upon notice by the existence of a visible boundary, and each of them in turn had failed to obtain a survey as well. Lastly, its noteworthy that the outcome of this case was not agreed upon by all 3 members of the Court, one Justice strongly dissented, making this a narrow 2 to 1 decision, and following the position expressed in that dissent, the Court would continue to enforce the mistake doctrine going forward, preventing adverse possession from nullifying existing boundaries of record. Nevertheless, a new door had been opened to Kansas litigants, even if only just a crack, and the impact of adverse possession upon boundary law would remain a matter of deep judicial controversy for many decades to come.

The 1890s - Recognizing the Value of Land Use Made in Good Faith

As the final decade of the nineteenth century began, the frontier was rapidly disappearing in Kansas and a modern society was taking shape, bringing new issues and questions to the Court, yet many of the land rights cases of this period were focused upon issues which had developed in earlier years, during the initial settlement of the public domain. Numerous legal battles were fought over rights claimed by homesteaders and other entrymen, which resulted from the legal complexities involved in the transition from a landscape composed primarily of public domain to one composed primarily of private properties, ranging from ranches and farms to cities and towns. The creation of roads and streets, to serve as channels of public transportation and communication, also produced a great many important conflicts, as the friction and tension between public and private land rights accelerated, becoming a major source of controversy, and requiring the Court to attempt to strike a proper balance between the rights of individuals and the needs of the public. The caseload of the Court was becoming unmanageable at this time, so alternative methods were sought, in an effort reduce the Court's workload. In 1887, as previously noted, a group of commissioners was created, and they were authorized to handle some of the cases, but the use of that system ended in 1893, and other alternatives were then proposed. In 1895, the Kansas Court of Appeals was created and began to function, marking an early attempt to put an organized judicial alternative in place, which it was hoped would expand the capacity of the Court, by handling those cases which were thought not to require the direct attention of the Court. This first incarnation of the Court of Appeals in Kansas was not destined to last however, it was disbanded in 1901, and few of the land rights opinions issued by that body proved to be of significance in the long term. We will eventually look on as the Court of Appeals returns, several decades later, on a

permanent basis, and has a significant impact on land rights adjudication, after briefly noting its initial appearance here.

The 1890s began with the arrival of *Roberts v Missouri, Kansas & Texas Railway (MKT)* (1890) a highly problematic case, focused upon the relationship between tribal land rights and the rights of a new state, which would generate a significant learning experience for the Court a few years later. When Kansas became a state in 1861, the Osage Tribe still held and occupied a substantial amount of land within the boundaries of the new state. This land was held in trust by the federal government for the tribe, but at the same time it was also held in trust for the new state, creating a question as to which of these trusts was superior. In 1866, Congress issued a railroad grant, enabling railroad companies to acquire right-of-way through the construction of railways upon the public domain. In 1867, the Osage land in Kansas was ceded to the United States, by means of a treaty, enabling that area to be surveyed, and allowing the former tribal land to be patented. Within that area however, once it was surveyed, there were school sections, represented by Sections 16 & 36 in each township, which were property of Kansas, by virtue of statehood, and were therefore subject to disposal by Kansas. In 1870, MKT built a railroad, which passed through the Osage ceded lands, and one portion of it happened to pass through a certain Section 16 within that area. In 1871, that section was sold by Kansas to Roberts, although whether he made any use of the land or not is unknown. Eventually, Roberts filed an action against MKT, alleging that MKT had no right-of-way through his Section 16, because the federal railroad grant of 1866, which created the MKT right-of-way, could not apply to any school sections, since all of the school sections had legally passed into the ownership of Kansas upon the arrival of statehood in 1861, so the United States no longer had any control over any such sections in 1866. The Court agreed with Roberts, and declared that MKT had acquired no right-of-way within any school sections in Kansas. MKT wisely did not give up however, and brought this matter before the Supreme Court of the United States (SCOTUS) where the ruling of the Supreme Court of Kansas was reversed in 1894 (see 152 US 114). SCOTUS determined that the Osage ceded lands continued to be held in trust by the United States until the treaty of 1867, and only then did that area become part of Kansas, so the railroad grant of 1866 was made at a time when the federal government still had full control over the entire subject area, and the MKT right-of-way had therefore been legitimately created by that grant. The school sections within the ceded area did not become property of Kansas until 1867, when the tribal trust was terminated, so by the time those lands were acquired by Kansas, they were subject to the railroad grant, which was subsequently utilized by MKT, therefore the section acquired by Roberts was already legally burdened with the MKT right-of-way, well before Roberts acquired it. The federal tribal trust was superior in nature to the federal state trust, under which the school sections were created, so the ceded area was not within the control of Kansas, and was not even part of the state, until the tribal trust was extinguished, and this was what the Kansas Supreme Court failed to realize in 1890, leading to the 1894 reversal. This case highlights the importance of not only researching the origin of land rights, but also fully understanding the true legal nature of those rights, in order to properly evaluate title issues and to assess the legitimacy of purported boundaries.

The applicability of the principle of reversion, in the context of school property, was in focus in the case of *Curtis v Board of Education* (1890). Curtis was the owner of a presumably typical platted lot in Eugene, and in 1866 he deeded it to School District No. 45

of Shawnee County. This deed stated that this conveyance was "for the erection of a schoolhouse thereon, and for no other purposes". A schoolhouse was promptly built on the lot, and it was put into typical use by the town of Eugene, but in 1867 Eugene was annexed by Topeka, which made this location part of a different school district, so School District No. 23 took control of the school at this time, and operated it henceforward. In 1873, Curtis died and his widow apparently challenged the ownership of the lot asserted by the Topeka Board of Education, so a quitclaim deed was executed by School District No. 45 to the Board, conveying the lot in question. In 1882 however, the use of the school ceased, and the building was moved away, leaving the lot vacant. In 1883, the Board apparently offered the lot for sale, which evidently angered the widow of Curtis, but for unknown reasons the proposed sale of the lot was not carried out. In 1884, the Board proposed to build a new school on the lot, but the widow of Curtis filed an action against the Board, alleging that she was the owner of the lot, bringing the work on the new school building to a halt. The widow of Curtis maintained that the lot had reverted to her when it ceased to be used for school purposes, pursuant to the language used in the 1866 deed. The Board responded that it intended to go on using the lot for school purposes, and the period of time during which the lot at issue sat idle had not resulted in a loss of the title which was acquired under the 1866 deed, and the trial court upheld the position taken by the Board. The Court first clarified that the Board was the legitimate successor to School District No. 45, the original grantee, so whatever rights had been acquired in 1866 relating to the contested lot had passed to the Board. The Court then also informed the parties that even if none of the use made of the lot after Eugene was annexed by Topeka was legal, the Board had acquired the lot by means of adverse possession, because in that event it had used the land adversely for a full 15 years, from 1867 to 1882. Nonetheless, the Court concluded, it was unnecessary to introduce adverse possession into this case, because the 1866 deed had conveyed the lot in fee simple absolute, with no contingency for reversion of the lot back into the ownership of the Curtis family or their successors, thereby confirming the decision of the trial court. The language used in the 1866 deed, the Court held, was not a valid reversion clause, it was merely a covenant addressing the use of the land, so even when the lot was no longer used for school purposes the fee title to the lot remained vested in the Board. Because Curtis had failed to expressly state in the 1866 deed that the lot would revert to his family or their successors, if it were ever to be left unused, or used for any purpose other than a school site, no reversion had occurred, demonstrating the heavy burden placed upon all grantors by the Court, to very fully and clearly express their true intentions in all deeds and other documents of conveyance.

The significance and legal effect of language used in a legal description once again came under the scrutiny of the Court in *Knote v Caldwell* (1890) which also highlights the importance of modern platting standards, by illustrating the kind of confusion that can result when plats overlap, making subsequent plat references inherently ambiguous. E. L. Lower was evidently the original owner of land which would eventually comprise the town of El Dorado, although when he acquired the land in this area is unknown. Lower was apparently a developer, and during the early 1860s he was instrumental in the creation and settlement of El Dorado, but no plat of the town was recorded until 1870. This plat, which was entitled simply "E. L. Lower's Addition to the Town of El Dorado", apparently showed only a portion of the town, and it evidently contained some unspecified errors, but it was apparently used in making numerous

conveyances. The town presumably grew and expanded over the ensuing years, and in 1877 Lower issued another plat, entitled "E. L. Lower's Second Addition", which showed an expanded area with additional lots, but also stated that it was intended to correct the plat of 1870. This process was repeated in 1878, when Lower brought forth yet another plat, this time entitled "E. L. Lower's Third Addition", and once again an even larger area with more lots was depicted on the plat, but again it also indicated that it was being issued for the purpose of correcting certain unspecified defects in the prior plats. In 1878, Caldwell acquired Lots 77 and 79 in El Dorado, first by virtue of a tax deed, and secondly by means of a warranty deed issued by Lower, but both of Caldwell's deeds described those lots with reference to Lower's first plat, stating that they were located in "E. L. Lower's Addition to the Town of El Dorado". These lots were situated within the originally platted area and they appeared on all 3 plats, but Caldwell's deed referenced only the obsolete 1870 plat, and neglected to mention either of the plats which had superceded it. Knote was apparently a land shark, who was evidently clever enough to discover and recognize this defect in Caldwell's title, so in 1887 Knote obtained a quitclaim deed from Lower, and he then filed an action, claiming that he was the owner of the lots in question, and demanding that Caldwell be ejected from the premises. The trial court upheld Caldwell's title to the lots however, and the Court confirmed that lower court decision, deeming Caldwell's legal description to be fully valid, despite the mistaken plat reference. While it was true that the descriptions in Caldwell's deeds should have referenced the current plat, the Court observed, an erroneous or inaccurate plat reference alone is insufficient to nullify an otherwise valid legal description, reiterating that any description which can be applied to only one specific lot, parcel or tract is an acceptable and legally effective description.

The case of Taylor v Deverell (1890) presents a well detailed scenario, which ideally illustrates the Court's implementation of the concept of description reformation, and also demonstrates the importance of obtaining a survey prior to acquiring land. Taylor was the owner of a 2.5 acre tract near Salina, while Deverell owned a nearby quarter section, and these 2 men agreed to an exchange of land. Deverell evidently wanted to trade his quarter section for the portion of Taylor's tract which contained a valuable orchard, and Taylor agreed to convey the west 1.5 acres of his tract, bearing the orchard, to Deverell as his part of this deal. In order to establish the east boundary of the parcel to be conveyed to Deverell, Taylor proposed that they should measure it off together, and Deverell agreed, so they taped along a fence from west to east, then they marked a point on the fence at the east edge of the orchard, and Deverell was satisfied with the area lying west of that point. Taylor reported that the distance they had measured was 166 feet, and that distance was therefore used in the legal description in Taylor's deed to Deverell, so the description indicated that Deverell had acquired only the west 166 feet of the Taylor tract. The 2 men had not accurately measured the fence however, the true distance to the point which they had agreed upon as marking Deverell's east line was in fact 226 feet and not 166 feet. When this error was discovered, Taylor insisted that he had conveyed only the area described in the deed, forcing Deverell to file an action against him, seeking to have the deed corrected, to cover the full intended area, through description reformation. The trial court reformed the description to reflect the true distance of 226 feet, from the west edge of Taylor's tract to the agreed point marked on the fence, as requested by Deverell, and the Court upheld that ruling, over the protest of Taylor, who maintained that legal descriptions must always control as written. Testimonial evidence that a grantor marked a certain line or point, and

informed his grantee that it represented the boundary being created, is a sufficient basis upon which to require the grantor to honor that representation, the Court indicated, because a grantor cannot deny that his grantee had the right to rely upon his boundary representation. Because Taylor had told Deverell that he was getting all of the land west of the point marked on the fence, the inaccurate distance used in the legal description could not control, it was subject to correction, and Deverell was entitled to the full area that was shown to him by Taylor, the Court concluded. The mark on the fence was the controlling physical boundary evidence, the Court determined, effectively negating the description error, in accord with the principle that physical boundary evidence controls over documentary evidence. Here the Court reiterated that specific numerical calls in legal descriptions are subject to rectification, whenever it can be shown that any given number is based upon either fraud or a mistake, thus allowing Deverell to escape the consequences of his unwise decision not to insist upon a survey to verify exactly what he was acquiring:

“A conveyance, which either through fraud or mistake, fails to express the actual agreement of the parties, will be reformed by a court of equity so as to correspond with the actual contract, and will be corrected so that it shall embrace all the land it was agreed should be thereby conveyed.”

The concept of adverse possession made in good faith, based upon color of title, is particularly well illustrated by the case of *Goodman v Nichols* (1890). Cody was the patentee of the NW/4 of a certain Section 27 in Jefferson County, which was partially timbered and partially pasture, but she mortgaged her land shortly after acquiring it in 1857, and then in 1858 she died, at which time her quarter was left vacant and unused. She was evidently single and childless, but she left numerous brothers and sisters as her legal heirs, and Goodman was among them, yet none of them asserted any interest in her land at the time of her death, and in 1859 it was sold off by the administrator of her estate. In 1862 however, the mortgage that had been executed by Cody was foreclosed, and her quarter was conveyed to Nichols by means of a sheriff's deed, pursuant to the foreclosure. Nichols apparently lived elsewhere, and made only minimal use of the land, but he evidently visited the quarter on a somewhat regular basis and made some unspecified use of it, beginning in 1863 and continuing throughout the ensuing years. In 1885, Goodman apparently learned that the mortgage foreclosure action was legally void, because Cody was dead in 1862 and no one had represented her in that action. Upon making this discovery, Goodman realized that the deed held by Nichols was void, so she first bought up all of the interests that her siblings ostensibly held in the Cody quarter, and she then filed an action against Nichols, seeking to have him ordered to relinquish that quarter to her, thereby forcing Nichols into the position of an adverse possessor. The trial court rejected the argument set forth by Goodman however, and the Court also upheld the ownership of the contested quarter by Nichols, being disinclined to reward Goodman's attempt to opportunistically leverage the flawed foreclosure for her own benefit. Nichols had maintained sole control over the entire Cody quarter for 23 years, the Court observed, prior to Goodman's action, recognizing that the 15 year statute of limitations was designed to protect innocent parties such as Nichols, who never had any reason to suspect that his deed was invalid. Goodman protested that the use of the land by Nichols was insubstantial, and indeed he had never used most of the quarter at all, yet he held legitimate color of title to the entire quarter, the

Court reminded Goodman, so his minimal use of the land legally extended over the entire area described in his deed. The use of the quarter by Nichols was never made with any hostile intent, the Court understood, on the contrary, he held the land in complete innocence and good faith, yet his presence was legally adverse, so Nichols qualified as a successful adverse possessor. Here the Court began to differentiate between intentionally hostile possession and innocently adverse possession, and this key distinction was destined to become a major aspect of Kansas land rights law, the application of which would eventually be extended to include adverse possession in the boundary context, as we will later see. On this occasion, the Court approved the concept that adverse possession can run against parties who are unaware that they have any rights to lose in the land being adversely held, such as the Cody heirs, and also indicated that it was comfortable with the principle that a successful adverse possessor cannot be required to pay for the land that is judicially awarded to him. In addition, the Court pointed out that adverse possession becomes conclusive immediately upon passage of the statutory period, so Nichols had in fact already been the true and sole owner of the Cody quarter for many years, by the time Goodman found out that his title was defective.

At this time, a dispute over how a PLSS measurement discrepancy should be handled gave the Court an opportunity to address the concept of proportionate measurement in the PLSS context for the first time. Only scant details are provided for our review in the case of *Miller v Topeka Land* (1890) but we are given enough information to observe that the Court was cognizant of the proportionate measurement concept and understood how it was to be used, even at this early date, which is somewhat surprising, since that procedure had not yet been judicially recognized in many other states. The NE/4 of an apparently typical Section 2 in Shawnee County was patented to Wilmarth in 1860, and not surprisingly it was short of the nominal 160 acres, the north half of that quarter was depicted as containing only 76.79 acres on the relevant GLO plat. Wilmarth evidently owned this quarter for 20 years, but what use he made of it is unknown, and there is no indication that he ever had it surveyed or that he ever located the GLO monuments marking any of his corners. In 1880, he conveyed the north half of his quarter to Miller and the south half to Topeka Land, describing both areas in the typical manner, with reference to the GLO plat. There is no indication that any surveys were done, or that any surveyors were called upon to locate either the original corners of this quarter or the dividing line between the properties of these parties, but some measurements were evidently made and submitted as evidence. The GLO plat evidently indicated that the east line of this quarter was 39.07 chains, but that line was subsequently found to measure 39.20 chains, and the focal point of the controversy which then arose was how to deal with this excess. Topeka Land therefore filed an action against Miller, and espoused the use of proportionate measurement, while Miller took the contrary position, maintaining that Topeka Land should be limited to 20 chains and asserting that he was entitled to all of the excess. The trial court ruled in favor of Topeka Land, and the Court upheld that lower court decision, specifying that "the plaintiff ... is entitled to it's proportionate share of the .13 of a chain". The Court then went on to formally approve the use of proportionate measurement, stating that "we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the whole line, and distribute such variance between the several subdivisions of such line in proportion to their respective lengths". As we will have occasion to note going forward, the Court did not yet have a truly complete

understanding of all of the PLSS rules and principles that have come to be well known and widely accepted today, but this case marked an important step in that direction.

Here we will briefly note a group of 3 cases from this period, in which the Court continued to demonstrate that it was prepared to ardently protect public land rights, such as those created through dedication, and the statutory section line right-of-way as well. The townsite of Olathe was platted in 1857, that plat was recorded, and over the subsequent years it was used as the basis for numerous conveyances, even though it bore no approval statements and no dedication statement. In 1867 however, Giffen enclosed a substantial portion of the area that appeared on the townsite plat, including 2 platted streets that adjoined his land, which had never been put to use for purposes of travel, and his use of that enclosed area went undisturbed for 20 years. In 1887, Olathe removed his fences and opened those 2 long unused streets, resulting in the case of *Giffen v City of Olathe* (1890) in which Giffen argued that he had acquired the platted streets through adverse possession. The trial court rejected his assertion however, and the Court fully agreed, declaring that all of the streets and other public areas shown on the townsite plat had become public, through common law dedication, by virtue of the fact that lots had been sold in reliance on the plat, which effectively perfected the plat, so it was no less valid and binding for purposes of dedication than any properly completed and approved plat. In addition, the Court adopted the position that common law dedication is upheld by estoppel, and cannot be revoked, once the public has acted in reliance upon such a dedication, regardless of how poorly documented the dedication may be, and since the streets at issue were public in nature, the Court informed Giffen, adverse possession was inoperative, so he had gained nothing by enclosing them. Quite similarly, in *Webb v Board of Commissioners of Butler County* (1893) the Court again discounted the suggestion that any part of a public right-of-way could be negated by the presence of a fence, for any length of time. A certain rural road was legally created in 1872, but the hedge fence enclosing Webb's tract ran right down the center of the right-of-way, and for the next 17 years the travelling public simply passed around the fence, using only half of the right-of-way. When the county removed his fence, in order to enable public use of the entire right-of-way, Webb filed an action claiming that the enclosed half of the right-of-way had been forsaken and lost by the public, since his fence had been allowed to remain in place. The trial court ruled against him however, and the Court informed him that acquiescence on the part of the public cannot damage, disturb or reduce any public right-of-way, so the right-of-way in question was still in existence, and the lack of public use of Webb's half thereof had done nothing to change it's originally established width. During this same time period, Spencer, who was the road overseer of Grainfield Township in Gove County, either refused or neglected to engage in any work to facilitate public use of any of the section line right-of-way in his township, so the Attorney General of Kansas filed an action against him, to compel him to perform his duty by constructing section line roads, resulting in the case of *State v Spencer* (1894). In this case, the Court announced that all portions of the section line right-of-way, which had been created by the Kansas Legislature, must be cleared of all obstructions and made ready for use by the travelling public upon demand, directing Spencer to cease his resistance or indolence and proceed to prepare the required roads within his township. In so doing, the Court made it clear that all of the section line right-of-way which had been statutorily created was legally available to the public for free use at any time, and no obstruction of any part of that right-of-way would be tolerated.

The case of *Moore v Wiley* (1890) presents a classic example of the distinction between adverse possession in the title context and adverse possession in the boundary context. Emmert was the owner of several adjoining platted lots in Fort Scott, all of which were still unimproved and vacant in 1870, and the platted streets bounding his lots had not yet been constructed either. A mistake of some kind was evidently made when these lots were staked, the lot corner stakes were apparently either marked with the wrong lot numbers, or perhaps some of the stakes were moved, but in any event, the lot locations were incorrectly identified on the ground. Emmert deeded Lot 1 in a certain block to Banks, who then promptly took possession of the lot which was identified as being Lot 1 by Emmert. Banks built a house on his lot and he faithfully paid the taxes on Lot 1 every year for many years, never realizing that in fact he was occupying Lot 3, while Lot 1, which was the next lot to the north, continued to lay idle and vacant. Subsequently, Emmert sold Lot 3, but no one attempted to make any use of that lot, so Banks was not alerted that any problem existed, and he simply went on innocently occupying the area which he thought had been deeded to him. In 1886, Moore acquired Lot 3, and he evidently discovered that Banks was using that lot, so he filed an action, seeking to have Banks forced to move his house to Lot 1, but the trial court ruled that Banks had become the owner of Lot 3 through adverse possession, by virtue of his undisturbed use of that lot for a full 15 year period. Banks apparently died shortly after the trial, and Wiley, who was one of his heirs, replaced him as the defendant. On appeal, Moore protested that adverse possession was inapplicable to this scenario, under the rule adopted by the Court in the *Winn* case of 1886, stating that adverse possession has no application to boundary mistakes, so neither Banks nor Wiley was entitled to derive any benefit from the statute of limitations. The Court upheld the lower court ruling however, pointing out that this situation involved no boundary dispute, since no boundary errors had been made, and the lot line locations were all well known, the only error that had occurred was the mistake made in identifying the lots by number, and that was a title mistake, rather than a boundary mistake. Adverse possession exists to prevent title issues from being raised once the statutory period has passed, the Court realized, finding it to be the appropriate legal device with which to secure the title of Wiley to Lot 3, as the successor of Banks. Thus the Court on this occasion set forth the premise that although boundary errors are correctable and cannot result in adverse possession, any errors which afflict documents that convey title can be eliminated by adverse possession, and any such errors therefore become uncorrectable, upon passage of the statutory period. In conclusion, the Court recognized that the possession of Banks was genuinely adverse, even though it was based upon a mistake, and the fact that he was present upon the lot in question throughout the relevant period, gave full notice to all parties that he was claiming ownership of that lot at all times. Neither Moore nor any of the prior grantees of that lot, who had all ignored the presence of Banks, could legitimately claim to be innocent purchasers of the lot at issue, the Court observed, since they had all been placed upon inquiry notice, by both his physical presence and his open land use.

Having established adverse possession under the 15 year statute of limitations as an important factor in the resolution of title conflicts, the Court began during this period to address issues pertaining to the applicability of adverse possession to various specific circumstances. While land use made by a stranger can often be legitimately adverse, the question of what constitutes genuinely adverse use becomes more complex when use is made of land by parties who are related to one another in some way. Parties can be related

as family members of course, but they can also have a legal relationship, even without any familial connection, if they share a legal interest in the same land, and those who are associated in this way are known as cotenants. In *Jenkins v Dewey* (1892), the relevant parties were related in both of these ways, providing the Court with an opportunity to address the operation of adverse possession when land rights are held by such closely related parties. Jenkins and his wife owned an unspecified amount of land in Bourbon County, and in 1870 one particular tract of unspecified size and shape was sold by the wife of Jenkins, without the participation of her husband. This tract was subsequently deeded numerous times, and was evidently occupied at all times, by a succession of grantees, before eventually being conveyed to Dewey. The wife of Jenkins died in 1886, then about 2 years later Jenkins apparently realized that she had deeded away the Dewey tract in his absence, and Jenkins had never signed the deed that she had executed in 1870, so he decided to assert that he still owned that tract. In 1888, Jenkins filed an action against Dewey, alleging that Dewey had acquired only his late wife's interest in the tract at issue, and Jenkins was still the owner of his half of that tract, but the trial court rejected this assertion, leaving Jenkins with nothing. It was the position of Jenkins that he and the successive grantees of his wife were legal cotenants of the contested tract at all times, and the interest in the land held by each of the occupants in succession was nothing more than the same interest previously held by his wife. Since Dewey and his predecessors each stood in the same relation to Jenkins, as the grantees of his wife, Jenkins was right, the Court recognized, that he had remained a legal cotenant with rights to the disputed tract, yet the Court nonetheless upheld the lower court ruling against him. Here the Court adopted the position that one cotenant can successfully complete adverse possession against a fellow cotenant, since the use of the land by the cotenant in possession can be genuinely adverse to all other parties, even to parties who have very close ties to the possessor, such as the connection between husband and wife. In this instance, the Court decided, the use made of the land under the authority of the wife was adverse to the husband, so although Jenkins could have successfully demanded half of the tract in contention, if he had acted sooner, once 15 years had passed his title was extinguished, the inadequate deed of 1870 had been perfected, and Dewey had become the sole owner of his tract. Once again here, the Court applied the principle that even a party who is occupying land in complete innocence under a flawed deed, such as Dewey, can qualify as a genuine adverse land holder, and can utilize adverse possession to silence all claims of others to his land.

The significance of the concept of notice, and its specific relevance to resurveys, was displayed by the case of *Schwab v Stoneback* (1892). As we have already noted, statutory boundary resolution by means of resurveys had already been authorized in Kansas for more than a decade by this time, and such resurveys were evidently being conducted with some frequency, but how well the law governing such surveys was understood, and how well such surveys were actually done, are both open questions, and from this point forward these resurveys were apparently contested on a fairly regular basis. Stoneback and Schwab were owners of adjoining government lots in a certain Section 8 in Clay County, which was evidently comprised of typical farmland. Schwab had owned his tract since 1870, but Stoneback apparently arrived on the scene in the late 1880s, and for unknown reasons he suspected that Schwab was using part of the lot that Stoneback had acquired, so Stoneback ordered a resurvey of his lot by the county surveyor. The county surveyor notified the parties of the day when he intended to do the

survey work, as required by statute, and he arrived on that day in 1887, but he did not complete his work, and he returned about 2 months later, at which time he completed the survey in the absence of the parties, and he then filed his report, also as specified by statute. Stoneback was satisfied with the results of the survey, but Schwab was not, so he refused to allow Stoneback to fence his lot along the line indicated by the resurvey, forcing Stoneback to file an action against him, in which Stoneback alleged that Schwab was trespassing on his lot, based on the lot line location that had been marked during the resurvey. The trial court held that the resurvey was conclusive, since Schwab had failed to promptly appeal the results of the survey, as mandated by law, but the Court reversed that decision and ordered a new trial to be held, in order to give Schwab a chance to present competing evidence in support of his position that the resurvey was inaccurate. Although Schwab had neglected to formally protest the resurvey, the Court upheld his right to reject it, and to refuse to abide by it, because in the view of the Court the work had not been carried out in accord with the law. Noting that "the statute requires the surveyor to make the survey at the time mentioned in the notice", the Court concluded that the survey must be deemed void, due to the 2 month delay, which constituted a fatal lack of compliance. The Court was in fact fully prepared to uphold those statutory resurveys which were properly done, and was quite cognizant that surveys are a key element in the legislative vision of the boundary resolution process. As can readily be seen however, the Court was willing to do so only when it could be shown that "every material provision of the statute" had been met in the course of completing the survey, and one of the most crucial components of a proper resurvey, in the eyes of the Court, was the need for an opportunity for full participation and input to be provided by the surveyor to each of the relevant parties.

By this point in time the principle of monument control was well established in Kansas, as several of the cases that we have previously reviewed clearly indicate, but the true judicial basis for that principle may not have been fully understood by all land owners. Because the survey work done by the GLO was coordinated by the United States, and the GLO itself was a branch of the federal government, some people evidently had the impression that the reason GLO monuments always controlled was simply because they were set by the authority of the federal government, in other words, it was thought that they controlled simply because the federal government was perfect and could do no wrong. That was most definitely not the case however, as all surveyors know, the work of the GLO was seriously flawed in many places, and the level or degree of precision obtained by the GLO surveyors was certainly not the basis for the judicial respect which was bestowed upon their work. The true basis for the principle of monument control is the right of reliance, and as the case of *Spawr v Johnson* (1892) demonstrates, the work of the GLO surveyors is honored as controlling because it represents the original partitioning of the land, under the authority of the owner of the land, not because it was executed with perfection, and not because everything done by the United States government is unimpeachable. Johnson and Spawr both evidently acquired their lands in the early 1880s, Johnson entered the SW/4 of a certain Section 21 in Harper County, while Spawr entered the SE/4 of the adjoining Section 20. These men apparently knew the location of the section line forming their mutual boundary, which had been platted by the GLO in 1871, and they lived in peace, both abiding by that line, in it's originally monumented location, until 1884, when for unknown reasons a GLO resurvey of their township was conducted, which resulted in a new section line, an unspecified distance east of the original section line.

Spawr naturally welcomed this development, and of course he took the position that the new line was a duly authorized correction, insisting that he owned the area west of that line, which forced Johnson to file an action demanding enforcement of the original boundary. The trial court upheld the original boundary, and the Court did so as well, informing Spawr that not every survey done by the GLO controls, even the GLO was capable of violating the law, and that was exactly what had happened in this instance. Once a patent has been issued, making any given line a boundary of patented land, that line is no longer subject to corrective action of any kind, the Court declared, because the patent holder has the right to rely fully upon the original survey, as the sole true demarcation of his boundaries, which henceforward even the United States has no authority to alter in any way. The concept wisely expressed here by the Court would eventually be acknowledged as legitimate and put into practice by the GLO itself as well, once a directive was set forth by the United States Congress, mandating that no PLSS resurvey can ever damage any rights created by an original PLSS survey, but that day would not arrive until the next century.

As we have already seen, the concept of adverse possession, once codified into law by the creation of statutes of limitation pertaining to real property, becomes a statutory form of estoppel, which is an ancient and widely acknowledged concept of equity. The concept of estoppel simply mandates that one who failed to speak fully and truthfully in defense of his rights, on an occasion when it was appropriate for him to have done so, cannot be allowed to assert his rights at some later time, when it becomes more convenient for him to do so, and thus he can be judicially required to fall silent and relinquish land rights which he may once have had. This is the penalty that has been legislatively inflicted upon any land owner of record who neglects to attend to his land rights for the statutorily mandated period, which in Kansas is 15 years, if the land has been put to adverse use, resulting in successful adverse possession. As the case of *Hazel v Lyden* (1893) well illustrates however, adverse possession does not replace estoppel, which remains an essential equitable tool available to the Court, and since it carries no time requirement, estoppel can operate to preclude or bar land rights from being asserted at any point in time, even though the relevant statutory period has not fully run. In 1875, one of Lyden's brothers, who owned a 160 acre tract, died, and he left his tract to their sister in his will, but she apparently did not want it, so shortly thereafter she sold it to Lyden. In 1876 however, a judgment was executed against the estate of the deceased brother, and the 160 acre tract was sold at a sheriff's sale, pursuant to the judgment against the estate. Lyden mistakenly believed that the judgment against his late brother's estate was legal, and that the subsequent sale of the Lyden tract by the sheriff was therefore a legitimate conveyance, so he said nothing when the land was put to use by others, rather than openly announcing that the tract in question had been deeded to him. In 1882 Hazel acquired the Lyden tract, and over the ensuing years he made valuable improvements to the property, substantially increasing it's value, in the belief that his deed was valid, unaware that anyone else held a deed to the same tract. In 1888 Lyden finally stepped forth, and filed an action against Hazel, alleging that the tract had really always belonged to him, and asking to have Hazel ordered to surrender the tract to him. Finding that Lyden's title to the contested tract was in fact superior to that of Hazel, the trial court ruled in Lyden's favor, because 15 years had not passed since the execution of the bogus sheriff's deed which formed the root of Hazel's title, so Hazel could not turn to adverse possession. The Court came to Hazel's rescue however, and reversed that decision, declaring that Lyden was estopped from

claiming any rights to the land in contention, because he had stood by in silence and watched as Hazel invested in the development of the land, waiting until its value had thereby been greatly inflated, before asserting his ownership of it. The improvement of the land by Hazel, the Court determined, made the passage of a full 15 years unnecessary to secure his title, because Lyden had relinquished his rights and was conclusively barred, by virtue of his silence when he had an equitable duty to speak, in order to demonstrate good faith. The balance of good faith, the Court recognized, favored Hazel, even though his deed was invalid, and unknown to him he had been an adverse possessor throughout the whole period during which he had occupied the Lyden tract.

Having penalized Lyden for neglecting to assert his land rights in a timely manner, later the same year the Court again had occasion to deal with a case involving similarly neglectful conduct on the part of another land owner, in *Anderson v Burnham* (1893) although in this instance the owner of the land in question was a corporation, rather than an individual. Starkey was a young man in 1866, and he was living on his father's farm, which was comprised of an unspecified quarter section in Allen County. At least one of the quarter sections adjoining the Starkey quarter was evidently vacant and unused at this time, and Starkey realized that it was unpatented land which was part of the public domain. Starkey apparently wanted to establish a homestead of his own, so he began cultivating the adjoining quarter, and he eventually developed it into a full farm, with several structures and a large orchard, but he never took any steps to document his use of the land as a homestead. In 1873, the section containing the quarter occupied by Starkey was patented to the Missouri, Kansas & Texas Railroad Company (MKT), presumably as a small part of a large land grant which included many such sections. MKT apparently never sent anyone to visit the area however, and thus had no idea that the land was being put to use by anyone, so Starkey simply went right on using the land, completely unaware that it was no longer part of the public domain. In 1881, Starkey sold the quarter that he had been using to Anderson, who took over the operation of the farm and continued to make the same use of the land. In 1889 however, MKT sold this quarter to Burnham, and when he discovered that it was in use, he filed an action seeking to force Anderson off the land. The trial court held that the land use made by Starkey was not adverse in nature, because it had begun at a time when the land was in federal ownership, under the well known rule that adverse possession cannot accrue upon federal land, and therefore Burnham prevailed. The Court reversed that decision however, noting that the land had passed into private ownership in 1873, so the possession of Starkey became adverse at that time, and the adverse use persisted for another 16 years, until it was halted by the filing of Burnham's legal action, so Starkey and Anderson had adversely acquired the quarter in contention. Thus the Court took the position that railroad land which is not part of any railroad right-of-way is subject to adverse possession, and in so doing clarified that adverse possession is not prevented by the fact that the adversely held land is owned by a corporation, while also upholding the right of an adverse claimant, such as Starkey in this instance, to convey the land that he is adversely using. In addition, the Court observed, the fact that Starkey was really just a plain squatter, with no color of title whatsoever, was also no impediment to adverse possession, because he had used every bit of the land comprising the disputed quarter, and color of title serves merely to validate adverse possession of an entire tract when some portion of it is left unused by the adverse holder. In conclusion, the Court found that the use of the land by both Starkey and Anderson was entirely sufficient

to support adverse possession, since "it is not necessary that a person should reside upon real estate ... the dominion of the claimant ... proclaims to the public that he asserts exclusive control and ownership of the land."

On the same day as the Burnham case, just previously reviewed, the Court decided *Guinn v Spillman* (1893) a very similar case of adverse possession set in a remote rural area. A tract containing 240 acres in Butler County was patented to Spillman in 1862, but he died shortly thereafter, leaving a wife and several children, who apparently lived elsewhere, and for unknown reasons they took little or no interest in this tract, making no use of it. The vacant tract was sold for delinquent taxes in 1872, and the tax buyer began using it on a sporadic basis, occasionally visiting the tract to harvest timber or wild hay. Then in 1874 it was conveyed to Cameron, who also made only the same occasional use of it, before conveying it to Guinn in 1875. Guinn then became the first party to occupy the tract, building a house, barn, and corral on it, and he continued to make normal use of the land over the next several years, turning it into a typical successful farm, undisturbed by the Spillman heirs or anyone else. In 1888, one of Spillman's sons evidently decided to investigate what had become of his late father's tract, so he then learned that it had been sold, due to his mother's failure to pay taxes on it, and he also discovered that for unspecified reasons the 1872 tax deed was invalid. The Spillman heirs decided to attempt to take their tract back from Guinn, so they filed an action against him, maintaining that they were the rightful owners of his farm, as the legal heirs of the patentee. The trial court held that the Spillman heirs were still the legal owners of the tract, and they were thus authorized to throw Guinn off the land and take complete control over it. The Court reversed that decision however, observing that the evidence made it quite apparent that Guinn and his predecessors had acquired the tract at issue through adverse possession, which extinguished any title or other land rights allegedly still held by the Spillman heirs, leaving them with nothing, as the consequence of their undue delay in researching and asserting their inherited land rights. While Guinn had made distinctly adverse use of the disputed tract himself, including the erection of structures, he had not personally held it for a full 15 year period, the Court realized, because he had been personally using the land for only 13 years by 1888, making it necessary to consider whether or not the very minimal use that was made of that area by his predecessors was sufficient to support adverse possession during the early portion of the relevant time period. Although they had built no structures on the contested tract, and they had never lived on it, the Court was satisfied that the activities of Guinn's predecessors did in fact represent land use which was of the kind that is typically made of remote rural lands, so that early use, transient and insignificant as it was, did represent legitimately adverse use in the eyes of the Court. Thus here the Court adopted the position that even very minimal land use can constitute adverse possession, if that use is genuinely suitable to the character of the land, establishing that remote land can be acquired through adverse use that is far less intensive than the use which may be required of an adverse claimant making a comparable assertion in an urban context.

Clafin v Case (1894) presents another interesting scenario, highlighting the significance of the 15 year statute of limitation relevant to real property rights, but in the context of deed validity, rather than physically adverse use of land. A certain typical 80 acre tract was acquired by Clark in 1859, but shortly thereafter he mortgaged it, and he subsequently defaulted on the mortgage, leading to a foreclosure sale in 1862, by which means that tract was deeded to Case. Clark never lived on his tract, nor did he ever make

any use of it, the land was apparently vacant, and he was an absentee owner who lived in Illinois. Case never made any use of this tract either, and in 1863 he conveyed it to Claflin, who was also an absentee owner, living in Boston, by means of a warranty deed. Whether Claflin ever visited his Kansas tract or not is unknown, but he never put it to any use, so it remained vacant and idle for several more years. In 1884, Harris, who was an attorney, took notice of this vacant tract, and he readily recognized that an opportunity existed to acquire it at very minimal expense. After evaluating the mortgage foreclosure records, and correctly ascertaining that the 1862 foreclosure sale was legally void, he went to Clark and obtained a quitclaim deed covering this tract, then he filed an action, *Harris v Claflin* (1887) in which he prevailed, successfully quieting his title and thereby very deftly plucking the tract from the hands of Claflin. By the time Harris took an interest in the Clark tract in 1884, the Court noted, Claflin had been paying taxes on that tract, under the 1863 deed which bestowed valid color of title upon him, for well over 15 years, but because neither he, nor any tenant of his, had ever put any of that land to any physical use, Claflin could not qualify as a legitimate adverse possessor, and thus he lost the tract in contention to Harris. Claflin conceded that he had lost the land at issue, but since he held a warranty deed, which had proven to be bogus, he believed that he could successfully demand full compensation for his loss from Case, who was his grantor, so he filed an action in which he charged Case with breach of warranty. Case very astutely responded to Claflin's assault however, by pointing out that the 15 year statute of limitations had not only not operated in Claflin's favor, it had in fact run against him, fully negating the value of his warranty deed. The trial court ruled in favor of Case, finding that he was not liable to Claflin, despite having provided Claflin with an ineffective warranty deed, and the Court upheld that ruling, stating that "If a party does not chose to investigate his title or enforce his possession within the period of limitation, he must take the consequences of his own neglect". The fact that Claflin's warranty deed was useless as a legal conveyance document was irrelevant, the Court indicated, because Claflin himself could have validated that invalid deed, if he had exerted physical dominion over the deeded tract for a 15 year period, thereby rendering his void deed legally effective, through adverse possession. Because Claflin had failed to reinforce the bogus title that he held with any form of land use however, the Court was unwilling to allow him to demand enforcement of the covenant of warranty in his deed, which in the eyes of the Court had expired, upon the passage of the statutory 15 year period, since Claflin, ignorant of the deficiency of his deed, had left the land in question utterly idle.

Two cases addressing description issues created by the presence of a railroad right-of-way are worthy of brief notice at this point, the first being *Burrton Land & Town v Handy* (1894). Tarr was the owner of a tract lying in the east half of a certain Section 19 in Ellsworth County, which was crossed by a Union Pacific railroad track. In 1887, Tarr conveyed this tract to Burrton, by means of a warranty deed, and both parties were fully aware of the presence of the railroad track passing through the Tarr tract, yet no reference to any railroad right-of-way appeared in Burrton's deed. Handy subsequently acquired a mortgage covering that tract, and when he sought to foreclose upon it, the fact that Burrton's legal description contained no exception of the railroad right-of-way became a contested issue. In addressing the foreclosure action filed by Handy, the trial court allowed the right-of-way exception to be added to Burrton's legal description, and the Court upheld the addition of that descriptive text, as a proper application of the description reformation

concept. Because the railroad right-of-way traversing the subject property was plainly marked by the existence of the track, the Court explained, the land had been conveyed to Burrton subject to that right-of-way, regardless of whether any reference to it appeared in any deeds or not. Thus in reality reforming the relevant legal description to add the missing exception clause had changed nothing, and the alteration of the existing legal description was simply an appropriate corrective step, which was entirely valid in the eyes of the Court. Quite similarly, a mortgage foreclosure also triggered a description controversy in Denver, *Memphis & Atlantic Railway (DMA) v Lockwood (1895)*. Lockwood filed an action against several parties, seeking to foreclose a mortgage that he held upon an unspecified quarter section in Kingman County, which was burdened with a DMA right-of-way. The legal description in contention described that right-of-way only as "a strip and tract of land 100 feet wide, of which the center line of the route ... as the land is now surveyed, staked and located, is the center, being 50 feet each side of the center line of said route". The trial court held that "there is no definite and certain description ... the deed ... is indefinite, uncertain and void", and so ruled that no railroad right-of-way existed at all, awarding the entirety of the subject property to Lockwood. The Court adroitly came to the rescue of DMA however, reversing that lower court decision, and confirming that DMA did in fact hold a fully valid right-of-way over and across the subject property, to which Lockwood was not entitled. In so doing, the Court informed Lockwood that the description in question "disclosed with absolute certainty the property sold and conveyed to the railway", because the location of the right-of-way at issue could readily be ascertained from evidence on the ground, meaning the track itself, making it legally unnecessary to employ any dimensions to properly document its location. Any right-of-way, the Court indicated, can be properly described without any numerical values, aside from those defining its width, based solely upon the physical object which controls its location, thereby demonstrating that the principle of monument control can be relevant to objects of any kind, and is not applicable only to survey monuments. Thus on this occasion the Court clarified that metes and bounds are not essential components of a valid legal description, a description containing no bearings, distances or other such dimensional calls can be complete, entirely accurate and legally binding, and a description cannot be deemed to be void, or found to be in violation of the statute of frauds, simply because no measurement data appears in it.

As all surveyors know, a typical survey of any given lot, parcel or tract can provide information about the property that will prove to be beneficial to various parties in numerous ways. Clarification of the acreage embraced within any given property is just one of the many forms of helpful information produced during an accurate survey, which of course can be particularly useful when the property is about to be sold, and the parties want to base the compensation for the conveyance upon the amount of land being conveyed. In some cases however, the parties neglect to obtain a survey and simply proceed based upon their own speculation or mistaken assumptions, and in other cases land owners may deliberately choose not to have their land surveyed, in an effort to facilitate deception. The case of *Speed v Hollingsworth (1894)* shows how the Court deals with such a situation, and resolves the controversy that arises when a conveyance is made by parties who are acting in a state of mutual ignorance about the acreage of the land being conveyed. Hollingsworth owned a substantial farm in an unspecified location in Cowley County, apparently bounded by a river, which Speed proposed to buy. Hollingsworth verbally

informed Speed that this tract contained 716 acres, at least 680 acres of which constituted good useful farmland, without obtaining a survey to verify those figures. Whether these numbers were based on a GLO plat, or resulted from some other form of acreage estimation, or represented a sheer fabrication, is unknown, but Speed relied on the acreage statement made by Hollingsworth, and he acquired the tract on that basis. Speed eventually discovered, presumably by means of a subsequent survey, that the farm contained only about 350 acres, so he refused to complete his payments on the land, compelling Hollingsworth to file an action against him. The trial court held that Speed must complete his payments on the land, regardless of the actual size of the tract, because he had negligently failed to verify the acreage of the Hollingsworth tract prior to acquiring it. The Court reversed that ruling however, clarifying that it is the grantor, and not the grantee, who bears the burden of supplying truthful and complete information relating to any property which he proposes to sell, and a grantor cannot successfully maintain that an innocent grantee was unwise or foolish to have believed and accepted what he was told about the subject property by his grantor. If there was a need to survey the property, to verify it's acreage prior to conveyance, that burden rested upon Hollingsworth as the grantor, the Court indicated, and not Speed as the grantee, so when Hollingsworth stated the acreage, without qualification, he was voluntarily taking the liability for the correctness of his statement upon himself, and if he made that statement in ignorance, then he was the one who was guilty of negligence, the Court specified, rather than Speed. Thus the Court adopted the rule that a grantor can be held liable for the inaccuracy of any information about his land which he provides to his grantee, either written or verbal, and a grantee who relies upon any such information freely offered as factual by his grantor, or by any duly appointed or authorized agent acting on behalf of the grantor, will be judicially protected.

The Court continued to place a significant burden of accuracy and completeness upon all grantors, consistent with the position which it had taken in the Speed case, just previously reviewed, as well as other earlier cases, in a very different context in Arnold v Weiker (1895) which demonstrates that the Court takes the right of all grantees, including the public, to rely upon plats very seriously. Peace was platted as a townsite in Rice County in 1874, and incorporated in 1876, and the townsite plat showed a certain area which appeared in the form of a strip, but bore no label of any kind identifying it as either a lot or a street. The area in question was bounded on the east by Broadway, on the west by Tenth Street, on the north by the site of a railroad depot, and on the south by an unspecified number of platted lots. This area opened into Broadway and Tenth Street on the plat, thus it had the appearance of a typical street, yet it had been left without any name, or number, or any other form of designation on the plat, so whether or not it was intended to be among those platted areas dedicated to public use was unclear. This unlabeled area was used as a street by the general public to some extent for several years, but in 1883 it was vacated by the city council, and in the vacation order it was described as "Railroad Street", since that was apparently the name by which it had come to be locally known, having evidently been used primarily by railroad patrons. In 1888, Arnold and her business partners obtained a quitclaim deed covering the vacated area from a local land company, and in 1889 that strip was mortgaged to her, which brought her into conflict with Weiker, who was the holder of a mortgage upon some of the lots that bounded this strip on the south. In 1890, Arnold filed an action against Weiker, to determine the priority of their competing mortgage interests, during which the trial court held that the strip in question was a legitimate platted street,

that had been legally dedicated and vacated, and had therefore become legally attached to each of the abutting properties through reversion, rejecting Arnold's assertion that the strip could not be regarded as a public street because it was not expressly identified as such on the 1874 plat. The Court was completely comfortable with that decision, and confirmed that the contested strip represented a genuine dedicated street, even though it had been left undesignated on the townsite plat, in the course of upholding that lower court ruling, so Arnold had acquired nothing, by virtue of either her deed or her mortgage. In so doing, the Court observed that the intent to create a street in the unlabeled location was clear upon the face of the plat, despite the absence of any street name or number, based upon the configuration of the linework shown on the plat, thus the public had the right to utilize that strip as a legitimate public thoroughfare, until the time when it was vacated and it reverted, in reliance upon the manner in which the unlabeled strip was graphically depicted upon the plat.

At this juncture we reach the first and only notable boundary related opinion issued by the Kansas Court of Appeals (COA), during its brief original 6 year span of activity, until the eventual return of the COA more than 8 decades later, *Abbey v McPherson* (1895). Abbey was the owner of a substantial amount of land in a certain Section 35 in Doniphan County, and between 1859 and 1873 he deeded off several parcels of land, comprising most of his estate, then in 1875 he died, leaving his remaining land in that section to his wife. Abbey's wife then died in 1883, and at that time a tract of unspecified size was carved out of the remainder of the original Abbey tract and conveyed to McPherson, by the executor of the estate of Abbey's widow. Then in 1885 yet another tract, consisting of 70 acres, was created from the remaining Abbey property and conveyed by one member of the Abbey family to another member of that family. The legal descriptions used in these conveyances were evidently inconsistent however, and at some point it was discovered that the 70 acre tract was partially in conflict with McPherson's tract, so in 1889 McPherson filed an action in which he alleged that the 70 acre tract overlapped his tract, to the extent of about 5 acres in a triangular form. The conflict centered upon the southerly portion of the McPherson tract, which was described in pertinent part as " ... south to the southeast corner of the land belonging to Hughs, thence east to the southwest corner of the land of Michael Conley ...". The trial court deemed McPherson's description to be valid and controlling, and therefore ruled in his favor, and the COA agreed, fully upholding the lower court ruling in McPherson's favor. The decision thus rendered by the COA was rather basic and not especially remarkable, but in support of the position which it had taken the COA spelled out several principles that are highly relevant to boundary issues in general, and the resolution of description issues in particular. The COA first demonstrated that it understood, and was prepared to apply, the principle of monument control, pointing out that monuments are superior to numerical calls as boundary evidence, before setting forth the somewhat more advanced concept that even an intangible item, such as the existing boundary of an adjoining tract, also qualifies as a controlling monument, when called out in a legal description. Thus the COA wisely expressed the principle of monument control, emphasizing that monuments are fundamentally superior to measurements and dimensions in boundary determination, because monumentation provides the primary form of boundary certainty:

“... the question raised is as to the interpretation of the particular language

used ... it was intended that the line should run from the southeast corner of the Hughs land to the southwest corner of the Conley land ... both course and quantity must give way to natural or artificial monuments or objects, and courses must be varied so as to conform to the natural or ascertained objects or bounds called for by the conveyance ... before course, distance or quantity is permitted to determine boundaries ... every means of fixing the location of the monuments must be resorted to. The southwest corner of Conley's land ... will control over the course and quantity indicated in the will and the deed ... where land is described by another's land, the latter becomes a monument of description and ... will control the courses and quantity given in the deed ... boundaries of land as mentioned in a conveyance are fixed, known and unquestionable monuments ... the monuments will govern ... the boundary lines of these lands were fixed monuments.”

The frontier was closed by this point in time, and along with it the era of rampant tax deed piracy was coming to an end, due in large measure to the restrictive effect of the statutes of limitation pertaining to tax deeds that had been put in place by the Kansas Legislature and wisely implemented by the Court. The operation and interaction of the 2 relevant statutes was still poorly understood by some however, and the case of *Coale v Campbell* (1897) brought the Court another opportunity to provide clarification on how those statutes function. Coale was evidently a typical land owner, who had acquired a tract of unspecified size and shape in Lyon County at an unspecified date. His chain of title, extending back to the patenting of his land, was intact, but the taxes on his property had apparently gone unpaid by one of his predecessors during the early 1860s, and his tract had been sold to an unspecified party by tax deed, which was recorded in 1878. Coale was not a resident of Kansas, yet his tract was under his control at all times, having been occupied since the early 1870s by his tenant. At an unspecified date, presumably during the early 1890s, the tax title to the Coale tract was acquired by Campbell, and he then filed an action against Coale, alleging that because more than 5 years had passed since the recording of the tax deed in 1878, the tax title had become conclusive, and the 5 year statute of limitations on tax deeds barred Coale from challenging the validity of the tax title. Coale responded however, that the 5 year statute was useless to Campbell, because the tract in question had never been occupied, or even used in any way, by either Campbell or the original holder of the tax deed. Coale also pointed out that since the use of the disputed tract by his tenant and his predecessors had never been interrupted, the 2 year statute, mandating that 2 years of possession or land use which is adverse to a tax deed destroys the tax deed, was the applicable and controlling statute. The trial court, apparently functioning under the mistaken impression that the 5 year statute was inherently superior to the 2 year statute, ruled in favor of Campbell, but the Court reversed that decision, confirming that the position set forth by Coale was the correct one. Whenever land is in actual use on the date when the tax deed is recorded, the Court explained, the 2 year statute immediately commences to run in favor of whichever party is in physical possession of the land, which can be either the tax deed holder or the owner of record, or any agent or tenant acting as the representative of either of those parties. The 5 year statute, the Court also indicated,

becomes relevant only if the 2 year statute did not operate, because the land was left vacant by both parties, or because the land was not used for a full 2 years by either party. In this instance, the 5 year statute could not support the tax piracy scheme of Campbell, because that statute cannot accrue while the land is under the physical control of the record owner. Moreover, the use made of the tract at issue by Coale's tenant had triggered the 2 year statute in 1878, so the tax deed had been effectively nullified by 1880, thus Campbell had acquired an empty tax title. Decisions such as this one eventually made it clear to tax deed pirates that their efforts to snatch properties away from innocent occupants, with only a minimal investment of time and money, and without putting the land that they were attempting to acquire to any productive use, would go unrewarded in Kansas. Thanks to the astute employment of the statutes controlling the validity of tax deeds by the Court, those individuals were compelled to seek greener pastures in other states, upon which to carry out their treachery.

As noted in our review of the Jenkins case of 1892, the Court had already adopted the position that adverse possession is possible between cotenants, even those who were closely connected, such as a husband and wife in that instance. The case of *Rand v Huff* (1898) provides another good example of how land use by one party, who holds only a partial legal interest in the land that he is using, can be adverse to all of the others who also hold a legal interest in the same land, even those who are his blood relatives. The Poland family consisted of 3 brothers and 2 sisters, and one of the brothers, who was the owner of a tract of unspecified size and shape in Miami County, died in 1865. Patrick Poland then took sole possession of the land of his late brother, with the intention of making it his own, by acquiring the other legal interests in that land, which were held by his remaining brother and his 2 sisters. Patrick's sisters were both married and lived elsewhere however, and he was apparently unable to locate or contact one of his sisters, so he never obtained any deed conveying her interest in the Poland tract to him, but he went on using the land as his own anyway for the next several years, after obtaining deeds from his other brother and sister. At an unspecified date, presumably during the 1880s, Patrick mortgaged the Poland tract, and he then defaulted on the mortgage, so the mortgage was foreclosed, and the tract was conveyed by means of a sheriff's deed to Chandler. What use Chandler made of the Poland tract is unknown, but after holding it for an unspecified number of years he conveyed it by warranty deed to Huff. During the late 1880s, apparently after Huff had acquired the Poland tract, some of the descendants of the missing sister of Patrick Poland somehow learned that their late mother had a legal interest by inheritance in the Poland tract, which she had never deeded to Patrick, so they decided to claim a share of that land. Rand was a daughter of the missing Poland sister, and along with some other heirs, they informed Huff that they were the owners of part of his tract, forcing him to file an action against them in 1890, seeking to quiet his title by means of adverse possession. Rand and the other heirs maintained that they and their late mother had been legal cotenants of the Poland tract, along with Patrick, at all times, despite the fact that they lived elsewhere and never visited the Poland tract, so Patrick's use of that tract had never been adverse to them. The trial court rejected their position however, and decreed that Patrick had acquired sole ownership of the Poland tract through his sole use of the land for more than 15 years, thus the title acquired by Huff was complete and entirely legitimate. In 1897, the case went to the Court of Appeals (COA), which upheld that lower court ruling, as the COA acknowledged that Rand and the other defendants were legal heirs of the deceased

Poland brother, and they had once held a legal interest in the Poland tract, but concluded that they had lost their rights, by virtue of their failure to step forward and openly assert an interest in the land prior to the expiration of the 15 year statutory period. When the case came to the Court the following year, the Court simply confirmed that the 2 prior rulings were correct, verifying that the use of the contested land made by Patrick had been genuinely adverse to the rights of any unknown members of the Poland family, such as Rand, so the rights of the heirs had all been extinguished, 15 years from the moment when Patrick commenced his sole use of the Poland tract, thereby fully validating the title acquired by Huff.

As the nineteenth century drew to a close, the case of Steinbuchel v Lane (1898) brought the Court its first opportunity to rule upon title to an island. As we have previously observed, in reviewing the Wood case of 1882, the Court had already taken a position on the core riparian issue of navigability which was highly favorable to the land rights held by the general public as Kansas residents, while being highly restrictive toward the patentees of the public domain and all of the private land owners who became their successors, by deeming all meandered streams in Kansas to be navigable waters for purposes of title. Here, the Court would go on to take another important step in establishing ground rules pertaining to riparian title and boundaries in Kansas, which logically followed the precedent set by the Wood ruling, this time in the context of a battle over island ownership. An island already existed at the confluence of the Arkansas and Little Arkansas Rivers in Sedgwick County when the original GLO survey of the township which includes that area was done in 1867, but the GLO surveyor elected to simply bypass the island and leave it entirely unsurveyed, even though a section corner fell upon the island, which could have been set at that time. The surveyor meandered the course of the Arkansas River through this township, so the plat clearly depicted the river, but it did not indicate the presence of the island, although the island was already well established and contained mature timber, which served to identify it as more than just a transient sandbar. In 1873, all of the land north of the river in this immediate vicinity was patented to Smith, but he evidently never made any use of the island, since the channel separating it from his ranch was over 200 feet wide. In 1875, Norman settled on the island, and she requested that it be surveyed by the GLO, so that it could be patented to her. The GLO then surveyed the island, which was found to contain 26 acres, and the 4 riparian lots which comprised the island, since it lay partially in 4 different sections, were all patented to Norman in 1876. Norman subsequently conveyed the island to Lane, and at an unspecified date, presumably during the 1890s, Smith conveyed his property to Steinbuchel, who proceeded to file an action against Lane, claiming that the island was part of the property which had been patented to Smith, and was therefore owned by Steinbuchel. The trial court rejected Steinbuchel's position, on the grounds that the river was navigable, so Smith had acquired no title to any islands in the river, and his tract was bounded by the north bank of the north channel, thus the island constituted legitimately unsurveyed land, which remained property of the United States, until it was patented to Norman. The Court upheld that lower court decision, confirming that unsurveyed islands, which existed prior to statehood in a navigable stream, remain in the ownership of the United States, even after all of the surrounding land has been patented, and such an island can therefore be classified as omitted federal land and surveyed for sale to anyone by the United States at any later time. Thus the Court issued notice that it would uphold public ownership of all unsurveyed

islands, while strictly limiting the land holdings of all private owners of riparian land, and as we shall see, this staunchly pro-public position was one which the Court would consistently maintain going forward.

Bacon v Leslie (1893)

As we have frequently had occasion to observe, during our review of several earlier cases, the Court was very open to the use of extrinsic evidence for the purpose of clarifying poorly composed legal descriptions of land or land rights during the nineteenth century. The Court wisely recognized during the early decades of statehood that legal descriptions were often carelessly prepared, or were created by parties who were acting in a state of ignorance, and were thus highly problematic in nature, in many cases being incomplete, inconsistent or otherwise defective in some respect. The Court's awareness of the reality that many existing descriptions were fundamentally deficient resulted in a distinctly open judicial stance on the admission of evidence not found in the descriptive test, for the purpose of resolving both title and boundary issues, in a manner that accords well with both legal and equitable standards. The concept of description reformation, having been first addressed and adopted by the Court 20 years earlier, as we have noted in reviewing the Claypoole case of 1873, was well established in Kansas by this time, and was judicially recognized as a legitimate alternative to adverse possession, when inadequate legal descriptions resulted in controversy, although adverse possession would prove to be more commonly applied over the subsequent decades. Many conflicts over land rights which were created by the presence of poorly written, unclear or mistaken legal descriptions, and were resolved through the use of adverse possession, could have been just as readily resolved by means of description reformation, if sufficient evidence had been presented to prove that the land which was being occupied was in fact identical to the land which was originally intended to be conveyed, as our present case suggests. In addition, our featured case from the 1890s provides a fine example of one of the most essential legal burdens which the Court consistently places upon grantors, giving us an opportunity to take note of the legal implications of the differing responsibilities of grantors and grantees, which very often have a major impact on the outcome of land rights litigation.

1888 – Bacon and Leslie were both owners of multiple properties, Bacon owned a substantial amount of rural land in Butler County, while Leslie owned an unspecified number of platted lots in Kansas City. At this time, these 2 men entered a written contract expressing their intention to exchange some of their land holdings, and setting forth the pertinent details of their agreement to do so. Under this contract, Leslie was to convey 2 of his lots in Kansas City, which evidently bore highly valuable existing buildings, to Bacon, and Bacon was to convey all of his land

in rural Sycamore Township, consisting of one full section and half of a second section, to Leslie. How and when these properties had been acquired by these parties is unknown, but both men supplied abstracts of title, proving that they held clear title of record to their respective properties, and there was nothing suggesting that any of the land involved in this transaction was not at their disposal and subject to legitimate inclusion in the agreed transaction.

1889 – Leslie completed his portion of the conveyance agreement, by deeding the agreed lots to Bacon, and the deed executed by Leslie was placed in escrow, awaiting the execution by Bacon of the deed required to complete his portion of the intended transaction. Bacon evidently had second thoughts about this deal however, and he refused to fulfill his part of their agreement, so Leslie filed an action against Bacon, seeking to have him judicially compelled to complete their transaction, in accord with their contractual agreement.

Leslie argued that his conveyance contract with Bacon was fully and properly documented, so Bacon had no right to refuse to carry out his part of that agreement. Leslie further argued that the specific properties involved in the agreement were clearly understood by both parties, and if the legal descriptions of any of those properties were deemed to be ambiguous in some respect, then any such insufficient descriptions could be judicially rectified through description reformation, and doing so would not represent an alteration of the existing contract. In addition, Leslie maintained that any form of relevant extrinsic evidence can be introduced for the purpose of proving that a mistake was made in the preparation of a legal description, including verbal, anecdotal or circumstantial evidence, showing that any such description failed to capture the true mutual intentions of the parties, and therefore represented a correctable error, which was subject to rectification through description reformation. Bacon argued that the alleged agreement was incomplete and was not legally binding, because it contained an inadequate legal description, so he was under no obligation to honor his portion of their contract. Bacon conceded that the agreement had been made, and he did not assert that it was in violation of the statute of frauds, but he argued that the written contract was absolute in nature, and could not be modified in any respect by the use of extrinsic evidence of any kind, so the fact that the document contained an inadequate legal description was utterly fatal to the deal, negating his obligation to convey any of his land to Leslie. The trial court ruled in favor of Leslie, ordering Bacon to complete the agreed conveyance of his land in Sycamore Township to Leslie, but in so doing the trial judge neglected to order the correction of the problematic legal description.

The specific description issue which generated this controversy was in fact a very plain and simplistic one. Bacon owned all of Section 18 and the south half of Section 7 in Sycamore Township, but the word "south" had been accidentally omitted from the description of his property that appeared in his contractual agreement with Leslie. There was no dispute about which half of Section 7 Bacon owned, he admitted that he owned the south half of that section, and no other portion of it, but the scrivener who was tasked with drawing up the contested agreement had dropped the word "south" and described Bacon's land in an abbreviated form, transcribing it only as "1/2 of Sec. 7-23-7 and all of Sec.

18-23-7". Bacon's position here was predicated solely upon the basic premise that written documentation is absolutely conclusive, and is never subject to alteration, and here he sought to leverage that premise to his own advantage, after changing his mind about his deal with Leslie, in order to legally escape his conveyance commitment. The Court was of course fully cognizant of Bacon's motivation, and was quite prepared to support the imposition of the well established concept of description reformation, while reiterating that extrinsic evidence is always admissible for the purpose of augmenting or rectifying a deficient legal description, in order to provide effective clarification of the mutual intent of the parties to an agreement. Since legal descriptions represent only documentary evidence of title, which is secondary in nature to physical evidence of title, the Court understood, the fact that Bacon had acquired and utilized only the south half of Section 7, and had never established any claim to any other land in that section, made the description error in the conveyance contract entirely superfluous. The descriptive language at issue, the Court realized, was a classic example of a mutual mistake, in which the written text simply failed to embody the clear mutual intentions of the parties, so it could not be allowed to stand, leaving it subject to reformation, in order to give legal effect to the actual agreement, as the parties intended it to be documented. Therefore, following decisions in comparable cases from Illinois, Massachusetts, Missouri and New York, which addressed the clear need for the use of extrinsic evidence in conducting proper description interpretation, thereby outlining and emphasizing the need to judicially correct errors, ambiguities or other deficiencies afflicting legal descriptions, the Court informed Bacon why he could not prevail:

“We will discuss the objection ... that the description of the land is indefinite ... the trial court very properly overruled the ... objection of the defendant to the introduction of testimony ... defendant was the owner of Section 18 and the south half of Section 7 ... and no other real estate in Section 7 ... it is not essential that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary, if ... the purchaser knows exactly what he is buying, and the seller knows what he is selling ... with the aid of extrinsic evidence ... if the description of the half of Section 7 is too defective, it may be corrected ... where a contract describing land ... can be made sufficiently definite and certain by extrinsic evidence ... the identification of the property by extrinsic evidence should be settled and disposed of in the same action ... the claim made upon the part of the defendant below that ... all the descriptions in the contract must be disregarded, and the contract itself treated as a nullity, is not reasonable or equitable ... "1/2 of Sec 7-23-7" was not void for indefiniteness or uncertainty ... parol evidence ... to identify "1/2 of Sec 7", owned by the defendant, is admissible ... defendant below cannot complain because of the indefiniteness or uncertainty ... where there is a doubt as to the construction of a deed, it shall be taken most favorably for the grantee, whence, if there are 2 descriptions ... the grantee is at liberty to elect that which is most favorable to him ... the description ... is indefinite and uncertain in the absence of extrinsic

evidence, but the contract may be held valid ... if the plaintiff below will ... consent ... to omit therefrom "1/2 of Sec 7-23-7" ... the judgment will be allowed to stand as thus modified, otherwise the judgment will be reversed, and the cause remanded for a new trial."

Thus the Court provided Leslie with the option of simply accepting the deal without the mistakenly described area, or alternatively, returning to the trial court, to have the description of the disputed tract rectified by the trial judge, in order to allow the agreement in contention to obtain judicial approval, with the full originally intended area included and properly described. Bacon could not decline to fulfill his part of the agreement, and retain the land that he had solemnly promised to convey, because his effort to leverage his own description error to his advantage was unjustifiable in the eyes of the Court, making it clear that his reliance upon the description error as an escape hatch was misplaced. Under the rule applied here by the Court, which is known as the surplusage rule, any descriptive text employed by a grantor, which is superfluous or contradictory, can be simply ignored and in effect legally deleted from the description, thereby eliminating the apparent contradiction, since the grantee is free to interpret the grantor's ambiguous description language in the manner that is most suitable to him. In this instance, it really made no difference which half of Section 7 Bacon owned, and in fact if he had owned that whole section, Leslie would have been at liberty to select whichever half of that section appeared to be most appealing to him, because Bacon had left the door open for him to do so. As we have seen here, and as we will repeatedly see again, as we move forward through the decades, both grantors and grantees bear very clear and legally well defined duties and responsibilities, and even subtle or seemingly minor details of their interaction can be critical to the outcome of conflicts over their respective land rights. Every grantee bears a crucial burden of notice, and he cannot claim to be an innocent purchaser, operating in good faith, if he fails to carry his burden of diligent inquiry concerning the land that he proposes to acquire. Among the primary duties of all grantors however, as illustrated here, is the obligation to very clearly and fully identify what is, and what is not, being conveyed to his grantee, and he must accomplish this through the legal description which he provides, in a way that manifests no deception, in order to stand in the light of good faith. A grantor can pass his responsibility to provide a legal description off to his grantee, and if the grantee accepts that task, he then becomes responsible for the accuracy of the description, but if the grantor or an agent of the grantor creates the description that is used, the grantor will typically be stuck with the full liability for any consequences that develop from the use of that description, highlighting the importance of clarity, correctness and completeness in the composition of reliable legal descriptions.

The 1900s - PLSS Surveys and Resurveys in Focus

Nearly 4 full decades of statehood had passed in Kansas, when the twentieth century arrived, and the Court had adopted and established a great many principles and rules, most of which are still quite relevant, and play a major role in the adjudication of land rights today. Several subjects had been only partially addressed by the Court

however, and were thus still in need of further amplification or clarification. The resolution of title issues, focused upon determining ownership of whole tracts, dominated the land rights arena during the nineteenth century, as we have seen, but during the early years of the new century boundary issues would begin to comprise a higher percentage of the Court's caseload. Among the most lightly addressed matters during the previous century was the topic of riparian boundaries, and in a few key decisions made during this period the Court would begin to bring greater clarity to that relatively obscure subject, which was still rather poorly understood nationwide at this time. As the use of the Kansas statutory resurvey process accelerated, and it became better known and understood, the attention of the Court was drawn to boundary issues, usually in the PLSS context, with increasing frequency, so here we will begin to see the perspective of the Court upon boundary issues begin to emerge. Title issues, particularly those related to errors or other problems appearing in legal descriptions, continued to appear on a regular basis however, so a very substantial amount of the time spent analyzing land rights issues by the Court was still centered upon determining the legal implications of ambiguous language found in existing land rights documentation. In addition, a modern transportation system, represented by a network of highways and railroads, was in place by this time, making it often necessary for the Court to address right-of-way issues, and here we will look on as the Court's perspective on the legal significance of railroad right-of-way begins to take shape. In 1900, the Court was expanded from 3 Justices to 7 Justices, and by 1903 the modern practice, in which all 7 Justices typically participate in the adjudication of each case, commenced. All of the original Justices were gone by this time of course, but the wisdom that they applied to the resolution of the nineteenth century legal battles which we have already reviewed lived on, as the new Justices maintained a substantially consistent course in handling the somewhat more detailed and nuanced cases which would come before them early in the twentieth century.

We will briefly take notice of 3 cases from the first decade of the new century, in which the Court was called upon to assess the validity of allegedly insufficient legal descriptions, and continued to support descriptions that could have been much better composed. Leonard was the owner of a single 72 acre tract, which was situated in the SW/4 of a certain Section 20, but the legal description in his will mistakenly described his property as "All the land I now have in the NW/4 of Section 20 ... 72 acres more or less". When Leonard died, his land passed to his widow under his will, but for unknown reasons, Zirkle, who was an adjoining land owner, noticed and pointed out the description error, challenging the title of Leonard's widow to the Leonard tract, and leading to the case of *Zirkle v Leonard* (1900). Both the trial court and the Court agreed with Leonard's widow that this erroneous legal description was nonetheless valid, and upheld her title to the Leonard tract, verifying that since her late husband owned only one tract, his error in describing it's location was irrelevant and legally inconsequential. In fact, the Court indicated, the words "All the land I now have", standing alone, represented a sufficient legal description of the devised land, because those words effectively communicated the intention of Leonard to leave all of his land to his wife, regardless of where it might be located. Quite similarly, in *Powers v Scharling* (1902) the Court held that a will which described the property being devised with no location data whatsoever was nonetheless valid, and that a highly minimal legal description was legally sufficient. Sebrill was the owner of a certain homestead, with 2 daughters, and he willed his homestead to one of

them, describing it only as "my home place". After his death, the validity of Sebrill's will was challenged, on the grounds that it contained no valid legal description, and the trial court ruled that the will in question was fatally flawed, by the absence of any information defining the location of the subject property. The Court reversed that ruling however, and upheld the validity of the will, despite its failure to specify the location of the real estate at issue. In so doing, the Court stated that "it is not the office of a description to identify lands, but simply to furnish the means of identification, parol evidence is therefore often necessary to make descriptions intelligible ... that description is sufficient which, with the help of extrinsic facts, may be made certain ... the property described ... is sufficiently definite to be easily ascertainable by extrinsic evidence". The Court again applied this same principle, mandating the use of extrinsic evidence to supplement and clarify a poorly written legal description that was used in a tax deed, in *Herod v Carter* (1909). Carter was the owner of land situated within a platted block, but his lot was described in his deed only as "The third 25 foot lot from the north side of Lot 7 in Block 27 in J. A. Stevens Addition to the city of Garden City". Herod attacked Carter's title, alleging that Carter's deed was void, because his description failed to indicate whether his lot was north or south of Lot 7, and the trial court agreed with Herod on that point. The Court came to Carter's rescue however, and reversed that decision, finding that Carter's use of his land represented acceptable extrinsic evidence, clearly showing which lot he had actually acquired. Once again on this occasion, the Court emphasized that evidence of all kinds, and not merely descriptive text found in a deed, is always highly relevant, when evaluating the location or physical extent of any real property:

“... any description of land which shall indicate the land intended with ordinary and reasonable certainty ... shall be sufficient ... the law will not declare a deed void for uncertainty when ... facts and circumstances render the description definite and certain ... descriptions are sufficiently definite ... if they can be made sufficiently definite by the aid of matters or things had in contemplation by the parties ... it cannot be held that the deed is void for uncertainty in the description.”

The case of *Peuker v Canter* (1901) required the Court to explore several detailed aspects of the legal impact of river movement upon both titles and boundaries, which had not been previously addressed in Kansas, and the Court responded by taking initial positions on a number of important riparian issues, some of which were destined to stand the test of time, while others were not. A certain township in Doniphan County, through which the Missouri River ran, was surveyed and platted by the GLO in 1855. At that time, the river passed through the west half of Section 30 in this township, flowing northwesterly in the course of making a large loop, so riparian lots were platted by the GLO in that section, along the northeast bank of the river. Subsequently, all of the land in this area was patented, and both Peuker and Canter eventually acquired portions thereof. In Section 30, the riparian lots were acquired by Canter, while the non-riparian portion of the NE/4 was acquired by Peuker. For several years after 1855, the river steadily migrated to the northeast, until most of the Canter property had been submerged, and the southwestern portion of the Peuker property was submerged as well. At an unspecified time however, the river's lateral migration reversed direction, and by the end of the

century it had moved to a position well to the southwest of its platted location. Peuker claimed that he was entitled to some of the land adjoining his tract which had been thus exposed by the river, extending southwestward into the west half of Section 30, but Canter disagreed and refused to allow Peuker to access the river. Peuker then filed an action against Canter, requesting a judicial division of the unsubmerged area, but the trial court held that all of the original boundary lines in Section 30, despite having been submerged for many years, had been fully restored by the river's subsequent retreat to the southwest, limiting Peuker to only the land within his original boundaries, and denying that his property had been expanded by the river's migration. The Court took the contrary view however, and reversed that decision, finding that Peuker had in fact become a legitimate riparian owner, due to the river's invasion of his tract, so he was entitled to a share of the accreted land, extending far beyond his platted boundaries, in order to maintain the physical connection of his property to the river, which natural erosion had created decades earlier. The Court did not produce the accretion division decree sought by Peuker, because additional evidence was needed in order to properly establish the exact location of those division boundaries, but in the course of instructing the trial judge to conduct the requested accretion division, the Court set forth a number of principles that arose from this scenario, which can be summarized as follows:

- 1) The Missouri River is navigable, and all navigable rivers represent natural boundaries.
- 2) Meander lines do not represent boundaries in themselves, the presence of meander lines created by the GLO merely serves to identify the meandered body of water itself as a boundary monument.
- 3) Platted lines comprising the PLSS can be permanently and conclusively extinguished by submergence beneath a navigable body of water.
- 4) Accretion becomes legally part of any land to which it physically attaches, and once it has begun, the progress of accretion is not blocked or halted by the presence of any platted PLSS lines.
- 5) Division of accreted land is not dependent upon any platted PLSS lines, and a proper accretion division typically requires the creation of boundaries in new locations, deviating from the lines of the PLSS.
- 6) Complete submergence of any entire existing tract, beneath a navigable river, through typical river movement, destroys the existing title to that tract, which thereby becomes part of the bed of the river, and thus merges into the navigable bedland title held by Kansas.
- 7) Title to navigable riverbeds, which is held by the state, moves along with

the typical migratory movement of such rivers, thus accretion, reliction and erosion have the legal effect of relocating boundaries, by expanding or reducing the physical extent of both the state's bedland title, and the adjoining titles held by riparian owners.

8) Land which is part of one tract, at the time when it becomes submerged under a navigable stream, can emerge as part of a different tract, owned by a different party, if it eventually reappears as exposed land, through natural river movement producing accretion or reliction.

One of the longest running and most fervently contested legal battles in Kansas land rights history culminated at this point in time, although ancillary matters which sprang from it took several more years to fully play out, presenting a fascinating and inspiring saga which is well worth reading, though it involves a long series of cases, spanning nearly 2 decades. Ard was apparently a typical settler, who set up a homestead on land comprising part of Section 2 and part of Section 11 in a certain township in Allen County in 1866. Ard's homestead claim was rejected by the GLO, but he chose to simply go on living on the land anyway. In 1873, these sections were patented to the Missouri, Kansas & Texas Railway (MKT) but the company made no use of the land, and evidently paid no attention to it, so Ard simply went right on occupying the same area. MKT eventually sold Section 2 to Pratt and Section 11 to Brandon, and each of them filed actions against Ard, seeking to have him judicially ejected from the land that he had been using for over 20 years. When the controversy created by Ard's land use first came to the attention of the Court, it held that he had acquired no rights to any land, in *Ard v Pratt* (1890) & *Ard v Brandon* (1890) on the grounds that the rejection of his claim by the GLO represented the final word on his land rights, so his subsequent use of the area held no value whatsoever. In 1891 however, in the case of *US v MKT* (141 US 358) the Supreme Court of the United States (SCOTUS) invalidated the MKT patent to Section 2, pointing out that the law which authorized that grant covered only odd numbered sections, and not even numbered sections, effectively negating Pratt's victory over Ard the year before. Then in 1895, acting upon the appeal of *Ard v Brandon* (156 US 537) SCOTUS also struck down the MKT patent to Section 11, holding that Ard's 1866 land entry was in fact legitimate, indicating that his claim had been wrongly dismissed by both the GLO and the Kansas Supreme Court, and ordering the High Court of Kansas to revisit the matter. Although Ard had never been granted any legal rights, SCOTUS declared, as a bona fide settler he was the holder of equitable title to his tract, which was superior to the legal titles held by both Pratt and Brandon. This matter returned to the Court when Pratt again attacked Ard's presence, and sought to have him forced off the land, in *Pratt v Ard* (1901). Pratt alleged that Ard was really nothing more than a plain squatter, who knew that he had no legal interest in the land that he was using, and knew that the legal title to it was owned by others. The Court rejected Pratt's arguments however, and cognizant of the guidance provided by SCOTUS, upheld the superiority of Ard's title to that of Pratt, leveraging adverse possession in order to conclusively silence Pratt. Ard's dramatic victory soon became widely known, and soon many other settlers also legally secured MKT lands in the same area, which they had long been using, upon the strength of the Court's ruling in favor

of Ard. Pratt also lost other lands which had been deeded to him by MKT to other settlers, so he filed an action against MKT to recover his lost funds, and the Court ruled in his favor in *MKT v Pratt* (1902) confirming that MKT was liable to Pratt for the failure of those other faulty conveyances which the company had made to him. The Court then again found MKT to be liable to Pratt, this time with specific reference to Ard's tract, which had finally been patented to him by the GLO, when *MKT v Pratt* returned to the Court in 1906. Brandon and his wife had apparently come to despise Ard however, so they still persisted in their legal efforts to drive him from the land, but in *Brandon v Ard* (1906) the Court staunchly upheld the superiority of Ard's title. Brandon then died, but his widow continued to press on with this case, until she was finally silenced by SCOTUS in 1908 (211 US 11). Thus Ard ultimately prevailed, having taken on and overcome some of the most powerful forces in the entire land rights arena, demonstrating that even a humble settler can obtain justice through perseverance.

The significance of land use was again on display in the case of *Donald v Stybr* (1902) which addresses the relative rights of multiple mortgage holders, in the context of notice, and thereby demonstrates that land use is highly relevant to the determination of their rights, just as it is to the rights of land owners. Motz was the owner of a tract of unspecified size, shape and location, and at an unspecified date, presumably during the 1880s, he mortgaged his land to Stybr. Subsequently however, Motz mortgaged the same tract again, this time to Donald. Whether anyone other than Motz knew that he had mortgaged the same property twice is unknown, but Motz apparently made no payments to Stybr, and upon realizing that Motz was a deadbeat, who was simply trying to get as much cash as possible out of the land that he had mortgaged, Stybr decided to foreclose upon his mortgage, in order to gain control over the Motz tract. Upon issuance of the foreclosure decree and a sheriff's deed conveying the Motz tract to Stybr in 1890, Motz evidently vacated the premises, and Stybr took personal possession of the land, retaining sole physical control over it at all times thereafter. Stybr may or may not have known of the existence of the Donald mortgage, and Donald may or may not have known anything about Stybr's senior mortgage interest, but in any event, Stybr had not included Donald in his foreclosure action, thus Donald had been given no opportunity to defend his interest in the Motz tract, so the 1890 deed to Stybr was invalid, having been issued pursuant to an illegitimate foreclosure. In 1898, Stybr apparently learned, by unknown means, that Donald claimed to hold an interest in the Motz tract, so Stybr filed an action against Donald, seeking to leverage the 5 year statute of limitations on actions pertaining to mortgage foreclosure issues, to obtain a decree terminating the rights of Donald to the tract at issue. The trial court ruled against Donald, quieting title to the contested tract in Stybr, as requested by him, but on appeal Donald argued that Stybr had failed to prove that Donald ever had any knowledge of the existence of the Stybr mortgage, or any notice that Stybr claimed to be the owner of the Motz tract. The fact that Stybr had taken actual possession of the land in contention however, the Court reminded Donald, provided full notice to him that Stybr was functioning as the owner of the Motz tract, so Donald was unjustified in taking no heed of Stybr's presence upon that tract, and Stybr's use of the land, while resting upon the mere assumption that Motz was still the owner of the subject property. As can readily be seen, the notice provided by Stybr's open use of the Motz tract, under the color of title provided by his invalid deed, had triggered the relevant statute of limitations, which had then fully elapsed, with Stybr still exercising sole control over the

disputed land. Thus the rights of Donald had been terminated, the Court concluded, showing that one mortgagee, who makes use of twice mortgaged land, can in effect complete adverse possession against another mortgagee, who ignores the actual use that is being made of the mortgaged land, and thereby providing another example of how adverse land use can operate to legally validate otherwise questionable, or even illegitimate, conveyance documents.

As licensed professionals, land surveyors are expected to have the knowledge required to produce reliable results, and when engaged in boundary work, they are expected to apply that knowledge in an objective and consistent manner, rather than conspiring with one land owner, by acting in a manner which favors his interests over those of another land owner. This principle, mandating completely honest and objective performance on the part of the surveyor, lies at the heart of the statutory resurvey process, which was put in place by the Kansas Legislature in the nineteenth century, as we have previously noted, and which the Court has frequently had occasion to rule upon over the subsequent decades. Nevertheless, virtually all resurveys that are conducted for the purpose of resolving boundary disputes are inherently problematic and fraught with controversy, because no matter how well the surveyor executes the work, at least one of the parties is very likely to be dissatisfied with the results. This was well understood by the legislators who crafted this process, and the Court has always been fully cognizant of the difficult position in which the county surveyor can often find himself as well. For this reason, an option to appeal any resurvey was made a fundamental part of the resurvey process, to allow any negligence or other abuses on the part of surveyors to be pointed out and rectified. The primary goal of the statutory resurvey process however, is to deliver boundary certainty, and thereby general security, to Kansas land owners, and in order to accomplish that, finality must be achieved. The case of *Close v Huntington* (1903) well illustrates that the Court has always kept this goal in focus. Like most cases involving survey work, no details of the situation which triggered this litigation were provided by the Court in reporting its decision on this controversy, but the result alone reveals the Court's stance on the implementation of the statutory resurvey process. *Close* was evidently a typical owner of land in Greenwood County, who ordered a resurvey in an effort to resolve a boundary dispute of some kind with one or more of his neighbors. *Huntington* was the county surveyor, and he completed the resurvey, but *Close* was unsatisfied with it, and he intended to file an appeal, but he failed to do so within the time period specified by the relevant statute. Having missed the appeal window, *Close* decided to file an action against *Huntington*, accusing him of various abuses amounting to malpractice, but the trial court dismissed his case, on the grounds that the statutory appeal option was the only remedy available to him. The Court likewise refused to consider any aspects of *Close's* complaint, informing him that county surveyors cannot be attacked for any mistakes or other failures embodied in their work, and they cannot be held liable on a personal basis for any such shortcomings, because all such issues "amount only to irregularities" which are subject to correction through the appeal process. Once the appeal window has closed however, the Court here announced, no such issues can be raised, and the work of the county surveyor, as documented by him, whether rightly done or wrongly done, becomes absolutely conclusive.

The Court was called upon to address the meaning of acreage figures appearing in a legal description in the context of boundary control on 2 occasions during this time

period, the first coming in *Kemple v Hilmore* (1903). Hilmore was the owner of a 3 acre tract which was apparently situated near the center of an unspecified quarter quarter, and the south line of his tract was physically marked by a hedge, although how his tract was described, whether or not the hedge was on the line described as his south boundary, and how long the hedge had been in place, are all unknown. At an unspecified date, Kemple obtained a sheriff's deed, conveying the south 24 acres "more or less" of that same quarter quarter to her, and she claimed that Hilmore's hedge was located within the south 24 acres of that quarter quarter, so it was on her property, making it subject to removal upon her demand. The trial court ruled against Kemple however, denying her any land lying north of Hilmore's hedge, and the Court upheld the decision against her, even though she had shown, presumably by means of a survey, that a line drawn parallel with the south line of the quarter quarter, so as to encompass 24 acres, fell to the north of Hilmore's hedge. The Court first informed Kemple that she was not necessarily entitled to a full 24 acres, because her legal description contained the phrase "more or less", and in addition to that, she had no right to assume that her north boundary was parallel with her south boundary. Kemple's north boundary, the Court indicated, was controlled not by the acreage in her deed, but by the existing southern boundary of the properties lying to the north, thus she was left with only whatever acreage fell to the south of those existing boundaries. The Court again dismissed acreage as a factor in boundary control 2 years later in the case of *Mayberry v Beck* (1905). Mayberry owned a presumably typical quarter section, and he conveyed a small tract located in one corner of that quarter to a church, describing it as being 12 rods by 8 rods in size, and the church members then took possession of the described area and enclosed it with a wall. Mayberry subsequently deeded away his entire quarter "except one acre", and several years later, after being owned by various other parties, the Mayberry quarter was acquired by Beck, by means of a description containing that same "one acre" exception. Mayberry then filed an action against Beck, claiming that the exception of one acre from the description appearing in Beck's deed represented a full acre, and not merely the existing church tract, which covered less than one acre, so Mayberry still owned part of the quarter in question. The trial court rejected Mayberry's assertion however, and the Court concurred, verifying that Beck held title to the entire quarter, with the sole exception of the church tract. "Quantity ... does not control, in locating granted premises ... mere quantity or acreage will not control" the Court informed Mayberry, holding that his inaccurate reference to the excepted church tract as comprising "one acre", which was originally made when he deeded away his remainder property years before, was of no legal significance, and could have no controlling force or effect in determining the boundaries of the Beck tract. Thus the Court highlighted the fact that not all text appearing in a legal description can be taken literally, because testimonial evidence can control over deed language, effectively modifying or even negating any misleading descriptive language, whenever such extrinsic evidence serves "to explain the latent ambiguity in the deed, and to show the intentions of the parties".

The operation of the basic riparian principle of accretion was the central issue in the case of *Black v Diver* (1904) and the specific question was whether or not that principle was applicable to submerged land which was not exposed by natural means. During the 1880s, Black was the owner of a tract of unspecified size, shape and location in Sedgwick County, which was situated on the east side of a portion of the Arkansas River, and was described as being bounded on the west by the river. Black operated a landfill on the

western part of his tract, trash mixed with earthen materials were regularly dumped along the river bank, then Black would spread that material out, and through this process he gradually expanded his tract, by steadily forcing the river farther and farther to the west. In 1887 however, he mortgaged his tract to Diver, and Black subsequently died, so the mortgage went unpaid and it was foreclosed by Diver, who thereby obtained title to the Black tract by means of a sheriff's deed in 1892. For the next several years this tract evidently remained vacant and idle, but in 1900 Black's widow apparently decided to claim that she still owned the portion of the tract that was originally part of the riverbed, which comprised the landfill area, so she ordered a fence to be built along the line representing the original east bank of the river, and she took the position that Diver had never acquired the area west of the fence. When Diver discovered the fence he filed an action against the widow, asserting that the landfill area represented accretion to the original Black tract, which belonged to him as part of that tract, but the widow responded that the landfill was artificially created land, so it could not be considered accretion, and therefore it was a separate tract, which was not part of the tract that had been mortgaged to Diver. The trial court decided that the landfill was accretion and thus ruled in favor of Diver, and the Court upheld that decision, taking the position that the principle of accretion can apply to land which is created by artificial means as well as to land which develops from purely natural causes. The widow's attempt to leverage her late husband's activities, in order to artificially split the Black tract, was thus snuffed out by the Court, and in so ruling the Court stated that Diver's title extended all the way to the river and was "as complete and absolute as it would have been had the river ... made the deposit". The Court then proceeded to point out that Black could very easily have reserved the landfill area when he mortgaged his tract, by clearly stating in the legal description which was used to create the mortgage, that the landfill was not part of the area being mortgaged. Since that had not been done however, the mortgage covered the entire Black tract, the Court concluded, and no rights to any portion of that tract had been retained by Black. Thus the Court demonstrated it's strong inclination to maintain the continuity of all existing tracts of land, rather than allowing them to become fragmented, and this important principle is one which we will see the Court apply to comparable scenarios over the decades, such as those involving reversion, in the highly analogous right-of-way context. In addition, here again the Court approved the concept that riparian boundaries are ambulatory boundaries, as it had just 3 years before in the Peuker case, previously reviewed herein, and that judicial position was also destined to be quite consistently maintained going forward.

As noted in our review of the Sheldon case of 1887, the Court understood and acknowledged that the equitable concept of recognition and acquiescence could operate as a factor supporting adverse possession, and in the case of *Steinhilber v Holmes* (1904) the Court again made reference to that concept, citing it on this occasion however, as support for a mislocated original boundary. *Steinhilber* and *Holmes* were young married women, and they were both daughters of *Eichholtz*, who died in 1886 leaving his entire estate to his children. How many children *Eichholtz* had is unknown, and the size of his estate is unknown as well, but his land was partitioned so that all of his children could have their own individual tracts, and these 2 sisters thereby became the owners of adjoining tracts. A surveyor was employed to divide the *Eichholtz* estate, and he proceeded to do so in 1887, but what instructions he was given, and how he determined the location of the partition lines that he marked out on the ground, are both unknown. Fences were then built upon all

of the surveyed lines and the various heirs of Eichholtz each took possession of their respective tracts, presumably occupying the land in the typical manner, although what specific use they made of their lands is unknown. In 1901, for unknown reasons, Steinhilber apparently became concerned about the location of the fenced boundary between her tract and the Holmes tract, so she ordered a resurvey, which confirmed that the fence had been built upon the boundary line that was surveyed in 1887. Nevertheless, Steinhilber evidently remained convinced that some of the land occupied by Holmes had been intended by her late father to be part of her tract, rather than part of the Holmes tract, so she filed an action against her sister, seeking to have the line surveyed 14 years earlier corrected. The trial court ruled against Steinhilber however, and the Court upheld that decision, despite agreeing with her, after reviewing the will of Eichholtz, that she had been cheated, since part of the land which comprised the Holmes tract had actually been intended by Eichholtz to belong to Steinhilber. The original partition survey had evidently shorted Steinhilber, to the benefit of Holmes, but it was an original survey nonetheless, the Court realized, so Holmes had the right to rely upon the boundary that was thus created and openly marked for the use of all of the relevant parties in 1887. Intent upon protecting the innocent occupation and land use of Holmes, even though adverse possession could not be utilized, because the 15 year period had not fully run, the Court turned to acquiescence, citing it as the controlling factor in this scenario, while deeming the incorrectly surveyed line to be legally binding:

“The owners of adjoining tracts of land may, by parol settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, will be binding upon the parties and their grantees. Such an agreement, followed by possession, is not obnoxious to the statute of frauds. The agreement is not viewed as one passing title, but is viewed as an agreement fixing the location where the estate of each is supposed to exist ... boundary lines ... had been established ... the survey was made ... to establish the division line ... these lines so established had been recognized and acquiesced in by plaintiff and defendant for many years ... where parties by mutual agreement fix boundary lines, and thereafter acquiesce in the lines so agreed on, they must be considered as the true boundary lines ... even though the period of acquiescence falls short of the time fixed by statute for ... adverse possession.”

The case of *Abercrombie v Simmons* (1905) stands as a true landmark ruling on the subject of railroad right-of-way, which carried major legal implications, for both title and boundary determination, and it was destined to become one of the most frequently cited land rights decisions made by the Court during this period. Simmons owned and operated a typical farm covering a quarter section in Mitchell County, through which the Chicago, Kansas & Western Railroad (CKW) planned to construct a rail line. Simmons conveyed a 100 foot right-of-way, traversing an unspecified portion of his property, to CKW in 1887, by means of a warranty deed, but for unknown reasons CKW never built the line, and never made any use of the 100 foot strip, so Simmons just went on farming the area comprising the strip along with the rest of his tract. In 1898, CKW conveyed the strip

to Abercrombie, and in 1903 he informed the descendants of Simmons, who by then were operating the farm, that he was the owner of the strip. The Simmons family disagreed however, they maintained that the strip was not conveyed in fee, it was merely a right-of-way easement, which had been abandoned by CKW, and therefore had ceased to exist before being deeded to Abercrombie, so in fact he had acquired nothing by virtue of his deed from CKW. Abercrombie was thus compelled to file an action, in an effort to gain control over the strip in contention, and the trial court upheld his deed as valid, quieting his fee title to that strip. The Court reversed that ruling however, holding that the Simmons family was right, CKW had not acquired the contested strip in fee, it had acquired only an easement, which was limited to use of the strip for railroad purposes only, and CKW had subsequently lost all of its rights to that strip, by failing to ever make the intended use of it. Any right-of-way acquired for a specific purpose constitutes only an easement, the Court specified, which represents only a right of use, and not the land itself, regardless of how it was acquired, and an easement cannot be used for any unintended purpose, so an easement cannot be conveyed to any party who intends to use the land in some other way, thus the Court confirmed that the deed held by Abercrombie was worthless. CKW had legally forsaken the right-of-way in question, the Court concluded, by neglecting to use it as originally intended, so under the principle of reversion, the easement was terminated and the strip merged back into the Simmons estate, leaving CKW with nothing to convey. On another matter of special significance to surveyors, the Court also found that the legal description of the strip at issue was entirely valid, even though the location of that strip was described only with reference to the track, despite the fact that no track was ever built. Any legal description which implicates a survey, the Court indicated, is a valid description, since any evidence of the actual survey, showing where the described alignment was intended to be, including both physical evidence of stakes set on the ground and drawings depicting the survey, can supply controlling evidence of the described location. Thus at this juncture the Court adopted the important concept that railroad right-of-way cannot be acquired in fee simple in Kansas, pursuant to the basic principle that the use of land for any right-of-way purpose requires only the creation of an easement, and does not require acquisition of any land in fee. In addition, here the Court strongly upheld the concept of abandonment and reversion of an unused right-of-way, stipulating that a vacant right-of-way reverts to the underlying property, even when no reversion clause appears in the document by which that right-of-way was created, while highlighting the fact that even a warranty deed does not always represent a fee conveyance, and therefore does not necessarily result in the creation of any fee boundaries.

Adverse possession claims were denied by the Court in 4 notable cases during this period, and in 2 of those cases the Court approved and upheld surveys, making this group of decisions worthy of attention. As we have previously noted, the Court had already approved the concept of adverse possession between legal cotenants, including closely related individuals, but in *Sparks v Bodensick* (1905) the Court rejected a claim of adverse possession in the title context, which was set forth by a cotenant. Sparks obtained a quitclaim deed to a certain tract in 1878, and he then utilized it in the typical manner, as the sole occupant of the land for 20 years, before a group comprised of descendants of a prior owner of that tract challenged his right to the land, claiming that they were the true owners of that tract, through inheritance. Those heirs, including Bodensick, filed an action seeking to force Sparks to relinquish the subject property to them, but he asserted that he

had acquired it through adverse possession. The trial court ruled against Sparks, and the Court upheld his ejection from the land, because he had hired an investigator to try to locate the heirs, so that he could buy out their interests in the subject property, and in so doing he had openly acknowledged and recognized the existence of other parties holding an ownership interest in the same land that he was using, thereby destroying the otherwise adverse nature of his own land use, in the view of the Court. Another adverse possession claim in the context of title, which was also set forth by a legal cotenant, met with failure on very similar grounds in *Schoonover v Tyner (1905)*. Tyner acquired a certain quarter section by deed in 1901, which had been occupied by a succession of others since 1875. Some of Tyner's predecessors however, had attempted to acquire the interests in that quarter that were still held by the heirs of a prior owner of that tract who had died in 1873, including the interest of Schoonover, who was out of the country for over 30 years, and never conveyed his interest in the tract at issue to anyone. Upon his return, Schoonover filed an action to have Tyner forced to vacate the premises, but the trial court held that Tyner had adversely acquired his tract. The Court reversed that decision however, once again stating that a cotenant cannot prevail on adverse possession, if he or any of his grantors ever acknowledged the existence of other cotenants, so Schoonover was able to successfully reclaim the contested quarter, even after completely ignoring it for over 3 decades. Following the mistake doctrine, adopted in the *Winn* case of 1886, reviewed previously herein, the Court again rejected adverse possession in the boundary context in *Scott v Williams (1906)*. Scott owned part of the NE/4 of a certain Section 3, while Williams owned part of the NW/4 of the adjoining Section 2 in Sumner County, and Scott filed an adverse possession claim extending across the section line into Section 2. In that case, the Court upheld a lower court decision against Scott, approving a resurvey of the section line that was done by the county surveyor in 1879, and confirming that adverse possession would not be allowed to overcome or interfere with the controlling nature of section lines for boundary purposes. In *Crawford v Hebrew (1908)* the Court continued to adhere to the mistake doctrine, again stipulating that any possession, occupation or other use of land which crossed over any boundary line of record would simply be regarded as a plain mistake, and could not qualify as adverse land use. Once again on that occasion the Court upheld an unspecified resurvey, as sufficient and controlling evidence of the relevant boundary location, in a cursory manner however, without making reference to any details pertaining to the survey, and without any examination of its validity or correctness.

Significant movement of a portion of the Missouri River forming part of the boundary of Atchison County was the cause of controversy in *McBride v Steinweden (1906)*. The GLO surveys in the subject area were evidently completed in 1855, and the relevant GLO township plats showed that a portion of the river flowed westerly, between a certain Section 10, to the north on the Kansas side, and a certain Section 33 to the south on the Missouri side. A platted lot in Section 10, bounded on the south by the river, was acquired by Steinweden in 1881. Over the preceding years however, the river had evidently migrated about 2 miles to the south, and Steinweden proceeded to fence and occupy the land lying between the platted location of his lot and the river's current location. In 1894, Steinweden rented his property to McBride, who then began using it as a tenant farmer, and this arrangement continued for several years without controversy. In 1899 however, McBride either deduced or was told that most of the area he was farming was not part of Steinweden's lot, as that lot was originally platted, since the southern part of that area

comprised ground which had been platted as Section 33 in Missouri, prior to the river's southerly movement. Upon learning of this situation, McBride took the position that Steinweden was not the owner of any land lying south of the limited area covered by his lot, just as it appeared on the GLO plat showing Section 10, and McBride therefore refused to pay any more rent to Steinweden for his use of the area lying within the platted boundaries of Section 33. Steinweden was thus forced to file an action against McBride, to have him compelled to either resume his rent payments or vacate the premises. The trial court found that Steinweden was in fact the owner of all the land that he had enclosed, because it had formed as accretion to his lot, and McBride had failed to prove that the contested area had formed by any other means. The Court upheld that decision in Steinweden's favor, and in so doing verified the validity of several basic principles relating to riparian boundaries. The Court confirmed that the Missouri River had been adopted as the boundary between Kansas and Missouri, as indicated on the GLO plats, so that river represents a natural boundary monument, which controls the location of the state boundary, even as it proceeds through it's natural movements, thereby constantly expanding and contracting the size of the various riparian properties bounded by the river on each side. McBride was mistaken, the Court pointed out, in his belief that Section 33, which had been platted as part of Missouri, was now on the Kansas side of the river, because the river had in fact eradicated Section 33, while dramatically extending Section 10, as it moved southward, so the river still marked Steinweden's south boundary, and he had the right to rely upon it as a boundary monument, just as he had done when enclosing his land. The Court thus clarified that all river movement is presumed to be accretive in nature, unless the contrary is proven, and such movement destroys the platted lines of the PLSS which are devoured by the river in the course of any such natural migration. Here the Court first made reference to the concept of avulsion, stating that "where a stream, which is a boundary, from any cause suddenly abandons it's old bed and seeks a new bed, such change of channel works no change of boundary ... avulsion has no effect on boundary". The Court thereby wisely clarified the often poorly understood but essential distinction between typical river movement, as part of the natural erosion and accretion cycle, which relocates boundaries, and the creation of a distinct new river channel, which characterizes avulsion, and does not operate to relocate boundaries. Rivers, once adopted as boundaries, always remain boundaries, however far they may migrate, the Court very astutely mandated on this occasion, under the principle of monument control, until such time as an act of avulsion deprives the river of it's status as a controlling natural boundary monument.

A party wall became a source of controversy in *Mathis v Strunk* (1906) leading the Court to reiterate it's position on the relationship between boundary and title issues, in the context of a building encroachment, which position the Court had first announced 20 years before, in the landmark *Winn* case, previously reviewed herein. Mathis was the owner of a typical platted lot in Wichita, and Strunk was the owner of the next lot to the north, which bore an apparently typical brick building that had been erected in 1888. In 1905, Mathis proposed to construct a building on his lot, and he informed Strunk that he intended to utilize the south wall of Strunk's building, since it straddled the lot line and was therefore clearly intended to function as a party wall. Strunk refused to allow Mathis to use his wall however, and he filed an action in which he asserted that he had acquired the portion of the Mathis lot that was occupied by his building, by means of adverse possession. The trial court rejected the adverse possession claim set forth by Strunk, but ruled in his

favor anyway, on the grounds that he had the right to deny Mathis the opportunity to connect his building to the Strunk building. The Court upheld that decision, informing Mathis that he would have to file an action against Strunk, in order to obtain the right to make use of the south wall of the Strunk building. In so ruling, the Court reiterated that a building which encroaches over a property line is insufficient to set adverse possession in motion, because adverse possession is solely a title doctrine, which was never intended to be exercised for the purpose of correcting boundary mistakes, while pointing out that "a dispute regarding a boundary does not, in a proper sense, involve the title to real estate". A practically identical scenario subsequently came to the Court in *Winters v Bloom* (1915). In that case, Winters owned a certain parcel in Hutchinson, which was 25 feet in width, and was fully occupied by an existing building, while Bloom owned an adjoining parcel. At an unspecified time, it was evidently discovered that the east wall of the Winters building extended 2 inches onto the Bloom lot, so Bloom proposed to make use of it as a party wall, but Winters filed an action to prevent him from doing so, in which Winters argued that the east face of his building marked the true boundary between the properties of the litigants. The trial court rejected the position set forth by Winters however, and ruled that Bloom was free to use the wall in question to support his proposed building. The Court upheld that decision, agreeing that Winters had failed to prove that the wall at issue was not intended by the party who had built it several years earlier to serve as a party wall. Once again on this occasion, the Court observed that if the contested wall was built "by mistake, and possession was held under a misapprehension as to the true boundary, it would not be adverse ... agreement or acquiescence in a wrong boundary ... is treated ... as a mistake" which cannot operate to adjust or otherwise relocate a boundary location of record, by virtue of any kind or any amount of land use, and thus remains perpetually correctable.

Fowler v Wood (1906) represents the return to the Court of the long running battle between these 2 families and their associates, who held land situated on Kaw Point, which began with the 1882 Wood case, reviewed previously herein. Most if not all of the land forming Kaw Point, at the confluence of the Kansas and Missouri Rivers, which was destined to eventually become a bustling industrial sector of metropolitan Kansas City, was patented in 1857, and that area soon developed into one in which numerous parties held land rights interests. A great flood evidently took place in 1867, as a result of an ice gorge, which inundated much of the area, and as the flood waters finally receded in 1868 part of the submerged land first reappeared in the form of an island, causing numerous disputes to arise over land rights. The Wood and Fowler families were just 2 of the many families and corporations whose titles and land rights were rendered indefinite and unclear in the aftermath of that titanic event. Over the next few decades, as the area was subjected to rapid development, obstructions such as rip-rap and pilings were placed in the rivers, both during public infrastructure projects and through various efforts by private parties to either stabilize or re-direct the course of those waterways. One primary island in the Missouri, which had formed as a consequence of the 1867 flood, continued to exist until at least 1891, when it finally became merged with adjoining land, due to improvements that were built in 1889, and this had the effect of steering the Missouri eastward, back into it's historic channel, thereby finally exposing the last portion of Kaw Point that had remained covered by water since the time of the flood. Numerous surveys were undoubtedly done in this area over the decades, a few of which apparently formed a part of the massive body of evidence that was brought forth by the litigants, but no details of those surveys were ever

mentioned by the Court in reviewing the litigation which stemmed from this chaotic scenario. Shortly after the turn of the century, the Wood and Fowler families and their neighbors sought resolution of their title conflicts and definition of their boundaries, and at last the matter reached the Court, 24 years after their predecessors had first clashed, over the extraction and use of river ice. In dealing with the issues presented in 1906, the Court adopted several principles of notable importance to the determination of riparian title and the location of riparian boundaries. Here, for the first time, the Court applied the principle of avulsion, holding that an ice jam represents an avulsive event, if it causes a river to abandon its existing channel and cut an entirely new channel. When the location of the bed of a navigable river changes, pursuant to an act of avulsion, the Court also stipulated, the bed of the avulsive channel remains private land, adopting the position that mere submergence due to avulsion cannot legally convert private land into public land. An island arising in any stream, the Court also specified on this occasion, must always be deemed to be property of the owner of the bed from which it arose, and having once arisen, the new island is as entitled to benefit from growth by means of accretion or reliction as any other body of land. In addition, the Court indicated that artificial changes to the course of a stream can effectively negate the legal operation of both accretion and reliction, since no individual or corporation can equitably be allowed to gain land through deliberate deflection of a watercourse away from their land and onto or through the land of others. The litigation stemming from the great flood was not at an end however, even after this battle was decided by the Court, the following cases involving the Woods and their successors, and still other cases which we will later review, were also precipitated by the devastating river action which had occurred during the 1860s:

Meriwether v Wood (1908) (212 US 586)

Grider v Wood (1910) (178 F 908)

Grider v Groff (1912) (202 F 685)

Wood v McAlpine (1911) (118 P 1060)

The Court's first definitive statement of the evidentiary priorities that are to be observed by surveyors, when executing resurveys of platted city lots and blocks came at this juncture, in **Appeal of Richardson (1906)**. The Altoona townsite was platted in 1870 in Wilson County, and various buildings and streets were subsequently constructed, in reliance upon "walnut pins" which were set to mark lot corners during the original survey of the townsite, as the town presumably developed in the normal manner. At an unspecified time, apparently many years later, Cedar Oil & Gas built wells at various locations within the townsite, although whether or not Cedar owned any of the platted lots or blocks is unknown. A dispute eventually arose, between Cedar and Richardson, who was evidently the owner of a platted lot situated near the northern edge of the townsite, when Richardson claimed that a certain well was on his land. A survey was therefore ordered and completed by the county surveyor, which apparently showed that the contested well was on Richardson's lot, but this survey was evidently challenged by Cedar and was struck down. The trial court then ordered another survey to be done by the county surveyor, and this

second survey produced a different location for the platted lot lines in the relevant block, so the well wound up not being within Richardson's lot, leading him to protest the way in which the second survey was done. On appeal, Richardson pointed out that the second survey was made solely in reliance upon platted dimensions and measurements, and it had commenced from a street that was about half a mile south of his lot. The county surveyor had neglected to properly utilize existing physical boundary evidence, showing the original location of the platted lines in his block, during the second resurvey, Richardson alleged, and had thereby effectively relocated long established lot boundaries, the origin of which could be traced back to the original monumentation of the townsite. The Court agreed with Richardson that the second resurvey was improperly executed and could not be allowed to stand, stating that "the surveyor ignored the cardinal rules for his work, in not regarding original monuments and known corners, and making his survey conform to them, instead of the figures on paper". The Court then went on to specify "the primary rules for locating city plats upon the ground", announcing a set of 3 priorities to be followed in conducting such resurveys, which accord very well with the most fundamental principles of boundary control. "First, find the lines actually run and the corners and monuments actually established by the original survey. Second, run lines from known, established or acknowledged corners and monuments of the original survey. Third, run lines according to courses and distances marked on the plat." the Court wisely mandated on this occasion. "Original monuments and known corners cannot be ignored in making a survey" the Court declared, strongly emphasizing the vital importance of respect for all forms of physical boundary evidence, since such evidence typically represents the originally surveyed location of the boundary in question. Thus the Court held that the trial judge had mistakenly instructed the county surveyor, by discarding his first resurvey of the relevant area and directing him to complete a second resurvey, in which measurements were wrongly elevated in priority above physical evidence of original boundary locations, returning the matter to the lower court for correction of that error.

As we have noted in reviewing several earlier cases, the Court had already established well defined duties and responsibilities applicable to both grantees and grantors by this time, but the case of *Cox v Beard* (1907) was destined to become another significant judicial reference point, standing for the highly important, yet poorly understood, principle that all grantees have a fundamental right to rely upon the integrity of all statements made by their grantors, which can have a major impact upon boundaries. While boundaries are presumptively controlled by descriptive language, the Court recognized, under the most basic principles of equity, which ultimately control the resolution of all title issues, grantors cannot be allowed to deceive or mislead innocent grantees by providing them with any incorrect or conflicting information concerning the land being acquired, and in the view of the Court, this principle can operate to negate described boundaries. Cox was the owner of a tract of unspecified size, situated in Wichita, which was evidently rectangular in shape, composed of a group of 6 platted lots, along with an additional parcel abutting those lots, lying between the lots and Wabash Avenue, and another additional parcel abutting the lots in the rear as well. Cox offered his property for sale, Beard came to view it, and Cox showed Beard the full tract, which fronted upon Wabash Avenue and was enclosed on the other 3 sides. Beard agreed to buy the Cox property, and Cox executed a deed to her, but the deed made reference only to the 6 platted lots, and said nothing about the 2 abutting parcels. When Beard subsequently discovered that the entire Cox tract had not been

deeded to her, she filed an action against Cox, requesting that the legal description in her deed be reformed to include those parcels, but Cox flatly denied that he had ever intended to convey them to Beard. The trial Court decided that Cox could not successfully deny that he intended to sell his entire property, after having shown it to Beard, and thus ordered the 2 missing parcels to be added to her deed, thereby extending her described boundaries in both the front and the rear, to cover the whole enclosed area. Cox protested on appeal that the contents of the legal description in question were accurate, conclusive and controlling, so if any mistake was made, it was made by Beard, who failed to read or to understand her legal description, but the Court was entirely unsympathetic to this position, and upheld the reformation of Beard's legal description. Beard was under no obligation to verify the correctness or completeness of her legal description, the Court informed Cox, because he had indicated to her that she would be getting his whole tract, by pointing out the boundaries of the enclosed area to her, and she was fully entitled to rely upon the veracity of his representations. Whenever a grantor points out visibly established boundaries in the presence of his grantee, the Court thus confirmed, such boundaries control over those enumerated in any subsequent deed, leaving any legal description which fails to cover the physically outlined area subject to reformation, to properly document the delivery of the full area owned by the grantor to the grantee, provided of course that the grantor owns the relevant area.

One of the most important but often overlooked principles in the arena of land rights is the very basic equitable principle that innocent reliance holds value and will be judicially supported when justified. Land use resulting from innocent reliance upon information of any kind, such as a survey, represents productive activity made in good faith, in the eyes of the Court, and the evidence revealing which side carries the greater measure of good faith in any legal battle, rather than evidence relating to the technical merits embodied in such information, typically dictates the outcome of the litigation, as the case of *Foskuhl v Herzer* (1907) demonstrates. It evidently became necessary to re-monument a certain range line in Ford County in 1885, due to extensive obliteration of the original surveys of that area, and the county surveyor was called upon for that purpose. He proceeded to survey 18 miles of the range line, from a point in Clark County on the south to the Santa Fe Trail on the north, and in this 18 mile span he found no GLO monuments on the range line itself, but whether or not he searched for any evidence east or west of the range line is unknown. He then evidently reset all of the missing section corners and quarter corners along that portion of the range line, apparently by using the single proportionate measurement method, based upon the 2 original monuments which he had found and accepted, about 18 miles apart. Numerous roads were soon built to the corners which he had set, as well as some fences and hedges, and the land in that area was put to use by many typical settlers, including Foskuhl and Herzer, although where their properties were situated in relation to the range line is unknown. In 1887 however, for unknown reasons, the Ford County commissioners ordered another resurvey of a portion of the range line to be done by a team of other surveyors, and they reported that the 1885 resurvey had been erroneously executed, leading to a long running feud between some of the local land owners. Herzer eventually filed an action against Foskuhl, and some of his other neighbors, seeking a judicial answer to the question of which resurvey controlled, and the trial court upheld the 1885 resurvey. The Court, after reviewing the testimony of at least 5 surveyors, among many other witnesses, found that both surveys held some merit,

but concluded that the 1885 survey was adequately done, and therefore must control. In so ruling, the Court made it very clear that the use which had been made of the land throughout the contested area, and particularly the establishment of many property boundaries, all in reliance upon the survey work done in 1885, strongly supported the judicial adoption of the 1885 survey, regardless of whether the manner in which it was conducted was completely appropriate or not. Observing that the first resurvey "was generally acquiesced in by the public since 1885, roads were laid out ... fire guards were made, fences built, trees planted and other permanent improvements" the Court declared that "courts should hesitate to change boundaries ... long recognized". Thus the Court emphasized that all surveys are done solely to facilitate productive use of the land, so any survey which is put to actual use for that purpose, by parties acting in good faith, can be worthy of judicial approval, recognizing that the great significance of secure and stable land rights to our society can require subsequent resurveys to simply be disregarded, rather than allowing them to operate as a source of useless conflict over survey precision.

As has been noted in reviewing some prior adverse possession cases, the true intent driving the actions of any party who sets forth an adverse possession claim is always a major focal point of the Court, and is a principal factor in the key judicial determination of whether or not the use of the subject property was genuinely adverse in nature. As we have seen, in some instances, an act by the adverse party which amounts to a recognition that others hold rights to the subject property, such as an offer to buy that property, can be a sign that the land use was not really adverse at all, which destroys the adverse possession argument. Therefore, any acts of this kind on the part of the adverse claimant are typically pointed out in court by the owner of record, in an effort to show that his land was never held in a truly adverse manner, and *Liebheit v Enright* (1908) provides a prime example of such a scenario. Liebheit was the owner of a presumably typical vacant lot in Kansas City, although when the relevant area was subdivided, and how long this lot stood idle, are both unknown. In 1889, Bullett acquired an adjoining lot, which was also evidently vacant up to that time, and he built a house on it. Over the ensuing years however, Bullett also made use of the Liebheit lot, apparently unobserved by Liebheit, who was presumably an absentee owner living elsewhere, and who rarely if ever visited the subject area. Bullett's use of the vacant lot steadily increased over the years, and by 1902, when he sold his property to Brewer, the Liebheit lot bore a barn, a shed, a garden and a lumber storage area, all maintained by Bullett, and at least part of that lot was fenced in with Bullett's lot. Brewer naturally took possession of the whole area which had been put to use by Bullett, and continued using it in the same manner, presumably unaware that the improvements which had been placed upon the land by Bullett actually covered 2 lots, until he conveyed his property to Enright, at an unspecified date. Soon after acquiring this property, Enright evidently recognized the presence of the second lot, so he obtained an existing tax deed for that lot, but shortly thereafter Liebheit discovered the use of his lot, and he demanded that Enright cease his use of it. Enright responded by filing an action against Liebheit, in which Enright maintained that the lot in question had been lost to Liebheit by virtue of the adverse use of that lot by Enright's predecessors for a full 15 years. Liebheit asserted that the tax deed was invalid, but the trial court declined to consider that issue, finding that it made no difference, because Enright's predecessors had acquired the Liebheit lot through adverse possession, and Enright had legitimately acquired it from Brewer, although the second lot was mentioned nowhere in Enright's chain of title. Liebheit protested on appeal

that even if any of the prior use of his lot was adverse, the adverse possession was negated when Enright accepted the tax deed, since doing so represented an open acknowledgement by Enright that he did not own the disputed lot at that time. The Court disagreed however, and upheld the title of Enright to the Liebheit lot, on the basis of adverse possession, concluding that by obtaining the tax deed Enright had merely cleared a cloud from his existing title, so that action on his part did not represent an indication that he knew that the second lot belonged to someone else. Thus on this occasion the Court clarified that an adverse possessor can acquire an outstanding title, which threatens his own adverse title, without destroying the adverse nature of his land use, because doing so constitutes a typical act associated with land ownership, such as any prudent land owner might take, and does not constitute a recognition on his part of any land rights held by the owner of record, as would an offer to buy the land directly from the record owner.

The concept of original survey control was quite well known and fully understood in Kansas by this time, particularly in the context of surveys done by the GLO, as we have noted in reviewing several previous cases involving boundary evidence. The statutory resurvey process however, which had been in place and in widespread use in Kansas for more than 2 decades by this time, introduced an additional layer of complexity to the subject of boundary control, due to the fact that the Court had approved the controlling nature of such resurveys, once any qualifying resurvey was left without appeal for the statutory time period. The question thus arose as to whether or not a valid statutory resurvey is as absolutely definitive and conclusive as any original survey, such as a GLO survey, and this issue was squarely addressed by the Court in *Washington v Richards* (1908). Washington and Richards owned adjoining tracts located in an area identified as "Wyandotte Reserve No. 6" in Pottawatomie County, although how and when they had acquired their respective tracts is unknown. A state of uncertainty or dispute apparently existed between these land owners, regarding the location of their mutual boundary, so in 1893 a statutory resurvey was completed, and all parties were apparently reasonably satisfied with the results of that survey, although no details pertaining to how it was done are known, since it was never the subject of any appeal. The lands of both parties changed hands over the years, but both tracts remained in the ownership of the Washington and Richards families, and there is no indication that any sort of boundary controversy ever broke out between them again. In 1907 however, for unknown reasons, Richards requested that another statutory resurvey be done, and the county surveyor agreed to conduct the requested survey, but Washington objected, so she filed an action, seeking to prevent the proposed resurvey from taking place. The trial court found no merit in the position of Washington and therefore authorized the county surveyor to proceed, but the Court agreed with Washington, and reversed that lower court decision against her, barring the execution of the proposed resurvey. In so ruling, the Court gave no specific indication of whether the proposed 1907 resurvey represented an attempt to abandon and change the results of the 1893 resurvey, or merely an effort to restore and refurbish the boundary in question, in the same location that was monumented in 1893, but the words of the Court made it quite clear that the results of the 1893 resurvey were utterly impregnable, so no additional resurvey could be justified. "No appeal was ever taken ... the survey of 1893 ... has become fixed and permanent, and the boundaries of the two tracts of land have thereby been permanently established ... we have no hesitation in concluding that ... where no appeal is taken ... corners and boundaries ... shall be held and considered as permanently

established, and shall not thereafter be changed" the Court stated. The Court then went on to further stipulate that "The permanency which the statute seeks to give to established boundaries and landmarks would be of little value to land owners, if it lay within the power of anyone interested to disturb the boundaries by new surveys ... there would be no permanency in landmarks ... the statute is intended to make boundary lines and landmarks once established permanent and fixed." Thus the Court unequivocally mandated that a properly documented statutory resurvey essentially operates as the equivalent of an original survey, from which no subsequent resurvey can ever deviate, in any respect or for any reason.

The issue of navigability, which is crucial to the proper determination of the location of all riparian boundaries, was the central point of contention once again, in *Kregar v Fogarty* (1908) and on this occasion the Court provided important clarification of some of the key principles pertaining to riparian title and boundaries. The Fort Riley Military Reservation was surveyed and platted in 1857, and it was bounded in part by the Republican River and the Smoky Hill River. In 1874, an ancestor of Fogarty constructed a milldam on the Smoky Hill River, situated upon a portion of that stream which appeared on the plat of that reservation. Eventually, the government use of the fort ceased and some of the land within the reservation was patented. The area containing the Fogarty dam was patented to the Republican River Bridge Company, and was later acquired by the Fogarty family, while the land across the river came into the ownership of Kregar, but the dates upon which these conveyances took place are unknown. The Fogarty family continued to operate the dam, until it was destroyed during a flood in 1905, but the Fogartys planned to rebuild the dam, until Kregar objected. The presence of the dam evidently caused an unspecified portion of Kregar's land to be overflowed and inundated, periodically if not constantly, so he filed an action seeking to prevent the dam from being rebuilt. Kregar asserted that the Smoky Hill was a navigable river, because it had been meandered, so the Fogartys had no right to maintain the dam, since the riverbed upon which it rested was owned by Kansas, and not by the Fogarty family. In response however, the Fogartys argued that the river was non-navigable, and they prevailed in the trial court, despite the presence of meander lines defining the relevant portion of the river. Demonstrating that the knowledge of the Court regarding riparian issues had progressed, since the question of the legal significance of meander lines had first reached the Court, in the 1882 Wood case, reviewed previously herein, the Court wisely upheld that decision, making the Smoky Hill the first Kansas river ever expressly identified as being non-navigable by the Court. After reiterating that meander lines do not represent boundaries, the Court went on to declare that the mere presence of such lines does not mean that the meandered body of water is conclusively navigable, because the GLO surveyors who created the original meander lines were neither trained nor authorized to determine navigability. "In disposing of public land bordering upon rivers it is not the policy of the government to reserve title to the lands under water, whether the stream be navigable or not. The government parts with it's whole title ... meander lines ... are not for the purpose of limiting the title of the grantee", the Court explained. All riparian properties which are bounded by non-navigable waters extend to the thread of that body of water, the Court also decreed, so the entire submerged riverbed was privately owned, and the Fogarty dam was therefore actually situated on bedland which was owned by the Fogarty family, thus they were fully entitled to rebuild it. In addition, here the Court indicated that GLO meander lines are always presumed to have

been properly run along the bank of the meandered body of water, and the mere fact that recent measurements show that those lines are no longer located upon the bank is not an indication that they were run in a mistaken location, they will nonetheless be presumed to correctly depict the actual location of the water, at the moment when the area was surveyed and platted.

The Court's distinct inclination to strongly protect and uphold all public land rights, particularly those which were created by means of a plat, was vividly displayed in the case of *Kiehl v Jamison* (1909). The Park Place Addition to Topeka was platted in 1894, but how many platted streets were thereby created is unknown, and at least some of those streets remained undeveloped and unused for travel by anyone for the next several years. By 1902, Kiehl had become the owner of Block 3 in this addition, while Jamison had become the owner of Block 4. At that time, Kiehl fenced her entire block, and in so doing she also enclosed the full width of 2 adjoining streets, Union Avenue and Liberty Street, along with her block, apparently on the assumption that those streets had been vacated. In 1907 however, Jamison decided to build a house on his property, so he asked Topeka to clear all obstructions from Union Avenue, including Kiehl's fence, so that Jamison could make use of that public right-of-way to reach his block. Kiehl objected to the removal of her fence, so she filed an action against Jamison, in which she asserted that Union Avenue was no longer a valid existing public right-of-way, because it had gone unused for over 7 years after it was platted, under a certain statute, which mandated that all public roads left unopened for 7 full years shall be automatically vacated. The trial court initially ruled in Kiehl's favor, but for unknown reasons the trial judge then granted Jamison's request for a new trial, wiping out Kiehl's initial victory and leading her to appeal that decision. The Court concurred in the reversal of Kiehl's brief triumph however, and went on to order Union Avenue to be cleared for public use, as requested by Jamison, thereby bestowing complete victory upon him by approving the removal of Kiehl's fences. It was true, the Court acknowledged, that the relevant platted streets had remained utterly unused for well over 7 consecutive years, immediately following the recordation of the plat in question, but that fact alone did not destroy the public nature of the platted right-of-way at issue, because it was not physically blocked until 1902, moreover it was only blocked by Kiehl for 5 years, so Kiehl was mistaken in her position that no public rights remained in that location. Union Avenue still legally existed, the Court observed, because it was always open to use by anyone until 1902, making the mere fact that no one had actually used it during the 7 year statutory period entirely inconsequential. No actual use of a platted right-of-way is required to maintain its existence, the Court informed Kiehl, as long as it remains subject to future use for its intended purpose, nor is any construction or other improvement of an actual roadway within any legally created right-of-way necessary for that right-of-way to retain its validity. A mere absence of use is of no harm to a public right-of-way, as long as it remains physically open to use it cannot be characterized as being unopened, and unless it was physically closed off for 7 full years, the Court pointed out, it was not covered by the 7 year vacation statute. The statute which Kiehl sought unsuccessfully to utilize on this occasion was enacted in 1879, but was repealed in 1911, and since that statute required the passage of a full 7 years to perfect a road vacation under its parameters, no public right-of-way which was platted after 1904 could ever fall within the scope of that statute.

Continuing our examination of the judicial perspective upon the relevance of

resurveys as boundary evidence, 2 cases which came to the Court at this time are worthy of note, since they illustrate the important evidentiary distinction between surveys which are done under explicit statutory guidelines and those which are not. In *Bain v Peyton* (1909) the litigants both owned lots which had been platted by the GLO in a certain Section 18 in Lyon County. How and when they had acquired their tracts are both unknown, but in 1905 a dispute arose between them over the location of the platted lot line which constituted their mutual boundary. Peyton then asked the county surveyor to survey his property, but the line marked by the surveyor proved to be favorable to Bain, rather than Peyton, so she filed an action against Peyton, asserting that the line marked out by the county surveyor was correct and was legally binding upon Peyton. In response, Peyton argued that the surveyed line was not legally binding, because the resurvey was not done under the boundary resolution statute, it was merely a private survey, the results of which he was free to ignore and discard, despite the fact that it had been done by the county surveyor. The trial court ruled in Peyton's favor, on the grounds that the survey in question held no evidentiary value whatsoever, since it was not done in compliance with the relevant resurvey statute, so it was legally useless to Bain. The Court reversed that decision however, informing the trial judge that all resurveys represent relevant boundary evidence, although only statutory resurveys are legally conclusive, in the course of ordering a new trial, to assess the merits or shortcomings of the resurvey at issue. Just 6 months later, the Court had another opportunity to address the controlling force of resurveys in *Dent v Simpson* (1909) which involved a similar scenario, but produced a different result. In that case, a particular section corner location in Harper County was the focal point of dispute between the litigants. During a 1906 resurvey, a county surveyor reset a certain section corner about 50 feet south of a section line road running east and west. Dent, who evidently owned land south of the road, then filed an action against Simpson, who evidently owned the land to the north, charging that the road was on the section line, and the 1906 resurvey was wrongly done. The trial court deemed the 1906 resurvey to be controlling, on the basis that the work of the current county surveyor was conclusive, and no other evidence of any prior surveys could be introduced to contradict his work, thereby awarding victory to Simpson. The Court reversed that decision however, reiterating that no survey work done by a county surveyor is conclusive, unless it was done in full compliance with all relevant statutory requirements, and all other surveys are admissible, as potentially controlling boundary evidence. In this instance, it was proven through testimony that the original GLO stone monument marking the contested section corner had in fact been found, buried under the centerline of the road, during a prior resurvey, which the current county surveyor had either failed to discover, or simply declined to accept, as valid boundary evidence. Given this clear evidence that Dent was right about the original section line being marked by the existing road, the Court ordered the trial judge to grant Dent's request for a new trial, so that this testimonial evidence could be used to nullify the obviously bogus 1906 resurvey and control the section lines in contention.

The Court provided further clarification on the meaning of acreage references made in legal descriptions, in the PLSS context, in *Gunn v Brower* (1909). The relationship in which the litigants stood in this case was not indicated by the Court, so no factual background information can be provided, yet the Court's ruling here holds value, since it was controlled entirely by principles which are equally applicable to a wide variety of factual situations. It appears that Brower was the owner of Lot 4 and the SE/4SW/4 of a

certain Section 7, but this aggregate area was described in his deed only as "the south half of the southwest quarter", and Gunn, who apparently owned some adjoining land in the same section, decided to challenge the validity of Brower's deed on that basis. The trial court deemed Brower's deed to be valid, and further held that his boundaries were fully controlled by the platted lines bounding his property, regardless of what the acreage of the SW/4 of Section 7 might be. The Court agreed, and upheld that decision in favor of Brower, but also elected to take the opportunity presented by this case to expound upon the true meaning of PLSS descriptions, such as the one at issue, and the significance of acreage as a factor in the division and description of land. The Court first verified that the absence of any reference to Lot 4 in Brower's legal description was inconsequential, holding that the description used in his deed "amounts to the same thing", thus confirming that platted GLO lots need not be expressly referenced as such in legal descriptions, while noting that descriptions which do refer directly to such lots are preferable. The Court next rejected the suggestion that acreage can control boundary locations in the PLSS context, since the south half of the SW/4, the Court stipulated, does not represent a call for half of that PLSS unit as determined by acreage, it represents a call for the platted lines bounding that area, which appear on the GLO plat. All PLSS descriptions at and above the level of the nominal 40 acre PLSS unit, the Court specified, must be interpreted as calls for the relevant platted PLSS subdivision boundaries, and not for independent division of any section, or any portion of a section, based upon acreage. The terms "half" and "quarter", must always be taken in context, the Court thus clarified, and in the PLSS context they cannot be construed as expressing an intent to abandon or deviate from any PLSS boundaries, down to the sixteenth or quarter quarter level of sectional subdivision. Neither platted GLO acreage figures nor actual acreage, as determined by a subsequent resurvey, can alter any PLSS boundaries, the Court thus mandated, because acreage discrepancies have no legal impact upon boundaries, recognizing that platted lines represent a form of boundary control which is fundamentally superior to acreage control. Acreage can control boundaries under certain circumstances however, when it can be shown that one or more boundaries of a given conveyance were intended by the original parties to be controlled by either stated acreage figures or division into areas of uniform quantity, as we will have occasion to observe in reviewing subsequent cases.

Parks v Baker (1909 & 1914)

Our next featured case, which came before the Court on 2 occasions, still stands as one of the most interesting and informative boundary cases ever adjudicated by the Court. Up to this time, the agreed boundary concept remained largely unexplored and was of little significance in Kansas, the 1887 Sheldon case, previously featured herein, being the only prior Kansas case in which a line resulting from an undocumented boundary agreement was deemed to control over a described boundary location of record. This was starting to change however, because as time went by and the frontier period began to fade into the distant past, original survey evidence, which was typically meager to begin with, was undergoing rampant obliteration, and at the same time the consequences of poor platting

and poor original boundary monumentation during the early decades of statehood began to emerge, in urban areas as well as rural areas. Here we will look on as the Court deals very wisely with such a scenario, in which platted land in an urban setting was conveyed and used without regard for platted boundaries, by innocent parties, resulting in a rather unique conflict between the land use pattern established by them and the lot lines referenced in their deeds. In reviewing the Court's disposition toward this dispute, we will see the Court come as close as it would ever come to adopting the concept of practical boundary location by land owners, as a legitimate factor in boundary control, making reference to "practical construction", as a point worthy of note when analyzing boundary evidence, yet stopping short of adopting the practical location doctrine, which is accepted in several other western states, as a controlling principle in the realm of boundary law. The increasing number of cases, just such as this one, resulting from failures of platting and a lack of city lot corner monumentation, called attention to the need to establish and put in place more stringent platting standards, specifically including higher standards relating to monumentation of platted lots, and thus served to motivate the legislative action which eventually produced the platting standards that are in effect today.

1892 – Calvet was the owner of 3 rectangular and contiguous platted lots in Washington, each of which fronted to the north upon a platted street, and this group of lots was bounded on the south by a platted alley. Calvet lived in a house that was situated on Lot 11, which was the eastern lot, and a fence ran directly northward to the street from the northwest corner of his house. A fence also ran south to the alley from the southwest corner of Calvet's house, and there was a well which he used, situated just west of that fence near the southwest house corner. When Calvet's lots were platted, when he acquired them, and why the house, fence and well were built in that particular location, are all unknown, but Calvet believed that the west end of his house and the accompanying fence marked the west line of Lot 11. Calvet decided to sell the area lying directly west of his home at this time, which bore a vacant house that sat upon Lots 12 & 13, and Baker became his grantee, but at an unspecified time Calvet was informed by an unspecified party, that his house and fence appeared to extend a short distance onto Lot 12. Therefore, since he did not want to move his house or his fence, accepting this information without seeking any verification of it, Calvet deeded to Baker Lot 13 and that part of Lot 12 "lying west of the west end of the residence".

1893 to 1902 – Throughout this period Calvet and Baker lived in harmony and no issues arose between them. Both parties always openly acknowledged that the west side of Calvet's house, and the fence connected to it, stood upon their mutual boundary, because that house was called out as the only physical evidence of their boundary location in Baker's deed. Baker allowed Calvet to go on using the well however, even though it was a few feet or so on Baker's side of the fence. Evidently

neither of these parties ever concerned themselves with the true location of the west line of Lot 11 and neither of them knew how much of Lot 12 had really been deeded to Baker, since Baker's deed contained no dimensions at all.

1903 – Calvet deeded the remainder of his property to Parks, describing it as "Lot 11 ... and all that part of Lot 12 which was not deeded to Baker". Henceforward, Parks occupied the area east of the fence, just as Calvet had, and no controversy arose between Parks and Baker, since Parks evidently took no interest in learning the true location of the line between Lots 11 & 12.

1904 to 1908 – Parks and Baker lived as typical neighbors for most of this period, both regarding the existing fence as their boundary, until Parks was informed by an unspecified party, apparently shortly before 15 years had elapsed since the date of Baker's acquisition, that Baker was actually occupying not only all of Lot 12, but also the west 16.5 feet of Lot 11. Whether or not any lot corner monumentation existed 16.5 feet west of the fence is unknown, but upon being presented with this information, and apparently without making any effort to verify it by means of a survey, Parks proceeded to file an action against Baker, seeking to have Baker judicially compelled to relinquish the 16.5 foot strip lying directly west of the fence to Parks.

Parks argued that no part of Lot 11 had been conveyed to Baker, so Baker had no right to the contested strip, and all of Lot 11 had been very clearly and explicitly deeded to Parks, so she was the owner of all of that lot, and neither her house nor her fence represented legitimate evidence of her west property boundary. She further argued that no extrinsic evidence could be properly introduced or utilized in any way to overcome or negate the call in her deed for all of Lot 11, so she was the sole holder of title to that lot, and as such she had the right to prevent Baker from using or entering the area in contention. She also maintained that no boundary agreement had ever been made between either Baker and Calvet or Baker and herself, asserting that even if such an agreement was verbally made, it would be invalid and useless to Baker, since it would constitute a violation of the statute of frauds. Baker made no effort to deny that the platted lot line location adopted and contended for by Parks, 16.5 feet west of the house and fence, was accurate, instead Baker argued that the physical boundary evidence presented by the Calvet house and fence was the best available evidence of the disputed boundary location, therefore it controlled over the erroneous deed references to the relevant lot numbers. Baker did not seek judicial reformation of the legal description in her deed, but she set forth the proposition that the fenced boundary constituted a legitimate and binding agreed boundary, which her deed was intended to document, therefore it could not be properly characterized as an illegitimate conveyance or a violation of the statute of frauds, and it marked the east boundary of her parcel, regardless of any platted lot line locations. The trial court discounted the boundary agreement concept, and rejected the suggestion that the reference to the residence in the 1892 deed made the Calvet house a boundary monument, treating those words instead as a mistake, and therefore found that Parks was entitled to the strip in dispute, by virtue of her deed.

As can readily be seen, there was no absolute need for the Court to resolve this conflict on the grounds that an unwritten yet binding boundary agreement had been made, since other equally relevant and potentially controlling boundary evidence existed, such as the language used in Baker's legal description, and the reference made to Baker's deed in the deed held by Parks, upon which to base this ruling. Nevertheless, cognizant that the most important actor in this drama was neither Parks nor Baker, but Calvet, as the grantor of both parties and the creator of the problem confronting the litigants, the Court saw fit to emphasize the significance of the long established harmonious land use that was made by all of the parties, who lived in a clear state of agreement regarding their mutual boundary location for many years. Adverse possession was not a factor in this case, and Baker made no claim that she had adversely used the area at issue, so the statute of limitations was not available to silence the arguments set forth by Parks. In addition, no surveys were ever introduced by either party, so there was no basis upon which the Court could make any definitive decision as to whether the lot line location alleged by Parks was accurate or not, and in the view of the Court that was simply a moot question, since there was no indication that the platted lot line was ever intended to form the east boundary of the Baker parcel. A new parcel boundary had been legally created in 1892, the Court recognized, and a second deed had then been executed by the same grantor 11 years later, which expressly called for that same parcel boundary, but neither deed contained any dimensional calls, and the references that had been made to the platted lot numbers in both deeds were obviously made in error, based on either inaccurate information or false assumptions. When this case first came to the Court in 1909, the Court determined that the trial judge had erred in his analysis and interpretation of the conflicting deed language, wrongly identifying the reference to the Calvet house as the mistake, when in fact it was the ignorance of all the parties, most importantly Calvet as the creator of the legal descriptions, regarding the true lot line location, that represented the real mistake. Thus the Court spelled out the path toward proper judicial resolution of this matter, before sending the controversy back to the trial court for further proceedings, but the trial judge evidently did not get the message, and once again held that Parks must be given control over all of Lot 11, since that whole lot was deeded to her, so the Court was required to reiterate itself in part 5 years later, when the case returned to the Court in 1914:

“... 1891 all these lots belonged to Calvet ... Baker examined these premises and was shown the property by Calvet ... at that time neither the owners nor the defendants knew where the lot lines were ... 1903 ... Parks took possession ... of all the premises east of the fence ... and made no claim to any of the premises west of that fence ... defendants contend that ... fixed visible monuments control ... the house being the controlling monument ... they contend ... that the fence was the boundary actually agreed upon at the time of the conveyance ... plaintiff ... insists that the controlling monument is not the house ... the description of the east boundary in the deed to Mrs. Baker is ambiguous ... where there is a latent ambiguity ... parol evidence may be received, not to contradict the instrument, but to explain the ambiguity ... statements of the grantors ... identify the property they intended to convey ... both parties ... agreed by parol that the boundary line between their

respective properties should be the fence ... owners of adjoining tracts of land may, by parol agreement, settle and permanently establish a boundary line between their lands which ... is not obnoxious to the statute of frauds ... these parties mutually agreed upon the line ... proof of such an agreement was erroneously excluded ... (then resuming in 1914) ... the court excluded parol evidence material to a proper interpretation of the deed ... there was and is great uncertainty and doubt as to the location of the lot and block lines ... the plaintiff took possession of the house on Lot 11 ... plaintiff made no claim to any of the premises west of the fence ... the Bakers ... took possession of such property with the knowledge and acquiescence of the Calvets ... the property intended to be described in the ambiguous deed to Mrs. Baker is thus identified ... by the practical construction given the Baker deed by the parties ... the mistaken reference to ... Lot 11 which created the ambiguity should be disregarded ... judgment for the defendants.”

In reversing the lower court and upholding Baker's position, the Court highlighted the fact that Calvet played an instrumental role in the development of this conflict, justifying the application of the principle that a grantee is entitled to rely upon any boundary location which was created and pointed out by his grantor, because a grantor's physical acts represent the highest and strongest expression of his true intent. In support of the use of extrinsic evidence for boundary clarification purposes, the Court confirmed that wherever boundary uncertainty exists parties are free to conclusively settle the unclear boundary location themselves, and in accord with the principle of physical notice, that location then becomes binding upon all of their successors as well, provided that the agreed line is distinctly marked and openly visible. The house and fence stood as an adequate boundary demarcation, which was in fact long accepted as such even by Parks, the Court observed, therefore those objects comprised the best evidence of the original boundary location, as intended by the original parties, regardless of the fact that they were either ignorant of, or mistaken about, the location of the platted line between Lots 11 & 12. In the eyes of the Court, the uncertainty under which Calvet and Baker were functioning when they adopted the fence as their boundary served to support the legitimacy of their agreement, rather than operating as grounds upon which that agreement could be dismissed. Any form of evidence, including testimony regarding the existence of a state of unwritten agreement, can support the validity of an agreed boundary, the Court indicated, if that evidence reveals the intent of the original parties to regard a well marked existing line, such as a fence in this case, as their mutual boundary, and their subsequent conduct confirms such an intention on the part of both parties. Here the Court acknowledged that any clearly apparent form of improvement, such as a house in this instance, can become controlling boundary evidence, when referenced in a deed, verifying that the Court understood that valid physical boundary evidence is not limited solely to objects which were put in place by land surveyors. Thus in both 1909 and 1914 the Court reminded both the parties and the trial judge that boundary evidence is not found only in deeds, and all ambiguous legal descriptions mandate the consideration of extrinsic evidence, to reach a proper conclusion when performing boundary analysis. Once again here as well, as we have already seen and will see again, the Court reiterated that the statute of frauds

presents no obstacle to the enactment of oral boundary agreements, because such agreements are not conveyances, they operate solely to bring definitive and valuable certainty of location to boundaries that already legally exist, but were created using ambiguous, incomplete, misleading or erroneous language.

Edwards v Fleming (1911)

As the second decade of the twentieth century commenced, the broad judicial trend toward merging and uniting legal and equitable actions, previously referenced herein, was clearly evident nationwide and was well established in Kansas as well as in most other states. One major result of this new emphasis on dealing with all issues that were presented by each case was the merging of title issues, which had historically been viewed and treated as fundamentally equitable in nature, and boundary issues, which had long been placed upon the opposite side of the judicial ledger, being regarded as strictly legal in nature, and therefore not subject to resolution based upon principles of equity. Under the expansive modern judicial umbrella of unified civil actions however, in which legal and equitable matters were adjudicated together, the old distinction between title and boundary issues was being steadily eroded, and not surprisingly so, since title and boundaries exist in a clearly interdependent relationship. By the time our present case came to the Court, half a century of statehood had passed, and during all of that period the Court had maintained the historically accepted position that adverse possession was solely a title doctrine, so it was not available for use as a means of resolving boundary disputes. The principal tool with which the Court implemented this judicial policy was known as the mistake doctrine, which dictates that any errors or mistakes made with regard to boundary locations always remain subject to correction, so land use made under one title cannot have any adverse impact upon an adjoining title, when that land use results from a boundary discrepancy of any kind. As long as this distinct partition between title and boundary issues was kept in place, adverse possession was limited to use in determining which of two or more parties held the strongest or best form of title to any whole tract of land, and no issues concerning the location of any of the boundaries of the subject property could be introduced or addressed in an adverse possession case. As will be seen however, the case we are about to review represents an important landmark in Kansas judicial history, relative to the adjudication of land rights, because here the Court signaled that the time had come to allow adverse possession to operate as more than just a title doctrine, thereby opening the door upon a new era, in which adverse possession would eventually come to be widely accepted and routinely utilized as a means of judicial boundary dispute resolution.

Prior to 1891 – At an unspecified date, the north half of the NE/4 of a certain Section 33 was patented to Fleming's father, who evidently made typical agricultural use of his land for an unspecified number of years, before conveying his

entire tract to Fleming. No details of how this tract was used during this time period are known, and there is no indication that it ever bore any buildings, but hedges were planted and fences were built upon it, and the land was presumably cultivated on a regular basis by various members of the Fleming family.

1891 – Fleming conveyed a portion of his tract to one of his brothers. The conveyed area was fully enclosed by hedges and a fence, except on the north, where it fronted upon a road which ran along the north line of this section. The legal description used by Fleming defined this parcel as a rectangle, 60 rods long on the north and south sides and 26 rods long on the east and west sides, the northeast corner of which was 20 rods west of the northeast section corner. This legal description made reference to the hedge which ran along the south side of this parcel, and it stated that the parcel contained "10 acres more or less", but it did not make reference to the fence and the hedge which respectively ran along the east and west sides of the property. There is no indication that any survey work was done at this time, or that any of the corners of this parcel were ever monumented by any surveyor, so how the dimensions appearing in this description were derived is unknown.

1892 to 1907 – The parcel created in 1891 was used in an unspecified manner by Fleming's brother throughout this period, presumably as cropland. Fleming's brother simply made use of the entire area outlined by the road, the fence and the hedges, apparently without ever taking any steps to verify the accuracy of the dimensions with which his parcel had been described. Fleming continued to own the surrounding land, so presumably he visited his brother's parcel from time to time, and he may have even worked on that land as well, while assisting his brother with farming activities, but he never questioned or challenged his brother's ownership of the entire enclosed area.

1908 – Fleming's brother conveyed his parcel to Edwards, using the same legal description by which he had acquired it, but Fleming had apparently grown suspicious that more than 10 acres were really enclosed within that parcel, so he asked the county surveyor to survey it. The surveyor did not regard the fence and the hedges as boundary evidence, and relied solely upon the numerical data presented in the legal description to locate the parcel boundaries, so he prepared a drawing for Fleming which showed that the fences and hedges were mostly outside the described boundaries of the parcel, and he informed Fleming that the enclosed area contained 13.5 acres. No details pertaining to the survey are known, but it appears that the northeast corner of the section, which had been utilized as the point of commencement when the Edwards parcel was created, still existed and was found at this time, and measurements from that point were used to locate the parcel boundaries.

1909 – Fleming proposed to move the fence and the hedges to the parcel boundaries

that had been indicated by the county surveyor, which would reduce the Edwards parcel to 9.75 acres in size, but Edwards objected, so he proceeded to file an action against Fleming, seeking to quiet his title to the entire enclosed area, and thereby prevent Fleming from altering the established land use pattern by relocating the fence and hedges.

Edwards argued that the entire enclosed area had been conveyed to him, by means of his deed, regardless of the dimensional and acreage discrepancies which had been revealed by the 1908 survey. Edwards further argued that the survey was improperly done and could not control either the location or the physical extent of the land which had been conveyed to him. In addition, Edwards maintained that even if the survey had correctly located the boundaries of the parcel defined by his deed, neither his legal description nor the survey could control the physical extent of his title, because the entire enclosed area had been adversely acquired by his predecessor, and he had acquired that whole adversely held area, which was defined by the existing road, fence and hedges. Fleming argued that the fence and the hedges were never intended to represent boundaries, and the Edwards parcel was limited to the area which was numerically outlined in the deed held by Edwards. Fleming further argued that the 1908 survey was completely accurate and correct, and the survey must therefore be deemed to conclusively control the boundaries of the Edwards parcel. Fleming did not specifically contend that the land use made by his brother was not adverse to him, but he maintained that adverse possession can have no effect or impact upon boundaries, because no use of land which is based upon a mistaken boundary location can be regarded as adverse, regardless of who used the land or how long it may have been mistakenly used, so the title held by Edwards could not extend beyond the area described in his deed. The trial court accepted the proposition set forth by Edwards that adverse possession was applicable to this scenario and quieted title to the entire 13.5 acre enclosed area in him on that basis.

As most experienced land surveyors will recognize, this controversy could have been adjudicated on a variety of different grounds, utilizing only legal principles that are relevant to the resolution of boundary issues. The Court could have held that the legal description of the Edwards parcel controlled, and based the outcome of this case on the principle of monument control, due to the presence of the call for the hedge in both the 1891 and 1908 deeds. Alternatively, the Court could have held that the survey done for Fleming controlled, on the grounds that Edwards had filed no appeal of that survey, and in fact there was no evidence that the work of the county surveyor contained any errors of a technical nature. Either of those alternatives could have been used to resolve this matter as a boundary dispute, within the realm of boundary law, and without regard for title, but the Court bypassed each of those options, and elected instead to dispose of this case by applying the equitable principles that control the resolution of title conflicts, specifically acquiescence and estoppel, which are among the implicit components of adverse possession. The Court clearly realized that the parcel description created in 1891 was very obviously intended to identify and encompass the enclosure, which already existed at that time, and the subsequent conduct of the Fleming brothers in their use of the land operated to validate that supposition, yet the legal description at issue was weak, because it contained only one call to a physical object, the south hedge. The Court also observed that the surveyor had ignored that single bounding call, and had independently placed a new boundary upon the

ground, in a location where no boundary had ever physically existed, through the use of his own measurements along with dimensions of record, and the Court was not prepared to support that decision by allowing the boundary location so derived to stand. Since the statutory period had fully elapsed before any dispute over the boundaries in question erupted, adverse possession became a very inviting alternative in the eyes of the Court, as it offered an opportunity to simply disregard both the flawed legal description and the numerically based survey, thereby depriving them of any legally controlling force. Adverse possession represents nothing more than the codification into statutory law of the basic equitable premise that those who commit unjustifiable delay, by leaving problematic conditions long unaddressed, may experience the foreclosure of land rights, which they may once have been able to recover and retain, the Court well knew. Thus the circumstances presented here proved to be compelling enough to induce the Court to take a new perspective on adverse possession, allowing it to expand beyond the realm of title law, in order to leverage its conclusive power as a force in judicial boundary determination:

“plaintiff and his immediate grantors had ... adverse possession ... for more than 15 years ... defendants never claimed to own any of the land within the fences ... defendants insist that the possession ... was through a misapprehension of the true boundary lines and that the possession was therefore not adverse ... the character of the possession depends upon the intent with which it was taken and held ... under a mistake ... there is no intention on the part of the occupant to exercise ... dominion beyond the true boundary line ... the real test ... is the intention of the party holding beyond the true line ... it is not merely the existence of a mistake ... that fixes the character of the entry ... one may acquire title by adverse possession by claiming and occupying up to a fence ... the title may be acquired by adverse possession although by mistake ... if possession was held ... and the other party acquiesced ... if a fence is held as the true division line ... possession is adverse ... the deeds ... describe the land as bounded on the south by a hedge ... there is no evidence that the hedge fence on the south is not the true boundary ... the defendants ... acquiesced in that being the true boundary for a period long enough to estop them ... the boundary so agreed upon will be mutually adverse ... the original proprietor ... did not intend the fence as a boundary ... but the defendants ... agreed with the adjoining land owner that this should be the boundary ... their acquiescence continued beyond the statutory period and ... upon every principle of justice and equity, should estop them ... the survey, however valid, cannot defeat the action ... title to real estate is not put in issue ... by the county surveyor ... a valid statutory survey ... cannot change the title to the land ... the only effect of the survey is to determine the quantity of land which the defendants deprived themselves of.”

On this occasion the Court took a major step toward enabling adverse possession

to serve as a form of judicial boundary control, reinforcing the premise first referenced by the Court in the 1887 Sheldon case, as we have already seen, that a boundary agreement is not equivalent to a mere boundary mistake, because the presence of agreement indicates an intention to rely upon the agreed location, which makes all subsequent land use up to such a line adverse, in the view of the Court. Interestingly, among the many cases from other states that were cited by the Court for the principle that adverse possession can control boundaries, was the 1888 case of *Tex v Pflug*, in which the Supreme Court of Nebraska first adopted the position that adverse possession can effectively negate or nullify the controlling force of PLSS boundaries. As we will see, the Court would go on utilizing the mistake doctrine to prevent most claims of adverse possession in the boundary context from succeeding, but the Court would also become increasingly open to the suggestion that a state of boundary agreement existed in such cases, whenever circumstances sufficient to motivate the Court to set the mistake doctrine aside should arise. Good faith belief in the validity of a highly visible boundary, such as the fence and hedges relied upon by both Edwards, as an innocent grantee, and Fleming's brother as his grantor, was the principal factor in the outcome of this case, and as we will eventually see, that vital judicial concept was destined to achieve legislative recognition in Kansas as well, half a century in the future. In confirming the triumph of Edwards, the Court exercised the principle that the form of intent which controls adverse possession is that which appears from the actual use of land, rather than the presumptive intent of every land owner to assert title only to the area described in his deed. The barrier preventing adverse possession from operating as a de facto boundary adjustment device was thus fractured, and from this point onward the use of adverse possession in the boundary context accelerated in Kansas, as both attorneys and land owners came to realize that it could be used to acquire title to slivers and other fragments of adjoining properties, rather than being limited to use in securing title to existing tracts. Notably, here the Court also reinforced the linkage between acquiescence and adverse possession in Kansas, by approving the concept that acquiescence can represent definitive evidence of an undocumented boundary agreement, thereby enabling all land use made with reference to the acquiesced boundary to qualify as legitimately adverse land use. In conclusion, the Court also reiterated the important principle that no resurvey, however technically superb it may be, can overcome or undo adverse possession, so surveys of adversely possessed land hold no controlling value, and merely serve to quantify the amount of acreage that has been lost by the owner of record.

The 1910s - Clarification of Riparian Title & Boundaries

During this decade, the Court rendered several decisions further clarifying the conditions under which adverse possession can operate, most of which focused upon the determination of who held the strongest title to a full existing tract, but some of which involved boundary issues. Many of the Court's decisions from this period, during which land rights issues came to the Court with high frequency, continued to develop the judicial perspective on the relationship between grantors and grantees, as the Court further defined the extent to which equitable factors, related to title and the ownership of land, can impact and mitigate the force and effect of codified law, such as the statute of frauds.

Surveys were central to an increasing number of rulings issued by the Court during this period, showing that resurveys were being done at a rapid rate, as the statutory resurvey process came to be widely understood and utilized, by both county surveyors and land owners. Most cases from this time period involving surveys did not require the Court to examine any survey details however, since competing surveys were only rarely present, typically the work of county surveyors was respected by land owners, and the party opposing the survey most often made no effort to challenge the methodology or correctness of the survey, attempting instead to combat the survey by attacking its validity on other grounds. Most notably however, this period saw a sharp increase in the number of cases involving riparian issues, as a result of legislation which had brought about an era of heightened interest in riparian land. Fertile and useful unpatented land was becoming quite scarce in Kansas by this time, thus incoming settlers were compelled to try to find small tracts of land lying between existing farms, which had been overlooked by previous generations, upon which to plant themselves. An inviting opportunity to do so arrived in 1907, when the Kansas Legislature enacted laws which were intended to facilitate the sale of riparian land that had become permanently exposed by the ongoing substantial diminution of Kansas rivers. Leveraging the Court's strong support for the concept of navigability, which placed title to hundreds of miles of dry riverbed in the hands of the state, these new laws were targeted at making it easy for Kansas to dispose of such land, thus providing a major source of income for the state, as well as an opportunity for newcomers seeking unoccupied land. This plan worked well for the most part, and surveys were highly instrumental to its implementation, yet as we will see, the Court was soon required to put certain restrictions in place, dramatically limiting this program, in order to protect the existing land rights interests of prior patentees and their successors.

As we have already seen, adverse possession is not centered upon the acts of any certain individual, adverse possession is focused primarily upon the use of land, by any party or parties who are not authorized to make use of that land, along with the negligence of property owners who allow their land to go unattended, which represents a corroborating factor. Therefore, adverse possession can be completed by an individual, or a group of people, such as a corporation, or a succession of people or groups, all utilizing the same real property one after another. This concept is known as privity, meaning that one adverse occupant can effectively step into the shoes of a prior adverse party, for purposes of adverse possession, just as every grantee takes full control over all land rights that are passed to him by his grantor, as long as the unauthorized land use continues, intact and unbroken by any intervention on the part of the record owner or someone acting on his behalf. The principle of privity has always been tacitly applied in Kansas, but it was not formally adopted by the Court until the case of *Viking Refrigerator & Manufacturing Company v Crawford* (1911). A pair of presumably typical platted lots in Kansas City, which were evidently vacant, were acquired by the Crawford family in 1861. The Crawfords evidently never made any use of these lots however, and they apparently lived elsewhere, so the lots sat vacant and idle for over 20 years. During the 1880s, a brick plant was constructed on the adjoining property, and these 2 lots were either intentionally or mistakenly enclosed along with that property, thus henceforward they were used as part of the brick storage area. The adjoining industrial tract was conveyed numerous times over the ensuing years, and each successive owner of that tract perpetuated the illicit or accidental use of the Crawford lots, including Viking, which acquired the industrial tract in

1900. Eventually, the Crawfords discovered that their lots were in use, so Viking was forced to file an action against the Crawfords to quiet title to the 2 lots. The trial court quieted title to the contested lots in Viking, but on appeal the Crawfords asserted that each time the industrial tract was conveyed from one owner to another, the adverse possession was broken and terminated, so they still owned the lots, because no single party had ever used them for a full 15 years. The Court upheld the lower court decision awarding the lots to Viking however, informing the Crawfords that adverse possession is not halted by a typical transfer of land, since privity of estate exists between the grantor and the grantee of the adversely held area. If the grantee accepts the entire area conveyed, and continues to utilize and regard the adverse area as part of his tract, just as did his grantor, the statutory period continues to run, because in such event the land owner of record has done nothing to interrupt or disrupt the ongoing adverse use, so the conditions on the ground continue to be adverse to the title of record. In addition, the fact that the adversely acquired area is not mentioned in a deed passing between one adverse occupant and a subsequent adverse claimant does not prevent the adversely acquired land from passing by virtue of that deed, the Court confirmed, because the requirement for all conveyed land to be properly described, found in the statute of frauds, has no application to land acquired through adverse possession.

Just one month later, the relevance of the statute of frauds to a transaction involving real property was once again a factor under consideration by the Court, in *Keepers v Yocum* (1911). Keepers was evidently a Missouri resident, who was the holder of a contract for deed pertaining to a certain tract in Vernon County, Missouri, while Yocum was evidently a Kansas resident, and the holder of an unspecified amount of land lying in an unspecified part of Kansas. Early in 1908, Keepers and Yocum agreed to a land exchange, under which Keepers was to get one particular Kansas tract from Yocum, and Yocum was to get the Vernon County tract. This agreement was memorialized in writing, but it was documented only by means of a short note, in which the tract to be acquired by Yocum was described only as "114 acres in Vernon County, Missouri". The transaction was then carried out by the parties, Keepers was fully satisfied with the Kansas tract thus obtained by him, and Yocum took possession of the Missouri tract, which was evidently comprised of cropland. Over the next several months, Yocum put the Missouri tract to use, cultivating that land and harvesting a crop from it, although it had not yet been deeded to him. When Keepers later offered to complete the deal, by legally assigning his interest in the Missouri tract to Yocum and arranging for that tract to be deeded to Yocum, per their agreement, Yocum asked for an abstract of title, which was then provided to him. In reviewing the title, Yocum learned that some liens upon the subject property existed, and he also discovered, presumably by means of a survey, that the subject property was about 2.5 acres short of being a full 114 acres, so he informed Keepers that he no longer wanted to complete the land exchange, forcing Keepers to file an action against him, seeking to have Yocum judicially compelled to complete their deal, by accepting the Missouri tract. The trial court ruled in favor of Keepers, ordering Yocum to accept the Missouri tract, on the basis that the conveyance agreement was sufficiently documented, and did not violate the statute of frauds, so it was legally binding. Yocum protested on appeal that the written conveyance contract was in violation of the statute of frauds, because it contained an incomplete, inaccurate and therefore inadequate legal description of the tract that was to be deeded to him, so he could not be bound by it, but the Court disagreed, and upheld the

lower court decision against him. Even the extremely minimal legal description which appeared in the disputed contract was legally sufficient to satisfy the statute of frauds, the Court found, because there was no genuine dispute over the identity of the particular tract at issue. Since Keepers had no other land in Vernon County, and since Yocum had correctly identified the Keepers tract, and had taken physical possession of it and made actual use of it, the Court observed, Yocum could not use the flawed legal description as a means of escaping his commitment to complete the exchange of properties, as he had contractually agreed to do. A grantee, the Court thus decreed, upon taking physical possession of land, relinquishes his right to subsequently contend that it was so poorly described that he was unable to identify it, because the conduct of the grantee in utilizing the land operates to "render certain what might otherwise be deemed uncertain".

The decision of the Court in *Cummins v Riordan* (1911) another case centered upon description issues, which came to the Court just a month after our prior case, is likely to surprise those land surveyors who view PLSS legal descriptions as being fundamentally reliable. Cummins was the owner of the north half of the NE/4 of a presumably typical Section 25, which apparently constituted the Cummins family farm, but no other info pertaining to his ownership or use of that property is known. Cummins was apparently a widower, who had 3 children, consisting of 2 sons and 1 married daughter, and he composed a will, the content of which was revealed to his 3 children, who were all apparently adults, after his death at an unspecified date. His will contained just 2 legal descriptions however, each of them being addressed to 1 of his 2 sons. Cummins left "the north half of the NE/4 of the NE/4 of Section 25 ... 40 acres more or less" to one of his sons and he left "the south half of the NE/4 of the NE/4 of Section 25 ... 40 acres more or less" to his other son, but none of his land was bequeathed to Riordan, who was his married daughter. Riordan noticed however, that her late father had never expressly devised the NW/4 of the NE/4 to anyone, so she asserted that he must have intended that unenumerated quarter quarter to pass to her, because she was his only remaining heir. Her brothers disagreed however, and they sought to cut her out of any share in their late father's estate, by filing an action against her, in which they maintained that the entire nominally 80 acre tract had been split only between the 2 of them by their late father. The trial court attempted to come to Riordan's rescue, holding that the acreage figures in these 2 descriptions must be disregarded, because the clear and complete PLSS legal descriptions necessarily controlled, leaving each brother with only 20 acres more or less. Riordan's victory was not destined to stand however, as the Court reversed that lower court judgment and stripped her of the quarter quarter which she had thereby obtained. The acreage figures did in fact represent the controlling element of these legal descriptions, the Court determined, applying the rule that a grantor must be presumed to have intended to dispose of all of his land, in the absence of a clear statement by him that some specific portion of his land was excepted, reserved or otherwise retained. In so ruling, the Court also reiterated that parol evidence, such as testimony, is always available when needed for description clarification purposes, while reminding Riordan that acreage can become the controlling factor in a legal description, "where the intention is clearly expressed that a specified quantity of land is to be conveyed". Thus on this occasion the Court decreed that even a clear and complete PLSS legal description can in certain instances be regarded as mere surplusage and discarded, if the relevant document contains other descriptive information, such as the acreage figures here, which adequately communicate a clear

intention to convey the entirety of the subject property.

The Court's inclination to set the parameters of adverse possession very broadly, and to leverage the conclusive legal effect of that doctrine to the maximum extent in the context of title resolution, was quite evident in the case of *Freemon v Funk* (1911). Moger was an elderly widower, who owned a tract of unspecified size, shape and location in Mitchell County, upon which he resided, and he apparently had just one child, Funk, who was his married daughter. In 1888, Moger deeded his tract to Funk, but he verbally informed her that he wanted his land to be deeded back to him someday. Over the next several years, Moger's mental capacity deteriorated and his behavior became highly erratic, yet he continued to live upon his tract, clearly through the mercy and charity of his daughter. In 1895, Moger demanded that Funk re-convey all of his former real estate to him, but due to his very weak and unstable mental condition, she decided that it would be unwise to comply with his wishes. In order to pacify and silence her father however, she took a blank warranty deed form and filled in out, so that it had the overall appearance of a deed, but in fact the language she used in the document granted her father only a lease, which enabled him to go on using his former tract indefinitely, without ever making any payments to her. This ruse put in place by Funk evidently worked, her father went on living on the subject property, in the mistaken belief that fee title to that tract had been deeded back to him, because he was incapable of understanding the deed language, so he did not realize that he held only a lease. In 1905, Moger was declared to be legally insane, and Freemon was appointed to serve as his legal guardian. When Freemon discovered the lease document, and ascertained what Funk had done, he filed an action against her, on behalf of her incapacitated father, alleging that he had acquired his tract back from her through adverse possession. The trial court found that Moger had occupied his tract adversely to his daughter, and the Court upheld that ruling, quieting the fee title to Moger's tract in him, effectively nullifying his 1888 deed to his daughter. Funk protested that all of Moger's use of the disputed tract was clearly made with her permission, and she pointed out that she was both his daughter and his grantee, but to no avail, as the Court took the view that neither the parent and child relationship, nor the grantor and grantee relationship, nor the unsound mental state of Moger, could prevent him from qualifying as an adverse possessor. "Adverse possession ... constitutes a weapon offensive as well as defensive ... a mere trespasser ... becomes the owner of the property by virtue of the statute of limitations" the Court declared, inviting the use of adverse possession by plaintiffs, for the purpose of silencing title conflicts. Moger's insanity was actually beneficial to him, in the eyes of the Court, because it left him genuinely unaware that his use of the tract at issue was really all permissive in nature, so in fact he had occupied the contested land with the full intention of holding it as a legitimate land owner at all times, regardless of the existence of the lease. "Possession for the statutory period not only bars the remedy of the holder of the paper title, but extinguishes his title, and vests title in fee in the adverse occupant ... title acquired by adverse possession ... is as perfect a title as one by deed" the Court concluded, thereby establishing a position which the Court would maintain with great consistency henceforward.

The power of the equitable principle of estoppel was on full display in the case of *Westerman v Corder* (1912) which has often been cited in subsequent cases for the proposition that grantors have a solemn obligation to provide only accurate information to their grantees, and to carefully avoid providing any misleading information, either in

written form or verbally. Corder held an interest in a tract of unspecified size, shape and location, situated in Thomas County, but how or when he had acquired that interest is unknown, and nothing is known about the physical character of this tract or how it was used. Corder realized that he was not the sole owner of the tract in question, he knew that Tilden also held an ownership interest in it, but he did not know that the Kansas Town & Land Company (KTL) held a legal interest in it as well. At an unspecified date, Westerman offered to buy this tract from Corder, and a conveyance agreement was reached, which resulted in a quitclaim deed from Corder to Westerman, conveying the full interest of Corder in this tract to Westerman. Corder told Westerman that Tilden also held an interest in the conveyed land, so Westerman then went to Tilden and acquired his interest as well, at which point all of these parties believed that Westerman had become the sole owner of the subject property. By unknown means however, Corder later learned that KTL still held an ownership interest in the Westerman tract, and upon making that discovery Corder decided to acquire the KTL interest himself, rather than telling Westerman what he had learned. When Westerman found out that Corder was claiming that he held a partial ownership interest in the same land that Corder had previously deeded to him, Westerman filed a quiet title action against Corder. The trial court ruled in Westerman's favor, quieting his title as requested and leaving Corder with nothing, but on appeal Corder protested that since he had given Westerman only a quitclaim deed, Westerman had acquired only the interest held by Corder at the time of that deed, so Westerman had no valid claim to the interest subsequently acquired by Corder from KTL. The Court recognized that the position set forth by Corder was legally correct, yet upheld the decision against him, invoking the principle of estoppel in so doing. Because Corder had provided Westerman with inaccurate information, by telling him that Tilden was the only other holder of any interest in the land at issue, thereby misleading Westerman into thinking that he had fully acquired the subject property, Corder was estopped from ever denying that Westerman held sole ownership of that property, the Court decided. Corder was therefore incapable of legitimately acquiring any subsequent interest in that property, so any rights he acquired from KTL, the Court informed him, had automatically passed to Westerman, despite the fact that Corder had given Westerman only a quitclaim deed, to which the principle of after-acquired title is typically inapplicable. In addition, it made no difference that Corder knew nothing about the KTL interest at the time of his conveyance to Westerman, the Court stipulated, because Corder had nonetheless given his grantee misleading information, and he was therefore subject to estoppel, which negated his legal right to a share of the contested land. Thus the Court clarified that equitable principles, such as estoppel, can control land rights, and that any statement made by a grantor to his grantee, which amounts to a "positive assertion" operates to relieve the grantee of any burden of inquiry, because all statements made by a grantor about his land are presumed to be reliable, thereby strongly upholding the right of reliance which is vested in all grantees.

The relevance of land use made in reliance upon a survey, to the determination of the controlling force and effect of that survey, has perhaps never been more apparent than it was in Appeal of Martin (1912). A certain township in Harper County was subdivided and platted by the GLO in 1871. Extensive obliteration of original monumentation evidently took place in this township over the ensuing years however, so the GLO revisited and re-monumented this area in 1884. Settlement of the subject area evidently commenced

around that time, and naturally everyone adopted the monuments set in 1884, resulting in the establishment of numerous visible boundaries, which were well marked by improvements of various kinds. In 1894 however, for unknown reasons, the county surveyor conducted a resurvey of an unspecified portion of this township, during which he rejected many of the monuments set 10 years before. There was no indication that the 1894 resurvey was ever put to any actual use by anyone, but it was never the subject of any appeal either, and some of the monuments set in various unspecified locations at that time were apparently just left in place, to become the seeds of future controversy. At an unspecified date, presumably circa 1910, another resurvey was done by another county surveyor, also for unknown reasons, in which the 1894 monuments were deemed to control, but an appeal of that resurvey was promptly filed by Martin and some of his neighbors, since it evidently threatened to substantially disrupt their long established boundaries. The trial court held that the most recent resurvey was conclusive, dismissing Martin's appeal, but the Court reversed that decision, although only by a margin of 4 to 3. The rule that an unappealed statutory resurvey controls is not absolute, a majority of the Court decided, even an unappealed resurvey can be overturned, if it was never utilized. Emphasizing that "trees, hedgerows, vestiges of fences, old roads, buildings and other objects" had been positioned in reliance upon the 1884 monumentation, the majority dismissed the subsequent resurveys as "independent" in character and therefore fundamentally worthless, since they represented a plain abandonment of the original survey. A county surveyor cannot evade his duty to seek out original boundary evidence of all forms, the majority thus mandated, upon the mere hypothesis that whenever resurveys of the subject area have been done by others the current surveyor is free to either adopt or reject any of the prior survey work based upon his own opinion or preference. Each subsequent surveyor bears a duty, the majority stipulated on this occasion, to find and adhere to the best remaining evidence of the controlling original survey, which in this instance was evidently quite well perpetuated, by the many physical objects that were built when the original corners were still visible. Thus here the Court, by a narrow majority, carved out an exception to the rule that every statutory resurvey which goes unappealed becomes conclusive, while reiterating the venerable principle that "corners established by the government survey must stand ... at the identical spot where the original corner was". Similarly and not long thereafter, in *McKinder v Paulstring* (1912) an apparently comparable case, which was disposed of by the Court in just one paragraph, devoid of detail, the Court again struck down an illegitimate resurvey, because the boundaries proposed by the surveyor were "incongruous with the old improvements and long recognized landmarks".

At this time, a rush to acquire the land which had been abandoned through the dramatic diminution in the flow of the largest Kansas rivers was on, to the immense financial benefit of the Kansas citizenry, and the Court was highly inclined to support the enrichment of the state school fund which resulted from the sale of such formerly submerged lands. In *Hurst v Dana* (1912) the Court elected to support the validity of the 1907 legislation which had set the stage for the disposal of all vacated riverbeds in Kansas to private parties, who were typically newcomers, seeking a foothold in between the lands of prior settlers, often leading to friction. *Hurst* was evidently the owner of a riparian tract of unspecified size, shape and location in Reno County, which was bounded in part by the Arkansas River. *Dana* was evidently an incoming settler who purchased an area of

unspecified size, lying within a dry portion of that riverbed, which had been identified as an island, from Kansas at an unspecified date. When Dana arrived and took up residence near the Hurst farm or ranch, Hurst objected, but Dana refused to move on, so Hurst filed an action alleging that the area occupied by Dana actually belonged to Hurst, asserting that Dana's deed from Kansas was worthless and he had acquired nothing. At the core of this conflict was the very basic and obvious question of whether Kansas ever owned the bed of the Arkansas River or not. That river traversed roughly 600 miles of Kansas, and most if not all of it had been meandered by the GLO, at a time prior to statehood when it was flowing strongly, to a great width in many places. Since the river had virtually vanished however, the trial court found that it could not be properly characterized as a navigable river, and consequently quieted the title of Hurst to the contested area. The Court reversed that decision however, consistent with the position which it had first adopted in the 1882 Wood case, previously reviewed herein, that every meandered stream is navigable by definition, and is therefore state property until disposed. The fact that the river had gone dry was simply irrelevant and had no impact upon the title held by Kansas, extending to the full width of the meandered bed, the Court indicated. The entire portion of the dry riverbed occupied by Dana qualified as an island, in the view of the Court, which flatly declined to regard the exposed land as either accretion or reliction, since doing so would have had the effect of handing victory to Hurst, and such a decision would have called title to countless other riverbed parcels sold by Kansas into question. The Court was correct of course, in concluding that any river which was navigable at the moment of statehood always remained legally navigable for purposes of title thereafter, yet as 2 dissenting Justices wisely pointed out on this occasion, there was in fact no evidence at all that the Arkansas River had ever been truly navigable, even in any particular spot, much less throughout its entire length. Here the Court noted that there had been use of the river by early fur traders, as support for a hypothesis of navigability based on historic usage for commerce, but that test was destined to be discredited in the decades ahead, and we will watch as the Court gradually recognizes that genuine navigability requires far stronger support than mere use by a handful of canoes.

The case of *Wallace v Cable* (1912) provides an excellent example of the Court's strong protection of plats, and the right of those who acquire platted lots to rely fully upon all of the benefits which the plat implicitly bestows upon them. A portion of Kansas City, then known as Wyandotte City, was subdivided by survey, creating numerous typical blocks, which were platted in 1859, and a certain block contained 54 lots, which were divided by an alley of unspecified width running east and west for the full length of the block. This plat was evidently not fully or properly approved or recorded, but reference was made to it when this particular block was first sold in 1864 by the owner of the platted area. This block apparently remained undeveloped for several years, but 4 lots lying north of the alley were acquired by Wallace in 1873, although what use he made of them is unknown. These lots were described by metes and bounds in the deed held by Wallace, but his deed also made reference to the lots as being "represented on a plan of said city", without stating either the name or the specific recorded location of the plat however. At an unspecified subsequent time, some of the lots lying south of the alley, directly across the alley from the Wallace lots, were acquired by Cable, and at an unspecified date Cable enclosed the full width of the alley along with his lots. The alley was never used by anyone for purposes of travel, and in 1909 it was formally vacated, by which time Cable had

maintained control over his portion of the alley for over 15 years. Wallace asserted that he owned the north half of the vacated alley, based upon the vacation, but Cable insisted that the alley was never dedicated, therefore it was never public, so the vacation was meaningless, and he had acquired the enclosed portion of the alley through adverse possession. The trial court agreed with Cable that the alley had never been properly or legally dedicated, so the alley had remained in the ownership of the party who platted the block, and Cable had acquired the enclosed part of it by means of adverse possession against that party. The Court reversed that decision however, holding that the alley had indeed been dedicated, so it was public in character at all times until 1909, at which point the vacation made the centerline of the alley the boundary between the Wallace and Cable properties, thus there had been no adverse possession and Cable had acquired no rights to the north half of the alley. Although the plat in question was improperly created and filed, the Court observed, the alley had been adequately dedicated, by virtue of the use of that plat for conveyance purposes, therefore the fact that the contested strip was never put to use as an alley was of no consequence, the alley legally existed nonetheless, subject to public use, until it was vacated. Any sale of lots with reference to a plat operates as a complete and conclusive dedication of any areas shown on that plat as being public in nature, the Court reiterated here, so Wallace had acquired a right of reversion covering his portion of the alley, along with his lots. The party who platted the block, the Court went on to explain, retained no rights whatsoever to the alley, Wallace was the holder of the reversionary rights to the portion of the alley abutting his lots, despite the fact that the north line of the alley was described in his deed as being his south boundary, thus upon vacation his property automatically extended to the centerline of the vacated strip. The principle of centerline reversion, which operates to augment the title of platted lot holders by expanding the boundaries of all abutting properties to encompass their respective portions of a vacated right-of-way, is one which we will see the Court implement with great consistency throughout the decades.

The case of Nelson v Oberg (1912) clearly illustrates how open the Court was at this time to the use of adverse possession for purposes of title resolution, while also demonstrating that adverse possession is possible even between the most closely related parties. Oberg's mother was a widow, who owned a presumably typical 80 acre tract, which her deceased husband had left to her. The widow evidently had just 2 children, her son Oberg who lived in Missouri, and her married daughter, Nelson, who lived on a farm adjoining the property owned by the widow. In 1891, Oberg's mother deeded the entire 80 acre tract to him, and Oberg recorded his deed, but his sister simply disregarded the deed, and continued to insist that she was legally entitled to a share of the family farm through inheritance. When the widow died in 1909 however, Oberg took sole control over the entire family farm, denying that his sister had any rights to that land, thereby forcing her to file an action against him, in which she sought to have the 1891 deed declared void. The trial court agreed with Nelson that the deed purporting to convey the whole family farm to Oberg was invalid, so he had not acquired her share of that tract by means of that deed, but went on to rule that Oberg was nonetheless the owner of the entire tract at issue, by virtue of adverse possession. In upholding that ruling, the Court explained to Nelson that all of the use of the disputed tract made by her mother after 1891 was adverse to Nelson's interest in that land, because her mother was legally functioning as an agent of her brother, in making sole use of the land comprising the Oberg estate, so her own mother had

adversely extinguished the legal interest of Nelson in the family farm. By failing to take any action to legally negate the deed which purported to cut off her interest in the subject property for over 15 years, Nelson had allowed the land rights which were due to her as a legal heir expire, the Court confirmed, so it was simply too late for her to claim any share of the family farm. Thus the Court again held that adverse possession is possible between legal cotenants, including even those who are the closest blood relatives. A very similar scenario played out differently in *Cribb v Hudson* (1916) however, due to the presence of an important factor, which showed, in the eyes of the Court, that the adverse claimant never held the relevant land in a legally exclusive manner. Edwards, who was a resident of Illinois and the owner of 200 acres in Kansas, died in 1885, leaving a widow, 5 children and 3 grandchildren. The widow then conveyed the Kansas tract to Hudson, who proceeded to take possession of the land, making sole use of it for the next 28 years, without any disturbance or intrusion by any of the heirs of Edwards. In 1900 however, Hudson offered to buy out the interests of the heirs in the subject property, but no deeds conveying any of their interests to him were ever executed. When Cribb and the other heirs eventually filed an action against Hudson, seeking their respective shares of the Edwards tract, Hudson claimed that he had extinguished their interests through adverse possession, but the trial court ruled against him. The Court upheld that lower court decision, on the grounds that Hudson and all of the heirs of Edwards were legal cotenants of the tract in contention at all times, and Hudson was unable to prove that his sole use of the contested land was truly adverse to the ongoing legal interests of the Edwards heirs, because in 1900 he had acted in a manner which signified his recognition of their title.

Further clarification of the Court's view of the role of resurveys was forthcoming at this juncture, in 3 cases decided by the Court on the same day, the first of which was *Nelson v Harris* (1912). Nelson was the owner of the west half of a certain Section 13 in Trego County, along with the NE/4 of the adjoining Section 14, while Harris evidently owned the land in Sections 11 & 12 directly to the north. How and when these men had acquired their land is unknown, but their ownership of their respective properties, presumably held under typical PLSS descriptions, was uncontested. When the original survey of this township was done is unknown, but resurveys of Sections 11, 14 & 23 were done between 1879 and 1885, during which numerous original monuments were found marking those sections, and those which were not found were reset by the county surveyor at that time. The monuments set during these early resurveys were accepted and utilized by all of the relevant land owners for purposes of boundary control, and at an unspecified date, presumably circa 1910, a subsequent county surveyor performed a resurvey of Section 13, in which he adopted the monument marking the northwest corner of that section, as it had stood since 1885. Nelson decided to appeal that resurvey however, alleging that the north line of Sections 13 & 14 was actually an unspecified distance farther to the north. The trial court rejected his position however, and the Court upheld the contested resurvey as well, expressly approving the decision of the county surveyor to honor the work of his predecessors by treating all of the corners which they had set as being permanently established. "The present survey ... ought not to be disturbed, merely because exact measurements, made according to the field notes, might vary the boundaries ... the monuments must govern, and the field notes of the government survey must be disregarded ... the parties ... have long acquiesced in the boundaries fixed by the former surveys", the Court decreed, while reiterating that such recognition of established boundaries serves as

verification that they represent genuine original boundaries. The Court distinguished the acceptance of prior survey evidence by surveyors from reliance upon private boundary agreements by surveyors however, in *Rodenbaugh v Egy* (1912). Egy was the owner of the NW/4 of a certain Section 30 in Harvey County, and in 1910 the county surveyor reset the north quarter corner of that section, acting upon a request from Egy. The surveyor also staked the east line of that quarter, while dismissing the assertions of Rodenbaugh, who evidently owned the NE/4, that the location of that line had been privately settled by means of an agreement many years before. Rodenbaugh therefore decided to appeal the survey, on the basis that the surveyor was wrong to ignore the agreed boundary line, but the trial court upheld the survey, and so did the Court. In so ruling, the Court informed Rodenbaugh that the privately agreed boundary line was not a proper subject for consideration by the county surveyor, and the presence of that line could have no impact on the validity of the resurvey. However, the survey had no influence upon title and no control over the ownership of the land, the Court reminded the litigants, so the survey had in fact resolved nothing, it had merely indicated the presence of a boundary discrepancy, and Rodenbaugh remained free to file an action against Egy, in order to quiet his title up to the agreed boundary line, should he elect to do so. Thus the Court held on this occasion that title cannot be adjudicated in the context of a survey appeal, while noting that a survey can create a cloud upon title, but it cannot conclusively resolve one. The same position was then reiterated by the Court in *Sharp v Shriver* (1912) a case centered upon a resurvey of a certain Section 6 in Marion county, which the Court disposed of in just one paragraph, stating only that the ruling in the Rodenbaugh case applied equally to that scenario.

City of Hutchinson v Danley (1913) presents a particularly unusual illustration of the potential consequences of vacation upon title in the context of boundary expansion, and stands as a strong example of the Court's emphasis upon the rights of grantees of platted lots, while also showing that the public trust doctrine had begun to play a significant role in land rights adjudication by this time. In 1872, Hutchinson platted the land in Reno County which would go on to become a city bearing his name, and on this plat there appeared a certain unsubdivided block, identified only as "Baseball Park". This block was apparently never used as intended however, so in 1888 it was vacated by the county commissioners, and the land remained undeveloped over the ensuing years, although the platted lots surrounding the park, on the opposite sides of the streets outlining the park block, were presumably all sold and occupied in the typical manner. The City of Hutchinson first took legal action seeking to obtain title to this block in federal court in 1892, but in 1895 the case was directed back to the Kansas judicial system, where it remained idle until 1907, when the action was apparently deemed to be defunct. In 1910 however, Danley stepped forward, and apparently attempted to pay taxes on the park block, alleging that he had become the owner of that area, evidently under a conveyance agreement which he had made with Hutchinson, so the action was then renewed by the city against him, on behalf of all of the platted lot owners whose properties faced the park block. The trial court ruled that Danley held no ownership interest in the park block, because Hutchinson had no interest in that block to convey to him, and the Court upheld that decision, on the grounds that Hutchinson had forsaken any and all rights that he may once have had in the subject area, when he platted his land and authorized the sale of lots in reliance upon the plat in 1872, thereby dedicating the disputed block. Under the relevant statute, pertaining to the consequences of vacation of dedicated public property, the Court noted, the rights of

reversion held by the surrounding private lot owners were neither physically nor legally limited by the streets which intervened between their platted lots and the park block. The park block had therefore reverted in part to each of the lot owners upon vacation, the Court concluded, and portions of that block had become part of each of the lots which faced the area comprising the park from across each of the 4 public streets. Even though the 4 streets themselves all remained in active use, and had not been vacated, the boundaries of each of the relevant lots now embraced a proportional segment of the former park area, the Court thus determined, through the operation of reversion. Thus the Court poignantly reiterated the principle that a dedication of any kind, once made through the use of a plat, represents a genuine conveyance made by the dedicator to the public, leaving the dedicator with no land rights in the dedicated area, because such a dedication invokes the statutory provisions which vest the reversion rights associated with the dedicated area in the platted lot owners. The ultimate fate of the park block is unknown, since there is no indication of how it was actually divided up among the various lot owners. Potentially, one of them may have simply bought out the interests of all the others and thereby acquired the entirety of that block, or perhaps Danley himself acquired all of the interests of the lot owners, and subsequently put the land to use, making the process of proportionally dividing that area unnecessary.

The consequences of acreage errors were again in focus at this time, as the Court decided 2 cases involving apparent acreage discrepancies, both of which well illustrate the heavy description burden which rests upon all grantors, the first being *Maffet v Schaar* (1913). At an unspecified date, Schaar agreed to sell a portion of his land in Kingman County, consisting of a full quarter section and part of an adjoining quarter section, through both of which a railroad right-of-way of unspecified width passed, to Maffet. By unknown means, Schaar concluded that the area to be conveyed contained about 272 acres, so his deed to Maffet stated that the conveyance included "272 acres more or less". In reliance upon this figure, Maffet paid Schaar by the acre, without verifying the accuracy of the stated acreage figure. When Maffet was later informed by a surveyor that his tract really contained only about 258 acres, Maffet filed an action against Schaar, seeking the return of his payment for the missing 14 acres. Maffet argued that he had the right to rely fully upon the acreage figure provided by Schaar, because it had served as the basis of payment for their transaction, but Schaar maintained that he had intentionally designated the acreage as being only approximate, by using the words "more or less", insisting that he had never positively guaranteed Maffet that the tract in question embraced any specific acreage. The trial court held that Schaar was liable to Maffet for his failure to deliver a full 272 acres, despite the presence of the phrase "more or less" in Maffet's deed, and therefore ordered him to return part of Maffet's money. In upholding that decision, the Court observed that it made no difference whether Schaar actually knew the true acreage of the conveyed area or not, since he had verbally told Maffet that the tract at issue contained a specific number of acres, and he had accepted payment from Maffet on the basis of that acreage, he had made the stated acreage the essence of their contract, so the "more or less" clause in the deed was inoperative and useless. The same principle which proved to be dispositive in the Maffet case was again applied by the Court just 3 months later in the highly similar case of *Disney v Lang* (1913) set in Ellis County. Disney conveyed to Lang a certain half section, describing it as "320 acres, more or less, and less the Union Pacific right-of-way", and he verbally told Lang that he thought the right-of-way contained only

about 12 acres. When Lang was subsequently informed that the railroad right-of-way was wider than the parties had supposed it to be, and it actually covered about 50 acres, Lang filed an action against Disney, but the trial court ruled against Lang, holding that he was stuck with the 38 acre shortage. The Court reversed that decision however, and ordered a new trial, to enable the lower court to rescind the deed to Lang, and require Disney to return the full purchase price to Lang, as Lang had requested. In so doing, the Court observed that Lang, just like Maffet in the prior case, was under no obligation to verify the validity of the right-of-way acreage figure which had been provided to him by means of a survey, because doing so would require unjustified "trouble and expense" on the part of a grantee, pointing out once again that such verification lies instead among the duties of a grantor.

The relevance of references to platted lands appearing in legal descriptions was the focal point of the Court in the case of *Potter v Beck* (1913). McCartney was the owner of an unspecified amount of land in a certain Section 12 in Clark County, and in 1885 he platted a portion of his land, as an addition to Ashland. This addition included an unspecified number of lots lying in the northern portion of the SW/4SE/4 of this section, and this entire quarter quarter was owned by McCartney at this time. This plat was apparently properly approved and filed for record, but no lots were evidently sold during 1885. Early in 1886, McCartney mortgaged this entire quarter quarter, and the legal description used in the mortgage document contained no reference to the platted portion of this quarter quarter. Some of these platted lots were apparently sold shortly thereafter, but many of them evidently remained unsold for several years. In 1892, the McCartney mortgage was foreclosed, and in 1893 a sheriff's deed was executed, conveying the mortgaged tract to an unspecified party and leading eventually to the acquisition of the entire foreclosed quarter quarter by Potter. Over the subsequent years, the unsold lots were foreclosed for tax delinquency at various intervals, and they were eventually conveyed to numerous parties, including Beck, although there is no indication of whether or not any of these parties ever made any use of these lots. In 1907, Some of the tax deed holders, including Beck, obtained a quitclaim deed from McCartney, in which he purported to relinquish unto them whatever remaining land rights he might have in the platted portion of the quarter quarter at issue. When Potter learned that Beck and the other tax deed holders claimed to own land lying within her quarter quarter, she filed an action against all of them, seeking to quiet her title to the entire quarter quarter. Potter argued that the platted lots specified in the tax deeds and the quitclaim deed were all meaningless, so none of those legal descriptions had any validity, thus none of the lots conveyed by means of the tax deeds and the quitclaim deed had ever been legitimately sold. Beck and her fellow defendants argued that their deeds were valid, because the platted area had not been expressly included in the 1885 mortgage executed by McCartney, so the platted area had never been mortgaged, and that area had therefore never been acquired by Potter. The trial court agreed with the position set forth by Beck, and held that Potter's acquisition did not include the platted addition, because no references to that plat appeared in any of the legal descriptions in her chain of title. The Court reversed that decision however, and quieted title in Potter to the entire area claimed by her, which included the lots claimed by the defendants. The fact that the legal description which was used in both the mortgage itself and all of the deeds descending from the mortgage foreclosure made no reference to the plat was inconsequential, the Court concluded, because platted lots come into existence

only when they are first conveyed. The lots which remained unsold when the mortgage was foreclosed were thereby effectively nullified and never came into legal existence, so the land covered by those lots remained simply part of the quarter quarter acquired by Potter, and it was thus embraced within her legal description. The tax deeds and the quitclaim deed were all worthless and conveyed nothing, the Court observed, because no such lots existed once the mortgage was foreclosed, and neither the invalid tax deeds nor the quitclaim deed could revive any of those lots simply by describing them, because by that time the land occupied by those lots was owned by Potter. Thus even though the land in contention was duly platted, and many deeds were issued referencing that plat, no land had ever changed hands by virtue of any of those deeds, except those lots sold prior to the foreclosure, demonstrating that even typical platted lot descriptions can prove to be unreliable.

As we have already seen, the Court has taken a very distinct position regarding the legal consequences of undocumented boundary agreements, which it has maintained with consistency over the decades, and the case of *Peterson v Hollis* (1913) marks another important step in the early development of that judicial position. In 1872, Peterson and Goodspeed were the owners of land lying in adjoining quarters in an unspecified but presumably typical section in Saline County. Goodspeed, who owned the SE/4, ordered a survey, during which his west line was marked, but for unknown reasons, he chose to plant a boundary hedge on a 5 foot offset to the east of the quarter line. Goodspeed then informed Peterson that if Peterson would assist him in maintaining the hedge, Goodspeed would acknowledge the hedge as being their mutual boundary. This offer was accepted by Peterson, and the hedge was treated and regarded as the boundary between these 2 properties henceforward. The Goodspeed quarter was conveyed an unspecified number of times over the next 35 years, and in each case it was described as being a full quarter, yet all of Goodspeed's successors acknowledged the hedge as being the east boundary of the Peterson tract throughout that period. In 1907 however, Peterson proposed to replace the hedge with a fence, and Hollis, who then owned the Goodspeed tract, ordered a survey, which verified that the hedge was 5 feet east of the quarter line, leading Hollis to refuse to allow Peterson to place a fence on the hedge line. Peterson then filed an action, in which he asserted that the hedge line represented a legally binding agreed boundary, but the trial court rejected that assertion, and decreed that the quarter line had always remained Peterson's east boundary. The Court reversed that ruling however, holding that although the 1872 oral boundary agreement was not legally binding, since it represented a deliberate attempt to complete an unwritten conveyance of the 5 foot strip, it was a violation of the statute of frauds, and all of the subsequent land use up to the agreed line was therefore genuinely adverse in character, so Peterson had acquired that strip through adverse possession. Thus the Court confirmed that land use made under a conveyance agreement which is invalid for any reason, triggers adverse possession, and proceeded to quiet title in Peterson to the west 5 feet of the SE/4 on that basis, demonstrating that the presence of a state of agreement is crucial to adverse possession in the boundary context, in the eyes of the Court. In so doing, the Court emphasized that a boundary agreement between 2 or more land owners generates a distinct state of mutual reliance, which is fundamentally different from a mere mistaken notion of a boundary location held by just one party, thereby justifying the intervention of adverse possession as a means of boundary relocation in such instances. Here the Court also pointed out that physical notice is the core element of adverse possession, concluding that Hollis had no right to dispute the validity of the agreed

line, because the existence of the hedge provided him with full notice of the location of his west boundary, since it was already in place and visible when he acquired his tract. Hollis had no right to challenge the presence or the legal significance of the hedge without knowing its history, the Court observed, and no right to ignore the hedge, while relying solely upon his legal description to control his west boundary. Noting in conclusion that the outcome of this controversy was controlled primarily by principles of equity, the Court once again clarified that title and boundary issues can be fully resolved together in the same litigation, while also reiterating that a survey conducted after adverse possession has been completed can have no legal force or effect.

State v Akers (1914) stands as an excellent example of a case which was of truly monumental importance during its day, but which has been rendered insignificant by subsequent events, nonetheless no history of Kansas case law would be complete without due reference to this case as a genuine judicial landmark in the arena of land rights litigation. Many companies were involved in mining sand and gravel from the beds of Kansas rivers at this time, just one of which was the Wear Sand Company, and such mining operations became a focus of controversy at this time, due to the fact that the permitting and the taxation of these extensive mining activities represented a major potential source of revenue for Kansas. In an effort to obtain judicial verification that Kansas had full jurisdiction over all such activities, and to enable that revenue stream to begin to flow, Dawson, who was the Attorney General of Kansas, filed an action against Akers, who was the State Treasurer of Kansas, seeking to compel Akers to collect permitting fees and taxes from the mining companies, based upon their use of real property owned by Kansas, consisting specifically of the beds of the major Kansas rivers. It was well known and fully agreed by all parties that the beds of all navigable watercourses within Kansas were owned in fee by Kansas, so the key point of contention in this legal battle was how to define navigability for purposes of title. As we have already observed, as early as 1882 the Court had taken an especially liberal position on the issue of navigability, which was highly favorable to the rights and interests of the general public, but highly restrictive toward the rights and interests of all holders of title to riparian properties. The Court had chosen to enforce the presence of GLO meander lines as the definitive indicator of the navigability status of any given river within Kansas, while giving little if any regard to either the historically documented use of Kansas waterways, or the present physical status of those streams, many of which had experienced a very dramatic and permanent reduction in their rate of flow, rendering them unreliable if not entirely useless for practical purposes. On this occasion the Court held that each state was free to adopt its own definition of navigability, and simply reiterated its established position that meander lines conclusively signify the presence of navigability for purposes of title in Kansas, thus affirming the fee ownership of all land lying between any GLO meander lines by the people of Kansas, and thereby facilitating complete state control over all mineral extraction conducted in any such locations. This case then proceeded on to the Supreme Court of the United States, where the decision of the Kansas High Court was deemed to be entirely justified and fully upheld, in the case of *Wear v Kansas* (1917) (245 US 154). The issue of navigability determination was destined to come under greatly elevated scrutiny during the 1920s and 1930s however, as numerous disputes over highly valuable oil and gas drilling operations sprang up. During the coming decades, the United States Supreme Court went on to issue several major decisions focused on the subject of navigability, which fully

discredited the use of meander lines as a factor in the evaluation of navigability status, and made it very clear that viability of actual use for purposes of genuinely valuable commercial travel at the time of statehood is the sole legitimate test of navigability, as it relates to land ownership. Thus the views expressed by the Court in the Akers case are now entirely obsolete, and we will look on as the Court gradually shifts toward a much less restrictive position on private riparian rights in future cases, but this case nonetheless stands as an important one in Kansas land rights history, and the judicial views stated at this time have never been officially retracted by the Court.

Understanding the nature of islands, determining what legally constitutes an island, and ascertaining the legal ramifications of physical changes to islands, were all rapidly becoming important issues in Kansas at this point in time, because the great Kansas rivers were drying up, due to intensive use of water for irrigation, thereby creating countless numbers of islands, a great many of which grew to become inhabitable land, as the flow of water across the state abated. Having established the existence of state title to vast stretches of meandered but now unsubmerged land, the Court quite logically next turned its attention to the corresponding riparian issues presented by the formation and expansion of islands within meandered rivers. Just a month after announcing its decision in the Akers case, just previously reviewed, and acting in recognition of the urgent need for clarification of island issues, to protect the interests of both Kansas itself and the many new grantees of the state, the Court took up the case of *Winters v Myers* (1914). Winters was a typical incoming settler, who took up residence on an area consisting of about 56 acres, lying within the meandered bed of the Arkansas River in Reno County, under the recently enacted school land disposal statutes, authorizing Kansas to sell off navigable riverbed lands, on the theory that such lands constituted islands owned by the state. Myers was the owner of the riparian tract directly adjoining the land occupied by Winters, and the Myers property was comprised of 4 presumably typical riparian lots which had been platted by the GLO, so Myers insisted that the area Winters had settled upon was never an island, maintaining instead that it represented accretion to the Myers tract. Winters was thus required to file an action against Myers, in which Winters conceded that the land area occupied by him was physically attached to the land of Myers, while postulating that it did not lose its legal character as an island as a result of that physical connection. Following a 1913 statutory amendment, which dictated that any island which had been attached to the shore of a navigable river for a period of 20 years thereby became part of the property of the riparian owner to whose land it was connected, the trial court ruled in favor of Myers, holding that Winters had no right to settle in the location he had selected, because he had planted himself on land that was owned by Myers. The Court reversed that ruling however, stipulating that any unit of land which originated and developed as an island always remains an island, and remains a distinct land unit, for purposes of title, even after it has fully and permanently merged with the shore. In addition, the Court went on to strike down the 1913 statutory amendment, deeming it to be unconstitutional, on the grounds that it represented an illegitimate legislative attempt to forsake and relinquish valid subsisting land rights held by the people of Kansas. All islands arising from navigable beds are property of Kansas, until any such land unit is disposed of by the state, in return for valuable compensation provided by the acquiring party, thereby enriching the state school fund, the Court mandated, and no such land can ever be lost to the state for any reason without any such compensation. Observing that Winters had paid Kansas for his tract,

while Myers had paid the state nothing, the Court found that no valid basis existed upon which Myers could object to the acquisition of the contested area by Winters, provided that the subject area had in fact originated as an island, thus the Court concluded it's examination of this scenario by returning the matter to the lower court for a new trial on that purely factual issue.

Perhaps the most obvious issue remaining to be addressed at this point in the ongoing riparian saga outlined by our last 2 cases was the very basic question of which land areas could be properly characterized as islands. Both the Kansas Legislature and the Court had agreed by this point in time that Kansas owned, and could legitimately sell off, any land lying between the GLO meanders of any Kansas river, which had been permanently exposed by the receding waters flowing in those historic channels. In order to qualify for such a sale however, the land needed to be classified as an island, and this proved to be highly problematic to both the incoming settlers and the established riparian land owners, since no one was sure which areas had actually formed as islands over the prior decades, as opposed to land representing typical accretion or reliction along the original banks of these rivers. In recognition of the need for clarification on this issue, the Court took up the case of *Steckel v Vancil* (1914) just a month after disposing of the controversy between Winters and Myers. Steckel was the owner of a certain section in Barton County, through which the Arkansas River passed. This section had once been owned in it's entirety by Kansas, and in 1893 the whole section was patented by Kansas to a railroad company. The 1893 deed evidently contained no express reference to the presence of the river, it simply conveyed the entire section, without any express reservation to Kansas of any rights relating to the river, and eventually Steckel acquired this section, presumably by means of a deed which also made no direct reference to the river. At an unspecified date, Vancil arrived and set up a homestead upon the portion of Steckel's section lying within the dry riverbed, after having acquired that area from Kansas, as state school land comprising an island. Steckel naturally objected to this, and he insisted that he owned every bit of his section, including the dry part of the riverbed, but Vancil would not depart, so Steckel was forced to file an action against him, seeking to have Vancil's deed declared invalid, in order to eject him from the area. The trial court rejected Steckel's position however, and confirmed the validity of Vancil's deed, allowing him to remain in place, while limiting Steckel's title to those portions of his section which were not situated between the GLO meander lines outlining the original river location, effectively treating the meander lines as boundaries. The Court upheld that ruling, informing Steckel that he had never acquired the meandered portion of his section, because that area had been implicitly reserved to the people of Kansas, thus it was not embraced within the 1893 patent issued by Kansas or any subsequent conveyances. The fact that the river had gone mostly if not completely dry, the Court declared, was of no legal consequence, all of the land between the meander lines was legally still a navigable riverbed, and it was therefore properly identified and classified as an island, for all purposes related to the 1907 statute granting Kansas the right to dispose of all such areas to incoming settlers such as Vancil. Even a completely dry riverbed qualifies as an island, the Court concluded, again applying the principle that any land which was once an island always remains an island in legal contemplation, regardless of how far such an area expands, so it made no difference when the island claimed by Vancil had formed, or when the water had disappeared, the area in question was still an island, which had simply expanded to occupy most if not all of the

meandered riverbed. The highly dismissive judicial attitude toward the operation of accretion and reliction, to the benefit of riparian land owners such as Steckel, which was quite apparent on this occasion, was not destined to stand for long however, and as we will see, this judicial position soon produced a strong backlash, which would eventually bring the Kansas island disposal program to an end.

Although adverse possession in the boundary context can be prevented in Kansas by the presence of plain mistakes concerning record boundary locations, as we have already learned, no such limitation or restriction applies to adverse possession in the context of title, and the case of *Fear v Barwise* (1914) exemplifies this distinction, while also well illustrating its legal implications. Lewis was presumably a typical settler, who entered a conveyance agreement with Kansas in 1882, under which he was granted a certain 80 acre tract, comprised of state school land situated in Elk County. In 1887, Lewis conveyed his tract to Barker, who then sold the subject property, which was evidently vacant at that time, to Barwise. Lewis was deemed to be in default on the terms of his acquisition by Kansas however, so his land entry was cancelled in 1895. The sheriff posted notice of this cancellation on a fencepost on the subject property, which was spotted by Richards, who then occupied the land and filed an application of his own with Kansas, acting on the presumption that this tract had been abandoned and was still owned by Kansas, and seeking an opportunity to have the land patented to him. Richards complied with the Kansas land acquisition requirements, so the 80 acre tract was patented to him in 1897, and he lived on it without disturbance from anyone for another 5 years, until he sold it to Fear in 1902. Barwise had apparently learned that the Lewis entry had been nullified, so he simply assumed that he had thereby lost any rights which he might once have had to the subject property, and in fact he conveyed his rights to that tract to others, in the belief that his interest in it was worthless. At an unspecified date, evidently sometime after 1910, and after Fear had been occupying the subject property for several years, it was discovered that the Lewis land entry had been illegitimately cancelled, and a failure of proper legal notice had occurred in 1895 on the part of the state, so the patent issued to Richards in 1897 was legally null and void. Upon learning of this, Fear filed an action seeking to quiet his title to the tract at issue on the basis of adverse possession, but several parties including Barwise stepped forward to claim the tract, as the legal successors of Lewis. The trial court quieted title to the 80 acre tract in Fear, per his request, but on appeal the several defendants protested that there had been no adverse possession, because Richards, as the original adverse claimant, believed that the land in question was owned by Kansas, and he had therefore used the land only under a plain mistake, without any adverse intent whatsoever. The defendants were correct, the Court noted, that the land use made by Richards was not adverse to Kansas, but that was irrelevant, the Court informed them, because the contested tract had never been legally taken from Lewis by Kansas, thus the state had no right to convey it to Richards, so the land use made by Richards was adverse to Lewis and all of his successors, since they held a legal interest in the land, albeit unknown to them. Neither the fact that the successors of Lewis mistakenly thought they had no interest in the 80 acre tract, nor the fact that Richards mistakenly believed it to be public land, open to settlement, prevented the possession of Richards and Fear from being adverse to the successors of Lewis, the Court explained, upholding the lower court ruling in favor of Fear on that basis. Thus the Court adhered to the position that although mistaken beliefs concerning boundaries amount only to correctable mistakes, which do not trigger adverse

possession, use of a whole tract, based upon mistaken notions regarding title or ownership, does set adverse possession in motion. On this occasion the Court also clarified that "claim of title", "claim of right", "claim of ownership" and "hostile possession", are synonymous phrases, all simply indicating that the adverse claimant has appropriated the subject property unto himself, with the intention of establishing sole and complete dominion over all of it, thereby denoting a state of genuinely adverse land use:

“one who takes possession of land in the erroneous belief that it is public land ... may acquire title under the law as against the true owner ... the mere fact that one holds land in subordination to the state is not necessarily inconsistent with the conception of holding it in hostility to others ... one who enters upon land in good faith ... may upon discovering his mistake proceed to hold adversely to the actual owner so as to acquire title.”

The case of *Bailey v Hipple* (1915) demonstrates that by this time the Court was prepared to enforce the principle of monument control in an urban context, as well as in the PLSS context, while also perpetuating the well established theme mandating strong protection for all land rights held by the public. Miller's Addition to Hutchinson was platted in 1884 and an unspecified number of monuments were set at that time in laying out the lots lying within Block 7 of that addition. This block and the lots within it were presumably of the typical rectangular form, and it contained an alley, which was designated as being 20 feet in width. In 1888, Rhoads acquired the east 100 feet of Lot 8, which was bounded on the east by the alley. Rhoads asked the city engineer to stake his parcel, so the engineer did so, and Rhoads then built a house on the west 50 feet of the area that had been staked by the engineer. Subsequently, Rhoads sold the unused portion of his parcel, which comprised the east 50 feet of Lot 8, and at an unspecified date that 50 foot parcel was acquired by Bailey, who erected a house and other improvements on it. At an unspecified date, Hipple acquired the lot lying directly east of the alley, and he evidently noticed that the alley was not a full 20 feet in width, so Hipple accused Bailey of encroaching on the alley, charging that Bailey was using the west 6 feet of the alley. Bailey responded by filing an action seeking to quiet his title to the full area which he was occupying, but Hipple asserted that Bailey's improvements had been improperly placed, and he insisted that the alley must be maintained at the full platted width of 20 feet. The trial dragged on for over 6 months, during which time surveys were apparently made, and several original monuments were found at unspecified locations within the relevant block, yet the trial court quieted title in Bailey to the full area that he had used, thereby reducing the alley by about 6 feet in width. The Court reversed that decision however, and ordered a new trial to be held, stating that the judgment could not be upheld because "monuments, base lines and the original survey are essential to a full consideration and determination of the boundaries". Observing that the evidence indicated that the city engineer had either deliberately ignored, or simply failed to locate, any original monuments in 1888, and had staked the Rhoads parcel solely on the basis of dimensions of record and his own measurements from Main Street, which was an unspecified distance away from the subject property, the Court held that such a survey cannot stand. Emphasizing that numerical values, such as dimensions of record, are secondary in nature, while monuments represent primary evidence, the Court informed the litigants that lot corner stakes set during the

creation of a residential subdivision constitute authentic original monumentation, which cannot be bypassed during any resurvey, or rejected simply because measurements from some arbitrarily selected point or line suggest another boundary location. In addition, the Court concluded, although the engineer had neglected to honor the full platted width of the alley in 1888, the alley nevertheless legally remained 20 feet in width, and Hipple was within his rights in demanding that the encroaching objects must be removed from the alley. The public is incapable of acquiescing in any unauthorized use of any such dedicated areas, the Court stipulated, so the mere fact that no one had previously protested the presence of the structures which Bailey had constructed in the alley was of no consequence, he had acquired no right to obstruct any portion thereof.

As previously referenced herein, the Kansas Legislature had enacted laws in 1907, facilitating the disposal of the bedlands comprising the forsaken portions of the meandered rivers of Kansas. The large dry portions of the meandered channels of the Arkansas and Kansas Rivers in particular were thereby made available for sale by Kansas, to anyone looking for land upon which to settle. Since there was no practical way however, for a typical incoming settler, upon discovering an unused area lying within a dry but legally navigable riverbed, to tell exactly how the diminution of the stream had occurred, there was no way to conclusively determine which portion of a dry bed had really formed as an undocumented island, rather than accretion or reliction extending from the shore. In the absence of water, it was no longer clear which areas had legitimately formed as islands between channels and grown to cover most or all of the bed, unless perhaps trees happened to appear in a sufficient quantity to serve as an indicator of the presence of high ground which had emerged between extinct channels. In an effort to eliminate this apparent obstacle to the full disposal of all navigable beds that had gone permanently dry, the Kansas legislature modified the relevant statutes in 1915, discarding the island requirement and thereby expediting the sale of all dry bedlands lying between GLO meander lines, regardless of their origin or any history relating to their exposure and development. In addition to the difficulty in determining the true extent of former islands through physical evidence however, another issue contributed to the problematic nature of the island school land disposals, which was addressed by the Court in *Means v Kennedy* (1916). Means was the owner of a tract of unspecified size, shape and location in Sedgwick County, which was bounded in part by the Arkansas River. This segment of the river had gone mostly if not completely dry, and at an unspecified date Kennedy, who was a destitute settler, encamped upon a portion of the dry bed near or upon the land to which Means was entitled by patent. Kennedy would not leave, and he began building a house, so Means was compelled to file an action seeking his eviction, in which Means alleged that Kennedy's encampment was on land that was owned by Means. The trial court awarded victory to Means, and the Court upheld that decision, over the protests of Kennedy, who insisted that the land he had selected was obviously situated within the former riverbed, and it had clearly developed as an island, thus it was open to settlement under the statutes which were in effect at the time when he had taken control of the land in contention. In ruling against him, the Court informed Kennedy of the futility of his effort, due to the legal status of the area in which he had chosen to plant himself. Kennedy had failed to recognize that not all portions of the meandered riverbed were controlled by Kansas, because not all islands were undocumented, many islands had been surveyed and platted in Kansas, and he had evidently positioned himself on an island which had been platted by the GLO, so Kansas

was incapable of conveying the land that Kennedy had occupied, to him or to anyone else. It made no difference whether the area held by Kennedy had ever been patented to anyone or not, the Court informed him, he had no right to hold that area under any Kansas statutes, because Kansas had no authority to sell any islands that were platted by the GLO, since they were not undocumented land which had arisen from the navigable bed as state property, thus Kennedy was required to vacate the premises.

The Kansas island disposal program, as modified by the Kansas Legislature, and with strong support from the Court, was in full swing at this point in time, but less than 10 years after their enactment it was becoming clear that the statutes which formed the foundation of this program were generating an inordinate number of controversies. At this juncture therefore, in recognition of the land rights of existing riparian owners, the Court began to take a more restrictive view toward interlopers who sought to acquire abandoned navigable bedlands, by emphasizing the significance of accretion and reliction, as benefits to which owners of riparian land are legally entitled, and *Adams v Roberson* (1916) decided by the Court just a month after our prior case, exemplifies this judicial shift. Roberson was the owner of a riparian tract of unspecified size and shape situated near Great Bend, which was bounded on the north by the Arkansas River, although how and when he acquired his property is unknown. At an unspecified date, presumably circa 1910, Adams arrived and settled upon a portion of the formerly submerged riverbed lying directly north of the area that was being occupied or used by Roberson. Roberson evidently ordered Adams off the land, claiming that the relevant area was part of the Roberson property, so Adams was forced to file an action, seeking judicial confirmation of the legitimacy of his land entry. Adams presented evidence proving that the land upon which he had settled was in fact situated within the meandered bed of the river, yet the trial court ruled against him, agreeing with Roberson's assertion that he owned the contested area. On appeal, Adams protested that the area in question had been formed by artificial means, so Roberson could make no legitimate claim to it based upon accretion, but the Court disagreed and upheld the decision against Adams. Testimonial evidence, the Court noted, indicated that the course of the river had been forced to the north by some bridge work that was done by Great Bend, upstream from the Roberson tract, in 1884. The area occupied by Adams had clearly been exposed by the river's northward movement, and had become both physically and legally attached to the Roberson tract, the Court found, thereby invalidating the position set forth by Adams. Thus on this occasion, for the first time since the bedland disposal program was instituted in 1907, the Court supported an accretion claim made by an established land owner, signaling to incoming settlers that they could not rely upon GLO meander lines as boundaries, despite the 1915 statutory language to that effect. A highly comparable scenario played out in virtually identical fashion in *Corbett v Cohen* (1917) and *Cohen v Corbett* (1920). Cohen was the owner of land on the north side of the Arkansas River in Kearny County, and in 1915 Corbett settled upon a once submerged area south of the meander line which traversed the Cohen property, leading to a dispute over the legal status of that area. Just as in the Adams case, the trial court denied the claim made by Corbett, on the basis that he had improperly situated himself upon accretion which belonged to Cohen, rather than land to which Kansas held title, and again the Court upheld that ruling, allowing Cohen to eject Corbett from the subject area. In so doing, the Court again informed the newcomer, Corbett in this case, that the legal burden rested squarely upon him to prove that the land he had occupied did

not form as either accretion or reliction to the shoreland owned by the established riparian party, Cohen in this instance. To prevail upon the premise that any land originated as an island, the Court thus mandated here, the party making that assertion must prove that 2 channels existed and that the dry riverbed was not exposed through any natural shifting or narrowing of a single channel, in order to prevent the established riparian owner from deriving the benefit of the river's accretive advance or relictive retreat.

A very long series of riparian rights cases finally played out at this time, when the Court brought the gavel down at last upon the case of *Stark v Meriwether* (1916 & 1917). Stark was apparently a typical land owner who acquired some of the property situated on Kaw Point, which had been involved in the Fowler case of 1906, previously reviewed herein, but Meriwether was a major actor in the whole saga that resulted from the severe flooding which swept over Kaw Point in 1867. Meriwether was an attorney, and demonstrating ardent perseverance, he made the seemingly endless litigation over land rights on Kaw Point a major focus of his career. In addition, Meriwether acquired some of the land on Kaw Point himself, apparently during the 1890s, and he also evidently acquired an interest in an island which formed in the Missouri River, as the flood waters that had submerged and ravaged Kaw Point receded during 1868. Thus Meriwether was perhaps even more fully immersed in the Kaw Point litigation, which dragged on for decades, than even the Wood and Fowler families, since he played a role in every aspect of it, as both a litigant and an attorney. Even after the conflict between the Woods and the Fowlers was finally resolved in 1906, following a quarter century of controversy between them, Meriwether persisted in his drive to secure his own lands situated both on and near Kaw Point. At an unspecified date, presumably circa 1900, a railroad was evidently built upon a portion of Kaw Point, and land was condemned to create the required railroad right-of-way. Meriwether was among the parties who obtained condemnation awards, compensating them for the railroad right-of-way that was taken from lands which they purported to own. Kansas elected to contest the financial award given to Meriwether however, alleging that the land he claimed to own was actually former bedland, which had once been submerged beneath the Missouri River, so it was state property, thus these combatants engaged each other in federal court over that issue in 1909 and again in 1910. The conclusion of this struggle marked the zenith of Meriwether's career and his finest hour, as he leveraged the knowledge of riparian boundary law that he had gained during his participation in earlier litigation to triumph over Kansas, thereby securing title to an extensive amount of valuable land on Kaw Point. In his last legal battle however, Meriwether was destined to come up a loser, as Stark, one of his neighbors, ultimately managed to prevail over him. Meriwether had acquired an area known as Howe Island, which was once a genuine island in the Missouri River, through litigation with Howe, and after that area became merged with the eastern shore of Kaw Point, Meriwether set out to claim additional land in the immediate area, but he was confronted and stopped by Stark. Meriwether maintained that the extinct channel between Kaw Point and the former Howe Island was accretion to his land, but Stark successfully argued that it was actually accretion to his land on Kaw Point, and the Court upheld a lower court decision in favor of Stark on that matter in 1916 and again in 1917, finally silencing Meriwether's claim. In disposing of this case, and thereby bringing the curtain down on the Kaw Point riparian saga, the Court notably adopted the widely accepted rule that proportional division of river frontage must be regarded as the primary method of dividing accretion or reliction, while

acknowledging that other methods of such division can also be utilized, when varying circumstances make such other methods appropriate.

Although surveys did not play any prominent role in our last several riparian cases, the Court was well aware that surveys represent valuable evidence and can be instrumental to the determination of riparian title. In a series of 3 cases decided at this time, the Court highlighted the relevance of surveys to acquisitions made under the Kansas island disposal program, and began to leverage surveys as a means of testing the validity of such acquisitions, when they were challenged. In *Wilson v Zutavern* (1916) Wilson was a typical incoming settler who occupied an area which he thought had once been an island in the Arkansas River, situated in an unspecified location in Barton County, apparently on or near riparian land that was owned by Zutavern. Wilson arrived in 1912, but under the amended island disposal statutes of 1913 he was required to present a survey of the area that he was claiming, so he obtained and filed such a survey in 1913. Zutavern objected to the presence of Wilson however, so Wilson filed an action seeking to have his entry judicially validated, but the trial court denied his request, allowing Zutavern to remove Wilson from the area upon which he had settled. The Court upheld that decision, finding that the survey presented by Wilson was insufficient to support his land entry, since it failed to comply with certain statutory requirements for such surveys. Because Wilson's survey contained no certification statement by the county surveyor, attesting to the fact that the full area delineated on the survey was in fact a legitimate existing island or former island, the Court agreed that Wilson had failed to prove that the land in question was not comprised of accretion owned by Zutavern, thus Wilson's claim was unworthy of validation. Under a highly comparable scenario, in *Jensen v Finnup* (1917) the Court served notice that it was prepared to further tighten the requirements placed upon incoming settlers, in order to prevent abuses of the island acquisition program, while protecting the land rights of established riparian owners from unjustified intrusions. Jensen was a newcomer who presented a survey to support his purported island acquisition, situated in an unspecified location in Kearny County which Finnup claimed to own, but Jensen's survey was rejected by the trial court, and the Court upheld that decision. Just as in the Wilson case, the Court found the survey to be "fatally defective", because it failed to expressly confirm that the depicted area was either currently or formerly a genuine island, therefore Jensen's claim was legally unsupportable, since he was unable to demonstrate that the land which he had entered was not really accreted land that belonged to Finnup. All such land entries, based upon the premise that the land being occupied was owned by Kansas, rather than by an established riparian patentee or successor of a patentee, must be "viewed with some strictness" the Court stipulated, thereby informing all newcomers that they would be required to respect established riparian land rights. Just 2 months later however, in *Brennaman v Fleming* (1917) the Court had occasion to uphold a survey that was done for an incoming island settler. Brennaman evidently settled on an island in Gray County, and when his entry was challenged by Fleming he presented a survey which apparently confirmed that the land shown thereon had formed as a legitimate island, in the judgment of the deputy county surveyor, thus the trial court awarded victory to Brennaman on that basis. Fleming protested on appeal however, that the issues of accretion and reliction had been inadequately or improperly addressed, alleging that she was the owner of at least part, if not all, of the area that had been surveyed for Brennaman. The Court rejected her position

however, and upheld the validity of Brennaman's land entry, as it was defined on his survey, concluding that the survey was presumptively correct, so the jury which had reviewed it had the right to rely fully upon the survey as an accurate representation of the contested area.

The case of *State v Manny* (1916) provides an example of judicial utilization of the principle of acquiescence, in the context of mutual recognition of an original boundary location, leading to the adoption of a physical object as original boundary evidence, in accord with the principle of monument control. A road was opened in Graham County in 1881, which ran along the west line of an unspecified section. The date when the GLO had surveyed and platted the relevant township is unknown, but the original section line location was apparently still well known in 1881, and the roadbed was constructed upon the section line, although whether or not any original monumentation marking this section line was still in place when the road was built is unknown as well. In 1887, a 60 foot wide section line right-of-way was established by the Kansas Legislature, which applied to this location among many others, and that right-of-way was used in the typical manner with consistency over the subsequent decades, during which the location of the road remained unchanged. In 1906 however, a statutory resurvey was evidently ordered by the owners of the lands which were bound by this section line, and during that resurvey the county surveyor reset the 2 relevant section corners west of the centerline of the roadway, by 83 links on the north and by 25 links on the south, neglecting to place any value upon the roadway itself as original boundary evidence. Whether or not any existing survey monumentation was searched for, found or used during that resurvey is unknown, but no appeal was filed, so the line surveyed at that time became legally conclusive upon the relevant land owners and their successors. At an unspecified date, presumably several years later, Manny acquired the section lying to the east of this road, and when he discovered that the section line was west of the road, he fenced an unspecified portion of the section line right-of-way in with his property, leading Kansas to charge him with obstructing the public right-of-way. The trial court ruled in favor of Kansas, enabling the state officials to legally have Manny's encroaching fence either moved or removed, and the Court upheld that decision against him, over his protests that the 1906 survey was accurate, and that under the law it had become legally controlling even if it was not accurate. Kansas is not bound by any statutory resurveys, the Court informed Manny, so the relevant officers of the state were free to conduct and to enforce another resurvey, as they had done, based upon superior original boundary evidence, which had either gone undiscovered or been disregarded during the 1906 resurvey. During that subsequent resurvey a 17" x 16" x 6" sandstone was found beneath the centerline of the road at one of the section corners, whereas the GLO field notes called out a 17" x 10" x 4" limestone at that location, and the Court approved the acceptance of that stone at that time as either a genuine original monument or a valid perpetuation thereof, deeming such variance from the information found in GLO field notes to be of no consequence. In so ruling, the Court also took the position that acquiescence, as manifested by the long recognition of the roadway as the section line, made the roadway itself the best evidence of the original section line, so the centerline of the road controlled the section line right-of-way location, negating the erroneous location indicated by the 1906 resurvey, while also observing that in boundary determination recognition and acquiescence "may be sufficient to prevail over field notes".

Just a month after disposing of our prior case, the Court was confronted with another scenario which required it to engage in boundary resolution, in the case of *Bullington v Patterson* (1916) this time in an urban context, as opposed to the PLSS context, and again the Court responded by turning to the concept of recognition and acquiescence to resolve the boundary component of the controversy. Bullington was the owner of Lot 11 in Dexter, which was a 50' x 150' lot bearing a hotel, that was bounded by Valley Street on the north, a railroad right-of-way on the east, and Lot 12 on the west. When this area was platted, when Bullington acquired his lot, and when the hotel was built, are all unknown, but the plat was evidently a rather poor one, and any original lot corner monuments which may once have existed were apparently gone by the time Bullington acquired the hotel property, presumably some time during the 1880s. Around 1890, the owner of Lot 12 erected a fence on what he believed to be the east line of his lot, and Bullington accepted that fence as the west boundary of his lot. Around 1900, Bullington planted trees along his side of that fence, and concrete sidewalks were later built by each of these lot owners, on their respective sides of that established boundary. No boundary dispute ever arose between Bullington and his neighbor, but a boundary issue appeared after Bullington sold his lot to Patterson in 1912. Patterson evidently ordered 2 surveys of the hotel property after acquiring it, and both of those surveys indicated that the west line of lot 11 was located well to the east of the fence, so it ran through the hotel building, 3 to 6 feet of which was thereby deemed to be encroaching upon Lot 12. The owner of Lot 12 disagreed with the surveys and continued to maintain that the fence was on the original lot line, but upon being informed of the encroachment issue Patterson refused to make her payments to Bullington, so he was forced to file a foreclosure action against her. The trial court rejected the 2 resurveys and granted judgment in foreclosure to Bullington, on the basis that no encroachment existed, so Patterson was required to either pay Bullington for the lot or relinquish the property to him. Patterson protested on appeal that the resurveys had been wrongly discarded, but the Court upheld the lower court ruling against her, declaring that the established boundary location controlled over the resurveys. Emphasizing that boundaries which have been physically established by land owners acting in good faith must be honored, the Court concluded that the fence represented superior evidence of the original lot line location, since it was put in place by a party who had personal knowledge of that line location, indicating that the origin of the fence was the controlling factor, which made it the best evidence of the platted lot line. Upon reviewing the 2 resurveys, the Court found both of them to be highly suspect and unreliable, due in part to the fact that they disagreed with each other by about 3 feet as to the disputed lot line location, leading the Court to concur that both of them had been properly rejected, in favor of the physically established line, which had clearly been adopted and respected as an acknowledged boundary by the adjoining lot owners for a quarter of a century. Thus the Court once again confirmed on this occasion that resurveys based solely upon dimensions of record are insufficient to overturn or displace physically established boundaries, which date from a time period when original boundary locations, that have subsequently become obliterated, were well known, and were perpetuated by improvements placed upon the land.

As several of our prior cases have indicated, the Court was highly skeptical toward resurveys during the early decades, and not without good reason, as the quality of the survey work was often dubious, surveyors were not licensed, and professional

standards of the kind which are in place today were absent. Surveys have often met with the Court's approval however, and therefore been upheld as controlling, although the Court has only rarely examined survey details, instead typically approving surveys upon the basic principle that any unchallenged survey controls, until evidence sufficient to overcome it appears. In 4 cases decided by the Court at this time, all falling within a 2 year period, the Court addressed the circumstances under which different forms of survey evidence can exert control. In *Gemienhardt v Ward* (1917) a county surveyor was asked to execute a statutory resurvey in Ford County, and in so doing he accepted an unspecified monument as a section corner, on the basis of parol evidence provided to him, indicating that it had long been regarded as marking the section corner in question. The Court upheld a lower court decision rejecting that survey however, on the grounds that the surveyor erred in failing to mark the corner position indicated by proportionate measurement. Here the Court determined that the accepted monument was in fact an established property corner, for purposes of title and ownership, yet agreed that the survey was invalid because "land surveys are governed by precise and invariable principles of mathematics", thus surveys bear no relation to title or ownership established through land use. In *Swandt v Ballantine* (1918) a county surveyor completed a statutory resurvey in 1898, which was unappealed, but at an unspecified subsequent date Swandt and some of his neighbors verbally agreed upon other corners and lines as their boundaries, either knowingly or unknowingly disregarding some of the section corners which had been reset in 1898 in so doing. The Court upheld a lower court decision against Swandt, who argued that the agreed boundary must control, stipulating that any points which were set for purposes of boundary resolution during a statutory resurvey are not subject to relocation by means of any subsequent boundary agreement, so the 1898 resurvey still controlled. In *McKee v Rowley* (1918) the litigants were engaged in a dispute over the validity of an alleged section corner monument of unknown origin in Barber County, so the county surveyor was called upon, and he rejected the purported monument, unconvinced that it was really an original GLO monument. The Court upheld a lower court ruling approving that decision by the surveyor, finding that he had correctly rejected the 15" x 8" x 3" limestone monument pointed out to him as marking the corner at issue, since the GLO field notes called out the disputed corner as being marked by a 12" x 12" x 5" sandstone. In *McDonald v City of Iola* (1918) a survey was done for the purpose of marking the boundaries of an old city cemetery, and on one side the surveyed boundary ran 5 feet outside of a hedgerow which enclosed the existing burial ground, but McDonald, who owned the adjoining tract, protested that the hedge, which had stood since 1863, was an established and long accepted boundary. The Court nonetheless upheld a lower court ruling against McDonald, confirming the correctness and validity of the survey, due to the presence of evidence revealing that he had once offered to buy the disputed strip, which proved that he knew all along that it was not part of his tract, and that the contested boundary was in fact 5 feet on his side of the hedge.

The relationship between surveys and title was once again in focus in the case of *Vandling v Griffith* (1919) and on this occasion the Court made it clear that neither the precision nor the accuracy of a survey determines whether or not it will control, when title issues are present, because the correctness or incorrectness of a survey can have no impact upon the operation of the equitable factors associated with title. A certain range line was first surveyed by the GLO in 1869, and 2 townships lying along this range line in Pawnee

County were evidently subdivided and platted in 1884. The NE/4 of Section 24 in the westerly township was patented to Vandling, but what use he made of the area near the range line, if any, is unknown. In 1886 a resurvey was done, in which an unspecified portion of this range line was deliberately shifted an unspecified distance to the west, by a surveyor who apparently believed that the sections in the western tier of the easterly township were all entitled to a full 640 acres, and a public road was then built upon the relocated range line. The residents of the westerly township, including Vandling, all accepted this new range line as their eastern boundary, and the road constructed upon it was used by all parties and the general public henceforward. Evans acquired the west half of Section 19 in the easterly township in 1893, and he cultivated all of the land east of the road, until 1909 when he conveyed his tract to Griffith, who continued to use the whole area east of the road in the same manner. After Vandling's death, his daughter took control of the Vandling tract, and in 1914 her husband discovered the presence of the range line discrepancy, so the Vandlings filed an action seeking to take control of the easterly portion of the NE/4 of Section 24, extending eastward across the road to the GLO range line. The trial court ruled against them however, holding that the relocated range line was in fact their easterly boundary, and that by virtue of the 1886 survey the land east of the public right-of-way had become part of Section 19. Although the Court clearly realized that the conclusion reached by the trial judge regarding the true physical extent of Sections 19 & 24 was bogus, the Court nonetheless upheld Griffith's victory, on the basis that the road had become a binding boundary through recognition and acquiescence, regardless of where the range line was really located. The Vandlings protested that the construction of the road upon the clearly errant range line was a plain mistake, which therefore could not trigger adverse possession in the boundary context, and the Court agreed, but went on to explain that this outcome was not based on adverse possession, the deviant range line controlled as a result of the public adoption of that location, combined with the acceptance of the illegitimate resurvey by the private land owners. Thus the Court confirmed that an inaccurately surveyed line can control over a genuine original line, if substantial reliance is placed upon the mistaken line, while the authentic line is disregarded, for a period of 2 decades in this instance. In addition, here the Court clarified that acceptance of an erroneously surveyed line is not equivalent to a mere personal misconception about the location of a boundary, because surveys are presumptively correct and reliable, so the mistake doctrine cannot prevent equitable relocation of a boundary, where innocent reliance upon an improperly surveyed line has taken place. The Court's focus upon upholding all existing public uses of land, and upon consistently supporting boundaries established through agreement and reliance, both of which were quite evident here, heralded the forthcoming era of increasing judicial emphasis upon protection of all such physically established land use patterns.

The 1920s - Developing the Modern Right-of-Way Concept

The third decade of the twentieth century was destined to be the busiest decade ever for the Court, with regard to land rights adjudication, and this period produced several momentous decisions, which would influence the outcome of land rights litigation in

Kansas many years into the future. Perhaps the single greatest factor driving increased contention over land rights at this time was the arrival of the automobile as the primary mode of transportation, making the concept of public right-of-way more vital than ever before to a burgeoning society. This was a decade of prosperity, during which productivity was high, thus many people had money to invest in modern vehicular transportation, and there was a rapidly increasing emphasis upon improving and expanding infrastructure, in order to facilitate broad use of automotive technology in support of the growing economy. The concept of public right-of-way had long been established by this time of course, yet the legal implications of a right-of-way as boundary evidence were not yet well understood, and the title issues resulting from disuse, abandonment or vacation of any right-of-way had yet to be explored in depth, but this period brought the need for clarification of such issues to the attention of the Court. The concept of reversion, and particularly the passage of reversionary rights along with title to land, was about to become a major issue, as right-of-way was being created at an accelerating rate, often with little regard to the future fate of the land beneath that right-of-way, should the strip no longer be used or needed for travel at some point in time. During this period, as we will see, the Court began to establish a consistent position on the proper judicial treatment of unused right-of-way, in accord with the elementary principle that a right-of-way is not presumed to create or to represent a gap in title, thus boundaries close upon an extinct right-of-way, leaving no intervening strip to later become the subject of a contest over title to the underlying land. As noted previously herein, this decade also brought much needed clarification of riparian boundary principles at the national level, as the United States Supreme Court handed down several important decisions, which discredited and negated many long standing misconceptions about navigability and meander lines, leading the Court to substantially dial back it's highly pro-public position on those issues. In addition, growing judicial recognition of the value of informal or implicit boundary agreements will be noted as we traverse this decade, marking the beginning of a gradual shift toward achieving boundary stability and security through judicial protection of undocumented land rights.

The case of *Kyte v Chessmore* (1920) represented the conclusion of a long running boundary dispute which had come to the Court once previously in *Chessmore v Terrell* (1915) and the Court's handling of this controversy reinforced the importance of undocumented boundary agreements, while also highlighting the primacy of title issues over boundary issues. Chessmore was the owner of the SW/4 of Section 25 and the NW/4 of Section 36 in a certain township in Rawlins County, while Terrell was the owner of the adjoining SE/4 of Section 26 along with the NE/4 of Section 35, and all of these sections were evidently comprised of typical agricultural land bearing few if any structures. During a resurvey done in 1912, the long missing corner of those 4 sections was reset about 40 feet east of a fence of unknown origin, which these men had long treated as their mutual boundary. Chessmore initially responded to this development by filing an action against Terrell, in which he alleged that the resurvey was improperly executed, but he was vanquished on that issue in 1915, as both the trial court and the Court found no reason to strike down the 1912 survey. In reviewing the matter at that time however, the Court pointed out to the litigants that the correctness or validity of the disputed survey was actually of little practical significance, because the surveyor had "disregarded improvements indicating established boundaries", while also noting that such a survey "does not affect the location of an independent agreed boundary". Having been thus

alerted by the Court to the fact that in assailing the survey itself he had chosen the wrong angle of attack, Chessmore once again asserted that the fence was his true west boundary against Kyte, who had acquired the Terrell tract, thereby forcing Kyte to file an action against Chessmore, in an effort to enforce the surveyed line for purposes of title. This second time around Chessmore wisely testified that the fence in question was the subject of a boundary agreement made during the 1880s between his father and the predecessor of Terrell, so it represented a legitimately adverse boundary, and he owned the contested area lying east of that fence through adverse possession. Both the trial court and the Court agreed with Chessmore on this occasion, and awarded victory to him in 1920, since this time he had properly and successfully argued that he was entitled to the area in contention, regardless of the location of the resurveyed section line. In so ruling, the Court stated that a legitimate boundary agreement, resulting in genuinely adverse land use, "may be inferred from circumstances, such as the maintenance of a fence or long acquiescence", thereby preventing the mistake doctrine from nullifying the adverse land use, and justifying judicial approval of the physically established boundary location. The fence had been made the subject of an unconditional boundary agreement, the Court found, and the acknowledged uncertainty over the boundary location of record served to support the legitimacy of that agreement, so the subsequent use of the land was adverse in nature, and was not merely a unilateral mistake, in the eyes of the Court. Thus here again the Court held that resurveys which purport only to place boundaries of record upon the ground can have no controlling force or effect, where another location has been previously established as a binding boundary, under the equitable principles which ultimately control title and ownership of land.

Our next case, *Dean v Evans (1920)* when compared with our last previous case, well illustrates the fact that adverse possession is just one factor militating against boundary control by means of resurveys, and presents a very good example of the legal significance of any form of physical evidence that is indicative of original boundary intent. The Dean family owned an unspecified but presumably typical quarter section in Hodgeman County, which they resided upon and regarded as their homestead for an unspecified number of years. At an unspecified date, their daughter was married to Knoefler, and they decided to split their home quarter, by giving the east half to the young couple, while retaining the west half. Under the law however, land could not qualify for protection as a homestead unless it was physically occupied by a dwelling, and this posed a problem for them, because they had only one house between these 2 families. They elected to attempt to resolve this problem by placing their house directly upon the sixteenth line splitting the quarter, although how they determined the location of that line for this purpose is unknown. After having positioned the house in this manner, the conveyance of the east half of the quarter to the Knoeflers was completed, and henceforward the Deans lived in the west half of the house, while the Knoeflers occupied the east half of that structure. In 1911 however, a judgment was issued against the Deans, so Evans, who was the sheriff, sold the Dean tract, on the grounds that it was not a homestead, because there was no dwelling located upon it. It was thus discovered, presumably by means of an unspecified survey, that the Deans had mislocated the house, and since the entire house was actually on the east half of the quarter, the west half of the quarter was lost by the Deans. Upon learning what had happened, Dean filed an action against Evans and his grantees, asserting that the house was in fact located partially on each half of the quarter, because

the house itself was intended to define the line of division, so Evans had no right to sell off the Dean homestead, and the trial court ruled in Dean's favor. The defendants who had sought to acquire the Dean tract protested that the house was situated entirely on the east half of the quarter, so the sale to them was legitimate, because the west half of the quarter was not a valid homestead, but the Court upheld the decision in favor of the Deans. In reaching this result, the Court accepted the premise that the line running north and south, which was defined by the central axis of the house, represented an agreed boundary line, so it made no difference where the actual centerline of the quarter might be, and it also made no difference that the resulting west half was larger than the east half. The house itself was a controlling boundary monument, the Court recognized, because the parties had intended it to function as the primary means of delineation of their mutual boundary, thus each half of the quarter was in fact a homestead, making the judgment sale invalid, so the deed executed by Evans was void and Dean was still the owner of the west half of the quarter. Here the Court gave notice that a boundary location can become legally binding, even without the passage of any specific amount of time, if it is marked by even a single highly visible object which qualifies as boundary evidence, thereby verifying the primary and controlling nature of physical boundary evidence. In addition, this outcome demonstrates that even legal descriptions implicitly calling for PLSS lines of division cannot be relied upon as controlling, when physical evidence of a contrary intention is present, because any monument placed upon the land by a grantor, for the purpose of dividing his land, typically represents the highest and strongest evidence of the position which he actually intended the described dividing line to occupy.

Island acquisitions continued to be a recurring source of controversy early in this period, but in an effort to bring the chaotic title conditions created by the legislatively authorized state school bedland disposal program to an end, the Court was steadily tightening the judicial standards for approval of island claims with ever greater stringency. The case of *Warner v Snook* (1918 & 1920) which came before the Court twice, provides a good example of the Court's recognition of the need to place a heavy burden of proof upon those seeking to claim land based upon a mere hypothesis that it once constituted an island. Snook was apparently a typical owner of land lying directly south of the Arkansas River in Ford County, although no details regarding the size or shape of his tract are known, nor is anything known about how or when he acquired his property. Warner was a presumably typical incoming settler, looking for a place to plant himself, and he evidently thought he had found a suitable location when he arrived at the Snook property in 1914, because the dry riverbed contained an area which he believed had once been an island. When Snook discovered the presence of Warner, he refused to agree that the land Warner was using was ever an island and insisted instead that it was accretion to his riparian tract, so it was legally part of his property. Intent on remaining upon the bedland that he had selected however, Warner filed an action in which he sought judicial verification of the legitimacy of his claim that title to the area which he was occupying was vested in Kansas, rather than Snook. When this controversy first came on for trial neither party was apparently well prepared, and due to a lack of conclusive evidence regarding the formation of the alleged island, the Court decreed in 1918 that a new trial would be needed, to get to the truth of the matter, so the parties engaged for a second time, with the state participating in support of Warner's position. Survey evidence proved to be highly relevant to the prosecution of Warner's argument, in favor of the existence of an extinct island, as he pointed out the

existence of the same excessive and unexplained amount of land in the subject area, which had been the focus of the 1907 Foskuhl case, previously reviewed herein. The basis for Warner's island claim rested upon the testimony of land surveyors, who conjectured that the presence of an unsurveyed island could explain the presence of the excess acreage, which was not reflected on the relevant GLO plat or plats of the subject area. On retrial the lower court rejected Warner's claim however, and the Court upheld that decision against him in 1920, on the grounds that his evidence was speculative and he had failed to positively prove that the land at issue had formed as an island. In the eyes of the Court, it made no difference whether the contested area had been an island for centuries or had emerged only in recent times, as a result of the river's reliction during the decades subsequent to statehood, either way it would have been property of Kansas, maintaining on this occasion that the federal government never intended to reserve any unsurveyed islands unto itself. Nevertheless, that position taken here by the Court, supporting Kansas ownership of all islands left unsurveyed by the GLO, was of no benefit to Warner, since he was unable to positively prove that the land he had chosen within the meandered riverbed had not formed as a natural expansion of the Snook tract, by means of accretion or reliction along the south bank of the river.

Despite becoming increasingly open to acceptance and approval of undocumented boundary agreements, the Court continued at this time to adamantly adhere to the mistake doctrine, seeking to prevent adverse possession from becoming a tool for the relocation or adjustment of boundaries, in the absence of some form of agreement elevating the status of the adversely claimed line. The case of *Kinne v Waggoner* (1921) provides strong support for the concept that even long established boundaries can be viewed as mere mistakes which are subject to rectification, upon the premise that all boundary errors remain perpetually correctable. Waggoner was the owner of the west 90 acres of an unspecified quarter section in Neosho County, and for several decades a fence of unknown origin had been regarded as the east boundary of his tract, until Kinne acquired the east 70 acres of that quarter in 1915. Kinne somehow surmised that his tract was short of 70 acres, so he ordered a survey which indicated that the west line of his tract was 27 feet west of the fence at one end and 37 feet west of it at the other end, so he built a new fence on the surveyed line, but Waggoner promptly tore it down. Kinne then proceeded to file an action against Waggoner, in which Kinne sought judicial confirmation that the surveyed line formed his western boundary, while Waggoner maintained that he had acquired the disputed strip by means of adverse possession. Waggoner did not challenge Kinne's survey, instead he insisted that even if the fence had been mistakenly placed when his tract was created 40 to 50 years earlier it nonetheless represented his eastern boundary, because it was intended to mark that boundary. The trial court agreed with Kinne however, that such boundary mistakes are always subject to correction, and the Court concurred, holding that none of the land use made by Waggoner was ever adverse in nature, so the surveyed line controlled, just as it would have if no fence had ever existed, since Waggoner had presented no evidence showing that the fence in question was ever associated with the boundary at issue. Adverse possession in the boundary context requires genuinely hostile intentions on the part of the adverse claimant, the Court reiterated here, observing that mere reliance upon a personal misconception regarding a boundary location is of no avail to the adverse party. In order for adverse possession to intrude upon the realm of boundary law, and effectively nullify described boundary locations of record, the

Court stipulated, some form of boundary agreement must be shown to exist, because only the presence of a state of agreement, upon a specific visibly marked boundary line, reveals mutual intentions to hold the land on both sides of that line in a genuinely adverse manner. Although adverse possession in the context of title is typically destroyed by evidence that land use was made under an agreement, making it permissive in nature, the Court thus quite ironically demonstrated, in Kansas adverse possession in the context of boundaries is expressly supported by a state of agreement. Shortly thereafter, in the case of *Stalnaker v Bair* (1921) the Court rejected an attempt to overcome a survey, of an unspecified quarter section line in Rooks County on that occasion, on the grounds that a nearby fence had become an established boundary as a result of adverse land use, again confining adverse possession to a narrowly limited role as a judicial boundary resolution device.

While clearly expressing it's intention to restrict the use of adverse possession for the acquisition of title to mere portions of existing tracts, as illustrated by the 2 cases just previously referenced, the Court remained highly constructive on the utilization of adverse possession to quiet title to whole tracts, in scenarios which presented no boundary issues, such as *Vonfeldt v Schneidewind* (1921). As we have noted in reviewing several earlier cases, the Court has rarely placed any particular emphasis upon personal relationships as a potential obstacle to adverse possession, often approving adverse possession even between family members who are close blood relatives, so by this time the Court's liberal stance on cotenant adverse possession must have been widely known. In many other states, adverse possession between legal cotenants is virtually unknown, since land use made by one partial owner is typically regarded as beneficial to all other partial owners of the same tract by default, but the Court has consistently elected to hold negligent cotenants, who disregard use of their land by other cotenants, to the same standard as all other property owners who are similarly remiss. McNiff was an apparently typical husband and father of 5 children, who owned a certain presumably typical quarter section in Ellis County, upon which the McNiff family evidently lived for many years. When he died, prior to 1900, his widow apparently left the family homestead, since their children were evidently all adults who had already moved away and were living elsewhere, and she moved to Illinois. The widow proceeded to acquire the interests of some other members of the McNiff family in the subject property, but she apparently never attempted to acquire the inherited interests of all of her own children in that property. In 1900, the widow sold the entire quarter, by means of a deed which gave no indication that any other interests in the subject property existed, and the McNiff tract was farmed solely by her grantees henceforward. After having been conveyed an unspecified number of times over the ensuing years, the McNiff tract was acquired by Vonfeldt in 1917, but shortly thereafter Schneidewind, who was a married daughter of McNiff, appeared and asserted that she still owned a share of her former home quarter, forcing Vonfeldt to file an action seeking to quiet his title to the entirety of the quarter in question. The trial court held that the rights of Schneidewind to the property in contention had been foreclosed by adverse possession, and the Court confirmed that ruling, over the protest of Schneidewind that she was a cotenant whose land rights had been conveyed away without her knowledge or approval by her mother. The Court undoubtedly realized that Schneidewind was a legal cotenant who had been cheated, but also recognized that what had happened to her was no fault of Vonfeldt, and Schneidewind was guilty of sleeping upon her rights for a full statutory period, so in the view of the Court she had no one but herself to blame for her failure to step up and take

corrective action sooner. Thus the Court mandated that a deed purporting to convey the entire interest in any given tract is genuinely adverse to the rights of any existing cotenants, therefore such an illicit conveyance starts the clock for adverse possession running immediately, making the innocent grantee of such a deed an unknowing, yet entirely authentic, adverse possessor.

The rapidly increasing use of motorized vehicles and machinery produced a great demand for fuel at this time, which in turn triggered a sudden rush to extract oil and gas from every potential source, and *School District No. 100 (SD 100) of Wilson County v Barnes (1921)* stands as a classic example of the many land rights cases generated by such land use. Witham was the owner of a rural tract, evidently comprising a typical family farm, and in 1882 he agreed to allow SD 100 to utilize a small area, about 1 to 2 acres in size, situated in one corner of his property, as a schoolhouse site. A school was promptly erected in the agreed location, and the site was used as intended for school purposes in the normal manner henceforward, but this land use agreement went undocumented, although it was briefly mentioned in the notes of a school district meeting. Witham subsequently sold his property to Barnes, who continued to use it as a family farm, but the deed held by Barnes made no reference to the existence of the school site. In 1900, Barnes issued an oil and gas lease covering his entire tract, and again no language acknowledging the existence of the school site was included in this document, but no conflict arose, because no attempt was made to do any drilling in the schoolyard area. In 1918 however, SD 100 leased the school site for oil and gas purposes, and when the Barnes family learned about that lease, they informed SD 100 that they would not allow any such use of that area. SD 100 responded by filing an action against Barnes, in which SD 100 alleged that it had acquired the schoolyard through adverse possession, but the trial court rejected that argument and decreed that Barnes was the owner of the land comprising the school site. The Court upheld that lower court ruling, and proceeded to explain why it represented a proper application of the relevant principles of law and equity. By the time this controversy broke out, the school site had been in normal and consistent operation for well over 30 years, the Court realized, making full use of the area that was orally granted to SD 100, on a regular if not constant basis throughout that period, yet none of that land use could be characterized as adverse in nature, because it originated by virtue of an acknowledged land use agreement. The presence of the school site was never adverse to either Witham or Barnes, being permissive in nature from the outset, so the length of time for which the schoolhouse had stood was irrelevant, the Court indicated, thus SD 100 could derive no benefit from adverse possession. SD 100 was not completely without land rights however, the school site represented a valid and binding dedication of the relevant area for public use, the Court concluded, but under the equitable principles governing the concept of common law dedication, SD 100 had acquired only an easement covering the schoolyard, by means of the oral grant made in 1882, it had not acquired any land in fee. Since SD 100 owned no portion of the Barnes tract in fee, it had no right to issue any leases, so the 1918 lease was void and useless, but the Court also specified that the lease issued by Barnes in 1900 was not applicable to the area comprising the school site either, and SD 100 had the right to prevent any drilling within the schoolyard. Thus the Court effectively protected the validity of the school site for its intended educational purpose, while also shielding it from exploitation by anyone, for any unintended purposes, through the wise use of common law dedication, as an alternative to adverse possession.

Within the realm of riparian law, the concept of avulsion remained a relatively little known and rarely invoked concept in Kansas at this time, but at this juncture a controversy arose between 2 state officials which required the Court to expressly address the legal implications of avulsive river movement with regard to title. The distinction between avulsion and accretion was already reasonably well understood, accretive river movement being characterized as the constantly ongoing movement which any stream passing through soft soil is naturally expected to undergo, while avulsion embraces more dramatic forms of river movement, typically resulting from an unusual or extreme event, such as a flood. It was also well understood of course, that Kansas holds title to the beds of all navigable streams, since this question had already been repeatedly addressed by the Court by this time, as we have previously observed, and it was recognized that the title held by the state migrates along with any navigable stream, as it moves accretively. Some uncertainty persisted however, regarding the title implications when a navigable river experiences an avulsive event, after which the river occupies an entirely different physical location, having vacated it's former bed and cut a distinctly new channel through the land of one or more private property owners. This was the scenario confronting the Court in the case of *State v Turner* (1922) which involved an unspecified portion of the Kaw River, that was described by the Court only as being "near St. Mary's". Certain private properties in that vicinity were evidently invaded by that river during a flood, at an unspecified date, and those land owners requested compensation for the public taking of the submerged portion of their lands, which were now occupied by the relocated river channel, acting upon the presumption that title to the new riverbed was held by Kansas. Hopkins, who was the Kansas Attorney General, proceeding on behalf of the land owners, filed an action against Turner, who was the State Auditor, to compel Turner to pay the land owners for the acreage that they had lost by virtue of submergence, and this matter then came straight to the Court for resolution, since it was a direct contest between state officials. Under a 1921 statute, the Auditor was responsible for the disbursement of state funds to private parties whose lands were thus consumed by any navigable river, either wholly or in part, but the Court took the opportunity presented by this case to strike down that statute, on the grounds that it represented an illegal and unjustified waste of public funds. When a navigable river moves avulsively, the Court declared, no change to any boundaries or any titles occurs, thus the title held by the state remains in the abandoned channel, and it does not attach itself to the new channel. The Attorney General and the private land owners were mistaken, the Court concluded, in making the false assumption that fee title to any private land was taken by the state when an event constituting avulsion occurs, in reality the private parties still owned their entire tracts in fee, including the portion of their lands forming the new bed of the river. When any navigable stream relocates itself in an avulsive manner, the Court stated, Kansas acquires "full jurisdiction over the river in it's present location, for preservation and protection of it's public highway character; but the proprietors whose lands were invaded and degraded by the avulsion still own the bed and banks of the stream", therefore they have no basis upon which to demand any reimbursement from the state.

The emphasis placed by the Court upon the right of adjoining land owners to conclusively identify their own boundaries through mutual action was quite vividly displayed in *Shafer v Leigh* (1922) which exemplifies some of the most fundamental and vitally important principles of boundary law. An addition to Fredonia was platted in 1872,

but the platted area went unused for several years, and any original lot corner stakes that may have been set became lost. Hudson acquired the platted blocks in 1884, but he used the land only as a pasture until 1907, when he had all of the platted lots re-staked, in order to begin selling them off. Mikesell then acquired Lots 1 & 3 in Block 34, which were situated directly north of Lots 5 & 7, acquired by Shafer, and both of these parties presumably used their respective residential properties in the usual manner thereafter. The line between Lots 3 & 5 was still clearly marked by the stakes set in 1907, but in 1913 Mikesell apparently needed some extra space, so Shafer conveyed the north 5 feet of Lot 5 to him at that time. Mikesell and Shafer measured off the 5 feet from the existing stakes, and they then erected a fence on their new property line, which both of them subsequently honored as marking their mutual boundary. In 1919, Mikesell sold his property to Leigh, and in 1920 Leigh ordered a survey, at which time she was informed by her surveyor that her southerly boundary was 17 inches south of the existing fence, although how the surveyor reached this conclusion is unknown. Leigh apparently then went to Shafer and demanded that the fence be moved to the surveyed line, but Shafer reacted instead by filing an action against Leigh, seeking judicial confirmation that the fence represented her true north boundary. The trial court held that the fence was in fact a legitimate agreed boundary, conclusively established by Shafer as a grantor along with Mikesell as her grantee, therefore the fenced boundary was binding upon Leigh, as the successor of Mikesell. The Court upheld that lower court decision, observing that Leigh was fully aware of the existence of the fence when she acquired the Mikesell tract, therefore she was on inquiry notice of the fact that it represented her south boundary, and she had no right to challenge that boundary after having completed her acquisition. Leigh had made the mistake of failing to insist that her grantor provide her with boundary verification prior to making her acquisition, the Court pointed out, so she had no right to shut her eyes to the existing improvements defining the apparent limits of her land and rely solely upon her legal description for purposes of boundary control. Thus on this occasion the Court reiterated that property corners or lines which are physically marked in any visible manner by a grantor control over dimensions of record, including urban lot dimensions appearing on a plat or in a deed, while also adhering to the principle of monument control, by approving the fence as a controlling boundary monument. In so ruling, the Court rejected the suggestion that the physically marked line constituted a mistake, making the question of how accurately or inaccurately the fence may have been placed irrelevant, it was no more subject to correction or relocation than any other original boundary monument. In the eyes of the Court, the fence represented the best available evidence of the intended boundary location, so it was binding upon all parties and their successors by virtue of the intent which it embodied, making the fact that it had not been in place for a full statutory period, and therefore could not support adverse possession, inconsequential.

The presence of a grantor and grantee relationship was also highly relevant to the case of *Long v Myers* (1921 & 1922) which was addressed twice by the Court, and culminated in a very different outcome on the second occasion. Cosner was the patentee of the SE/4 of an unspecified but presumably typical section in Neosho County, and in 1882 he conveyed the SE/4SE/4 to Massey. Massey evidently wanted to fence his land, so he and Cosner measured off a quarter mile, proceeding northward from the southeast corner of the section, using a rope of unspecified length, and they then built a fence, running westward from the point so established, which they intended to mark the north line of the

Massey tract. These 2 men regarded the fenced line as their mutual boundary henceforward, until 1898 when Myers acquired the Massey quarter quarter. For the next 20 years, the fence continued to serve as an established boundary, and neither Cosner nor Myers evidently ever felt compelled to verify it's actual location. In 1918, Myers conveyed his tract to Long, and Myers then acquired the NE/4SE/4 from Cosner at an unspecified time, but shortly thereafter Long came to suspect that the fence was too far south, so he ordered a survey, which indicated that the fence was about 100 feet south of the sixteenth line representing Long's northerly boundary of record. Upon learning of this, Long filed an action against Myers, seeking to have the surveyed sixteenth line judicially confirmed as his north boundary, but the trial court ruled against him, accepting the fence as a legitimately established boundary, as proposed by Myers. The Court reversed that ruling in 1921 however, on the grounds that Myers had failed to prove that the fence was not just a boundary mistake, employing the mistake doctrine on that occasion, to nullify any value that the fence might hold for purposes of boundary control. A second trial was then held, and again Myers emerged victorious, forcing Long to appeal the matter to the Court for a second time in 1922. Upon reviewing the additional testimony presented at the second trial, the Court changed it's position regarding the value of the fence, and agreed that it controlled the disputed boundary, through adverse possession. The testimony of Cosner was key to this crucial change in the Court's perspective, as he clarified that both he and Massey had intended and agreed in 1882 that the fence was to function as their boundary, regardless of whether it was located precisely upon the sixteenth line at issue or not. The Court was thereby convinced that the fence represented a genuine agreed boundary, which had subsequently been perfected by adverse possession, over a 15 year period which had fully run and expired during the 1880s and 1890s. The fence was already the boundary between the relevant properties by the time Myers acquired the Massey tract, the Court indicated, 2 decades before Long had even arrived in the subject area. Thus here the Court reiterated that a grantor, Cosner in this case, can complete adverse possession against his own grantee, while also once again holding that a grantee, such as Long, who is placed upon inquiry notice by the presence of a boundary fence, cannot successfully protest the location of such a clearly defined boundary after completing his acquisition. In addition, the Court also hereby accepted the proposition that a fence mutually built along an aliquot PLSS line can effectively negate the controlling value of that line, leaving any subsequent resurvey of such a line powerless to disturb the boundary location thereby physically established.

The Court's highly affirmative and flexible stance upon the validity of legal descriptions was very much in evidence in the case of *King v Stephens* (1923) as the statute of frauds was once again in the crosshairs of the Court. Mary L. Stephens was the owner of a presumably typical platted residential lot in Lawrence, bearing a house, identified as 418 Elm Street, in which she lived alone until 1918, although how or when she had acquired that property is unknown. She had at least 2 children, a son and a married daughter, who were both adults, and their mother was evidently an elderly widow. As Mary grew older, she apparently realized that she needed personal care, so she beckoned her son Clyde and his family to move into her home, and they did so in 1918. Clyde shared his mother's place of residence, and presumably took good care of the feeble woman, serving as the man of the house, for about 2 years, until she died in 1920. In 1919, in an apparent effort to express her gratitude to her son for his presence and personal assistance during her declining

years, Mary offered to give him the property on which they were both living, and a conveyance contract was composed for that purpose. Under this very simplistic contract, Clyde agreed to occupy the premises and care for his mother until her expiration, and she agreed that her real property was then to become his. No deed was ever executed however, so after Mary died Clyde was left only with the written agreement, and when King, who was his married sister, found out what her late mother had done, she elected to mount a legal challenge to the validity of the contract held by her brother. Upon viewing the contract in question, King evidently realized that the legal description of her late mother's real property was highly dubious, since the contract stated only that the subject property was "418 Elm Street, owned by Mary L. Stephens". The contract made no reference whatsoever to any locative details, such as the city, county, state, or subdivision in which the subject property could be found, so King was evidently convinced that it was fatally flawed and legally unsupportable, thus she proceeded to file an action against her brother, in which she alleged that the contract at issue was null and void, insisting that she was entitled to an equal share of the subject property. The trial court agreed with King, and deemed the contract to be worthless under the statute of frauds, as she had requested, but the Court came to Clyde's rescue, reversing that decision and awarding the subject property to him. In so doing, the Court reminded the trial judge that the statute of frauds requires only that any document of conveyance must describe the subject property in writing, it does not require any specific form of description, nor does it require absolute completeness. Although it was obviously highly incomplete, the Court recognized, the contested legal description was not inaccurate, and adequate extrinsic evidence was readily available to fully identify the intended lot, thereby bringing clarity and certainty to the imperfect description. Since Mary and Clyde had physically occupied the described premises, and Mary owned no other real property anywhere, the Court observed, there could be no uncertainty or ambiguity whatsoever as to the location of the described lot, therefore the description in contention was legally sufficient to support the conveyance contract, despite the absence of several typical particulars. An incomplete legal description, which can be validated and made certain through the employment of extrinsic evidence, the Court thus informed King, will not be judicially nullified.

At this juncture, a contest which was destined to have an influence on the outcome of many future right-of-way cases reached the Court, marking the beginning of a series of cases in which the Court would clarify the modern judicial position on the title status of right-of-way of all kinds in Kansas. The case of *Rowe v Bowen* (1923) although simplistic and disposed of in fairly short order by the Court, set the stage for much more complex right-of-way battles which we will examine as we proceed through the coming years. Rowe was the owner of Lot 128 in Manhattan, which evidently fronted upon an unspecified platted street, that had either never been used for public travel, or was perhaps once used, but had been rendered obsolete and discontinued at some time during the previous decades. Nothing is known about the original dedication of this public street bounding the Rowe lot, but presumably it was a typical platted street which had proven to be either useless or unnecessary, and for that reason Manhattan proposed to vacate that street in 1912. Manhattan notified Rowe that the street was to be vacated, and informed her that her portion of that street would belong to her after it was vacated, apparently without fully explaining the operation of the vacation process to her, thereby leading her to believe that the vacated area in front of her lot was going to be treated as a distinct parcel,

which would be deeded to her by the city. Later in 1912, Manhattan vacated the street in question, then about a month later Rowe sold her lot to Bowen, by means of a deed which made no reference to the street vacation. Bowen subsequently asserted that she had acquired the portion of the vacated area that was associated with Lot 128, along with that lot as it was outlined on the relevant plat, despite the fact that nothing was stated regarding the vacated street in her deed. Rowe was thus forced to file an action, in which she insisted that the vacated area had never been deeded to her, and she was still waiting for it to be conveyed to her, as she had been promised, maintaining that she had no intention of deeding it to Bowen, and she could not possibly have done so, because she did not yet own that area. The trial court informed Rowe that she had in fact acquired the disputed area, and that she had deeded it to Bowen, and the Court upheld that lower court ruling, verifying that whatever Rowe had mistakenly believed or intended made no difference, the vacated portion of the street abutting her lot had legally become part of that lot immediately upon being vacated. By the time Rowe conveyed her lot to Bowen, the Court indicated, that lot legally extended to the centerline of the vacated street, and not merely to the edge of the former public right-of-way, as Rowe had apparently thought, so Bowen was entitled to the whole expanded lot, rather than just the portion of that lot outlined on the plat. It also made no difference, the Court concluded, that the vacated area was never expressly described in any deed, because reversion pursuant to vacation is an operation of law, which occurs automatically, thus the contested area legally passed from Rowe to Bowen without ever being specifically described, just as it had passed from Manhattan to Rowe with no need for any deed or any description. In addition, the Court observed, reversion is an appurtenant right, legally attached to land, so the fact that the vacation had taken place prior to the conveyance from Rowe to Bowen was of no consequence, Bowen would have obtained title to the vacated area regardless of which event occurred first, because Rowe, as a grantor, had no legal option to retain any reversionary rights associated with her lot after selling it, even if she had truly intended to do so.

Martin v Ott (1923) presents a scenario which was becoming common all over the west at this time, as some of the data on GLO township plats was rendered obsolete and unreliable by the passage of time, due to the natural migratory movement of the rivers depicted thereon. Ott was the owner of a presumably typical farm, situated near Eudora and bounded in part by a portion of the Kaw River flowing through Douglas County. Nothing is known about how or when he acquired his property, but he had evidently owned it for a number of years, long enough to notice that it was losing ground to the river, although he apparently never made any effort to measure the river's movement or determine the rate at which it was consuming his tract. At an unspecified date, presumably circa 1920, Ott decided to sell his farm and Martin came to look it over. Martin was apparently aware that the Ott farm consisted of 2 riparian government lots, situated in the SW/4 of a certain Section 22, and that the GLO plat of that area indicated that the 2 lots contained a total of 65 acres. As the 2 men walked the property, Martin noticed that the tract did not appear to contain 65 acres, and Ott frankly admitted that he was sure that it was short of 65 acres, telling Martin that he believed that at least 4 to 5 acres had been lost to the river. Martin continued to express concern about the acreage, so Ott warned him that the property had never been resurveyed, thus no one could be sure of the extent to which the river had encroached upon and reduced the originally platted acreage. Ultimately, Martin decided to buy the Ott farm, despite his concerns about how many acres

it contained, and the deed executed by Ott to Martin simply reiterated the original description language, that appeared in the deed by which Ott had acquired that tract, concluding with the words "containing 65 acres more or less". Subsequently, Martin had his property surveyed, at which time he learned that it contained only about 36 acres, so he filed an action against Ott, charging Ott with making false representations about the acreage embraced within the subject property, and seeking a decree declaring that Ott was liable to him for the acreage shortage. The trial court rejected Martin's accusation however, and the Court upheld the lower court ruling that Ott had not deceived or cheated Martin in any way. Martin protested that he was entitled to rely upon the reference to 65 acres in his deed, and that he was also entitled to rely upon the statements of Ott, leading Martin to believe that the tract in contention was probably only a few acres short. The Court disagreed however, and informed Martin that the evidence revealed that Ott had clearly notified Martin that the acreage of the tract in question was unknown and could not be guaranteed. Recognizing that the 65 acre figure had clearly been obsolete and worthless for decades, the Court observed that acreage figures pertaining to riparian lots appearing on GLO plats serve only to assist in confirming the identity of the relevant lot or lots being conveyed, such figures cannot be relied upon as accurate representations of current acreage. Ott had met his burden as a grantor, in the eyes of the Court, because he pointed out the need for a survey to Martin, and he never promised Martin any specific number of acres, while Martin as the grantee had failed to either obtain a survey before acquiring the farm, or to insist that Ott provide a survey for use in their transaction, therefore Martin had no right to complain about the acreage shortage after acquiring the subject property. Thus here the Court held that a grantee has no right to rely upon historically documented acreage as a basis for a real property transaction, when the subject property is riparian in character, because such property is necessarily always subject to acreage variation.

The case of *Ralston v Dwiggins* (1924) demonstrates that by this point in time the Court had developed a clear understanding of the fact that different forms of boundary control are appropriate for urban and rural surveys, while also once again highlighting the Court's appreciation for historical improvements as legitimate evidence of original boundary locations. Ralston was the owner of Lot 12 in Block 27 of Augusta, while Dwiggins owned Lot 11 in that block, which was platted directly south of Lot 12. Ralston's lot was apparently situated at the north end of this particular block, and it evidently stood at the northern extremity of the whole platted area, although whether Ralston's lot was bounded on the north by a section line or a boundary line of some other type is unknown. Both of these lots were presumably rectangular in shape, but Lot 11 was platted as being 50 feet in width, while Lot 12 was platted as being only 40 feet in width. After Dwiggins had his lot surveyed, at an unspecified date, presumably circa 1920, Ralston filed an action against Dwiggins, alleging that his survey had left her lot 6 feet short of its platted width, although how Ralston determined the location of the north line of her lot is unknown, and no evidence pertaining to the location of that line was ever presented. Ralston provided no survey of her own lot to substantiate her assertion, but the trial court ordered 2 additional surveys of the Dwiggins lot, one of which was performed by a county surveyor who was brought in from another county, presumably to provide complete objectivity, and all 3 surveys produced the same northerly boundary line for Lot 11. In view of this result, the trial court denied that the argument set forth by Ralston held any validity, rejecting her proposition that her lot extended 6 feet south of the line depicted on the surveys as the

north line of Lot 11. On appeal, Ralston argued that all 3 surveys were inaccurate, because they were all based upon the same survey control points, which were evidently located to the south of the lots in contention, somewhere within the platted area. She maintained that the 3 surveys should all be rejected, because none of them were based upon any section line location or any section corner monuments, they were all based upon control points found at various lot or block corners, at unspecified locations within the interior of the platted area. The Court disagreed with Ralston however, and upheld the decision against her, while approving the contested surveys, and reminding Ralston of the judicially established "rules for locating city plats", which the Court had enumerated in the 1906 Richardson case, reviewed previously herein. All original monuments are equal in controlling value, the Court went on to inform Ralston, regardless of where they may be located, and regardless of the sequence in which they may appear in a legal description. Section lines are typically not an ideal source of survey control in an urban context, the Court realized, wisely applying the widely accepted boundary principle that the nearest source of reliable survey control is typically most appropriately utilized for boundary control purposes. In conclusion, the Court observed that the results of the 3 disputed surveys all conformed well with the long established improvements in the subject area, such as buildings which were erected upon lot lines at an early date, when the original lot corner stakes were still in place, making those buildings themselves valid original boundary evidence, which the 3 surveyors had properly utilized.

Kansas City v Board of Commissioners of Wyandotte County (1924) presents an unusual mixture of 2 distinct land rights issues, accretion and dedication, which only very rarely arise in the same litigation. When the Wyandotte townsite was platted in 1857, a small strip, having unspecified dimensions and presumably consisting of only a modest number of acres, lying along the west bank of the Missouri River north of Kaw Point, was dedicated for the construction of a levee. No levee was ever built in this location, but as the flow of water in the great river gradually diminished, the platted strip greatly expanded to the east, through the combined natural forces of accretion and reliction, until 60 years later it had grown to more than 100 acres in size. Throughout the decades, this area remained unused, since it was highly flood prone, and it was occupied only by vagrants, but around 1920 Kansas City created a development plan for the vacant area, which involved raising the grade enough to prevent flooding, thereby converting it into a useful area. Kansas City then contracted with a construction company to begin work on this site by building a levee which would connect with existing levees to the north and to the south, and thus restrain the river, allowing the dedicated area to be put to productive commercial use as a river landing, with warehouses to store goods awaiting transportation downstream to the gulf coast. Wyandotte County elected to challenge the right of the city to put the subject property to such use however, forcing Kansas City to file an action against the county, to obtain judicial clarification regarding the dedication status of the accreted area and the manner in which it could be lawfully used. The trial court fully approved the proposed construction work and the planned future use of the accreted area as a commercial site, on the grounds that the proposed use of the subject area was public in character and was genuinely beneficial to the public, so it represented a valid use of dedicated land. The court concurred, confirming that the originally insubstantial dedicated strip had legally expanded in size through the operation of accretion and reliction, so it included all of the land extending eastward to the river, making that area a viable site for public commerce.

In so doing, the Court adopted the position that dedicated land increases or decreases in size with all natural river movement, just like all other real property situated along ambulatory watercourses. In addition, the fact that the area in question had been left unused for any public purpose for over 6 decades had no adverse impact upon the dedicated status of the land, which remained public despite being long neglected, the Court observed, while awaiting eventual use for its intended purpose. Neither the absence of public use nor the presence of intruders upon the area at issue had negated or reduced the dedicated area in any way, the Court concluded, noting that the plan to grade the area in a manner which would bring the river under control was in perfect accord with the purpose of the 1857 dedication, thus the Court deemed the development plan to be entirely acceptable, enabling Kansas City to proceed. Interestingly, another battle was fought over this same tract of land nearly 2 decades later, culminating in 1942, after the development of the area had been completed, in the federal case of *Swope v Kansas City* (132 F2d 788). On that occasion the Tenth Circuit Court of Appeals flatly rejected a claim set forth by the heirs of the party who platted Wyandotte in 1857 that they owned the entire dedicated area, because it had reverted to them as a result of the lack of public use of that area for several decades.

As we have previously noted, the concept of avulsion remained little used in Kansas for several decades, but at this time the Court was confronted with a case which required a judicial determination of where accretion ends and avulsion begins in Kansas, not in locational terms, but as to what type of aquatic action can be classified as avulsive, rather than accretive. In most states, erosion is regarded under the law as the counterpart of accretion, rather than being a factor supporting avulsion, because erosion operates to continually reduce upland, in a manner which corresponds to the building of upland that results from accretion, while avulsion is narrowly limited to those extreme events during which an independent river channel is created. In deciding the case of *Craig v Leonard* (1925) however, the Court adopted the position that erosion can signify avulsion in Kansas, when it occurs in a particularly dramatic manner. Craig and Leonard each owned typical family farms, presumably comprised of cropland or pasture, which were bounded by a portion of the Red Vermilion River that passes through Pottawatomie County, Craig's tract being on the east side of the river and Leonard's tract being directly to the west across the river, although when they acquired their respective properties is unknown. This segment of the river was evidently prone to flooding, and substantial chunks of soil undercut by the water were often observed collapsing and tumbling into the river during times of high water. This type of erosive activity was documented on several occasions, in 1902, 1903, 1908 and 1912, and most if not all of the land lost in this manner was taken from Craig's bank of the river. In 1913, a survey was done, which showed that the river had moved an unspecified distance eastward since the area was platted by the GLO, and as a result of that movement the upland area within the Craig tract had been reduced by 12.5 acres from the acreage indicated on the relevant GLO plat. Craig then decided to claim that she owned some of the land west of the river, and she had a fence built, an unspecified distance west of the river, but Leonard tore this fence out, maintaining that the river was still his east boundary, so Craig was compelled to file an action, in which she alleged that the river was no longer her west boundary, because it had moved eastward in an avulsive manner. The trial court agreed with Craig and deemed her to be the owner of all of the land east of the platted river location, and the Court upheld that decision, finding that the

evidence which had been presented by Craig was sufficient to prove that the river had repeatedly relocated itself through a series of small avulsive events. Because the testimonial evidence made it clear that the land in question was taken by the river in chunks, as a result of flooding activity, the Court was satisfied that Craig had met her burden to prove that the river was relocated through avulsion, even though that relocation was produced by erosion. The river had not moved accretively, the Court informed Leonard, because the erosion was so prominent as to be visible at the moment when it occurred, therefore the relevant portion of the river was no longer a boundary monument, and he had gained no land as a result of its eastward movement. Thus the Court here adopted the concept that rapid erosion can constitute avulsion, thereby opening the door to numerous future avulsion claims, by setting the burden of proof for avulsion relatively low. In conclusion, the Court also dismissed Leonard's assertion that the 1913 survey, which identified the present river location as his east boundary, was controlling, stating that it was "not the province of the surveyor" to decide whether the river had moved accretively or avulsively, since surveyors are not authorized to make any conclusive determinations pertaining to title.

The Court took another important step toward full clarification of the operation of the principle of reversion, while emphasizing the importance of properly recognizing the status of any right-of-way as either fee or easement, in *Bowers v Atchison, Topeka & Santa Fe Railway (ATSF) (1925)*. ATSF was the holder of a 50 foot wide railroad right-of-way passing through Douglas County, which was centered upon an existing railroad track, and ATSF also owned a tract of unspecified size, situated on the north side of that right-of-way, known as Lake View Station. In 1897, a public road was opened, with a right-of-way 40 feet in width, which evidently paralleled the railroad right-of-way, and the north edge of the highway right-of-way was 25 feet south of the south edge of the railroad right-of-way. ATSF then acquired this 25 foot strip in fee, as an addition to the Lake View Station, and the deed granting this strip to ATSF described the strip as being bounded "on the south by a line 50 feet south of and parallel to said center line of said main track", which line was the northerly highway right-of-way line, but the deed made no direct reference to the public highway. The public roadway was subsequently abandoned, and the 40 foot public right-of-way was officially vacated, but the fence running along the north line of that right-of-way remained in place, and ATSF never used any of the land south of that fence, lying within the vacated right-of-way. At an unspecified date, presumably circa 1920, Bowers evidently acquired the property lying directly south of the vacated right-of-way, and he used all of the land lying south of the fence, just as each of the several prior owners of his tract had done. When ATSF informed Bowers that ATSF owned a 20 foot strip south of the fence, consisting of the north half of the vacated 40 foot right-of-way, Bowers reacted by filing an action in which he maintained that the fence marked the south boundary of the ATSF property. The trial court ruled against Bowers on the right-of-way issue, holding that the north half of the vacated right-of-way had in fact been part of the ATSF tract, but awarded that strip to Bowers, on the basis of adverse possession. The Court struck down that adverse possession ruling however, and upheld the ownership of the disputed 20 foot strip by ATSF, allowing ATSF to take control of the area north of the centerline of the old roadway. Bowers protested on appeal that the legal description of the 25 foot strip held by ATSF very clearly called out the north edge of the 40 foot right-of-way, which was the fenced line, as the south boundary of the ATSF tract, so ATSF owned no land south of that

line. The Court agreed with Bowers that the ATSF legal description was clearly bounded on the south by the north line of the vacated right-of-way, but then explained to him that he was mistaken about the legal consequences of that description. The fact that the ATSF fee property extended south to the highway right-of-way, the Court stipulated, meant that ATSF held a reversionary right to the north half of that right-of-way, so when the 40 foot right-of-way was vacated the ATSF tract was effectively expanded southward 20 feet, enabling the centerline of the former public right-of-way to function as the boundary between Bowers and ATSF. Property dimensions appearing in deeds or on surveys describing boundaries cannot prevent reversion, the Court reiterated on this occasion, wisely defining reversion as an operation of law which honors centerline boundaries and mandates their enforcement, in order to prevent title gaps comprised of vacated strips:

“... the grant extended to the center of the highway, subject to the public easement ... when the highway was established it constituted an easement ... the subject of who owns the fee of a highway becomes important when the highway is vacated ... when the public easement terminated ... the highway reverted to the fee owner ... what occurred was the burden in favor of the public was lifted ... to exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by express declaration ... to include the highway is inferred as a matter of law ... a survey ... does not operate to destroy the presumption that the fee to the roadbed was conveyed ... conveyance of realty abutting upon a street, in the absence of clear express indications to the contrary, includes the center of the street ... the description fixed the south line of the grant 70 feet from the center of the railroad track, instead of 50 feet, and when the highway was vacated the grant was simply freed from the overlying public easement.”

By the time our next case came before the Court, it had been nearly 2 decades since the Court had first acknowledged the fallacy of navigability based upon meander lines, in the Kregar case of 1908, previously reviewed herein. During the subsequent decade, the Court had reverted back to meander based navigability however, as we have observed, in an effort to preserve the desiccated bedlands of the once mighty Kansas streams as a source of revenue for education, only to later learn that the Supreme Court of the United States held a very different view on the proper determination of navigability. So it was amidst this cloud of uncertainty, regarding how to properly ascertain navigability for purposes of title, which was only beginning to clear during the 1920s, that the case of *Piazzek v Drainage District No. 1 of Jefferson County* (1925) arrived, and found the Court open to the employment of a standard for the determination of the navigability status of Kansas waterways that was aligned with federal law. *Piazzek* was the owner of a tract of unspecified size, shape and location situated near Valley Falls, through which the Delaware River passed, and his property bore a milldam, which he had built and operated since the 1860s on a portion of that river. For unknown reasons, the Drainage District condemned the riparian portion of the *Piazzek* property in 1920, and proceeded to destroy the milldam in 1921 after *Piazzek's* death, but his widow maintained that the condemnation award she had gotten was insufficient, since it did not include the value of the milldam. The Drainage

District dismissed her complaint however, and declined to provide her with any additional compensation, taking the position that the milldam had occupied the bed of a navigable river, so it was never part of the Piazzek property. The trial court decided that the Drainage District was right, and held that the widow was entitled to no compensation for the destruction of the dam, but the Court reversed that ruling and ordered the lower court judge to conduct a new trial, to give the widow the opportunity to prove the value of the razed structure, which would then establish the amount that was still due to her. The river in question was not navigable, the Court informed the litigants, because only those watercourses which can be shown to constitute "a channel for useful commerce" can be classified as being navigable for purposes of bedland ownership, under the federal definition of title navigability, espoused by the United States Supreme Court. No evidence had been presented to prove that the Delaware River had ever been used for commercial navigation, or that it was ever regarded as a potentially viable route for commercial traffic, the Court observed, so there was no support for the suggestion that it was worthy of navigable status for title purposes. Therefore, the Drainage District had acted in error, the Court concluded, and had destroyed property owned by the Piazzeks without providing adequate compensation to them, on the false assumption that Kansas held title to the riverbed at issue. Thus the Court announced that the Delaware River is non-navigable, making it only the second river ever to be expressly decreed to be non-navigable in Kansas, along with the Smoky Hill River, which the Court had declared to be non-navigable in 1908. All non-navigable riverbeds were patented by the United States to the original entrymen of the public domain and are owned in fee by their successors, the Court wisely recognized on this occasion, and the thread of all such streams marks the boundary of any lands which are described as being bounded by such a stream.

Oil & gas exploration activity along the banks of the Arkansas River resulted in a controversy involving numerous land owners along with competing companies, which was resolved by the Court in the case of *Cushenbery v Waite-Phillips* (1925) but not without some difficulty. A township in Cowley County, through which the Arkansas River passed, was surveyed and platted by the GLO in 1871. At that time, the river was still flowing strongly and the riverbed was broad, as reflected by the meander lines that were run along it's banks by the GLO surveyors, but half a century later most of the former riverbed was dry land, and the legal consequences of this development were not understood by many of the riparian entrymen or their successors. Several parties who owned the riparian lots which were created in 1871 leased their lands to Waite-Phillips for exploratory purposes in 1923, and in so doing they described their properties in the typical manner, with reference to the relevant GLO township plat, which showed the acreage of each lot that was bounded by the river. However, that group of lot owners soon came to believe, or perhaps they were informed by some unknown party, that they had not leased all of their land, and they still had additional land which they could profitably lease to others. This additional land area, the lot owners believed, was comprised of the accreted or relicted land lying within the dry riverbed, so in 1924 all of those same lot owners issued additional leases, purporting to grant Cushenbery the right to conduct exploration activities within the meandered riverbed. Waite-Phillips objected to this however, claiming to hold the exclusive right to explore the whole subject area, including the former riverbed, and refused to allow Cushenbery to commence operations, forcing him to file an action seeking to have the validity of his leases judicially confirmed. The trial court ruled against Cushenbery,

holding that each of the several land owners had in fact leased every bit of their land to Waite-Phillips, not just the originally upland portion of each tract, so they had no land left to lease to Cushenbery, thus his leases were all void and worthless, as maintained by Waite-Phillips, and the 1923 leases all extended all the way to the existing river. On appeal, Cushenbery pointed out that the leases to Waite-Phillips all specified the acreage being leased, and all of the land owners testified that they never intended to lease the meandered riverbed to Waite-Phillips, stating that they intended to lease only the upland acreage in 1923. This testimony was convincing to 3 of the Justices of the Court, who held that the 1923 leases must be limited by the meander lines, upon the principle that the intent of a grantor must always control, thereby leaving the meandered riverbed open to Cushenbery. A majority of 4 Justices however, wisely recognized the treachery which was being executed by the land owners, for their own financial benefit, and declined to regard their testimony as valid, instead upholding the lower court decision in favor of Waite-Phillips. Astutely applying the principle that meander lines are not boundaries, the majority decreed that the land owners had no right rely upon the GLO acreage figures as a controlling factor in the 1923 leases, by describing their lands as riparian lots they had granted Waite-Phillips the right to use each lot in it's entirety, which included the accreted or relicted riverbed. The grantors, the majority realized, could not be allowed to deny the efficacy or the fullness of their prior grants, in order to generate an opportunity for additional personal profit for themselves, at the expense of their original grantee. Thus by a majority of 4 to 3 the Court mandated that accretion and reliction passes with every conveyance of land, even when no reference is made to it in the document of conveyance, because it is legally part of the conveyed area, not a separate or distinct tract or parcel, and acreage figures which appear in conveyance documentation do not prevent the operation of that principle.

The case of *Sweeney v Vanhole* (1926) much like our last previous case, again illustrates that excessive reliance upon a GLO plat, without sufficient regard for subsequent events, can be a mistake, while upholding the legally controlling nature of a subsequent survey. *Sweeney* was the owner of a tract of unspecified size and shape, which was bounded on the southwest by the Kansas River. How and when *Sweeney* had acquired her tract is unknown, but it was bounded by a portion of the river which flowed in a southeasterly direction through the south half of a certain Section 9, and the originally platted location of the river evidently changed very little from 1860 to 1902. Early in 1903 however, the river moved more than 200 feet to the northeast during a flood, thereby cutting a new second channel through the land of *Sweeney*, but later in that same year the river relocated itself again, this time creating a third channel which was southwest of the original channel, although some water continued to flow in all 3 channels. In 1908, *Sweeney* conveyed a portion of her tract to *Vanhole*, but she wisely ordered a survey, in order to properly define the area that she intended to convey to him before doing so. The survey correctly outlined the intended area, comprising 12.8 acres, which was situated on the northeast side of the northern channel, being bounded by that channel on the southwest, and the surveyor properly tied this new parcel to the boundaries of Section 9. *Sweeney's* surveyor also created a legal description for her, based upon his survey, which she then used when she conveyed that area to *Vanhole*. For several years *Vanhole* evidently farmed the described area and no controversy arose, but when the northern channel eventually dried up he extended his farming activities in a southwesterly direction, to the original

river channel. When this expanded land use was questioned by Sweeney, Vanhole informed her that because his legal description made reference to the river as his southwest boundary, his tract legally extended all the way to the platted river location, which effectively expanded his tract by about 10 acres. Sweeney reacted to this development by filing an action against Vanhole, seeking to have him judicially restrained to his 12.8 acre tract, insisting that the defunct north channel was still his southwesterly boundary. The trial court ruled in Sweeney's favor, and the Court upheld that decision, stating that "it is not important to consider which of the 3 channels referred to could, with the greatest propriety and accuracy, be described as the Kansas River". This was so, the Court observed, because the area acquired by Vanhole had been well defined by means of a survey, which made it completely clear that the northerly channel, and not the original channel, was intended to function as the southwest boundary of the Vanhole parcel. It made no difference, the Court also noted, whether any of the river's movement was accretive or avulsive in nature, because all of that movement took place before Vanhole's parcel existed, so he could not benefit from any of the prior activity of the river, his parcel was conclusively limited by his legal description, and he had no valid basis upon which to claim any land southwest of the dry northeast channel. Thus the Court clarified that a call for a river as a boundary in a deed cannot be presumed to represent a call for the river's platted location, such a call will be presumed to represent a call for the location of the river as it existed at the time of the deed, which thereby makes that particular river channel a controlling boundary monument, under the principle that the intent of the parties at the moment of conveyance controls the contents of that conveyance. In addition, the Court here wisely acknowledged that even a survey which is not expressly referenced in a deed can control boundaries, if it can be shown that the survey was original in nature, and that it formed the basis for the description that was used in the deed.

The importance of the grantor and grantee relationship to boundary determination was on full display in *McBeth v White* (1927) demonstrating that a boundary location which is agreed upon between a grantor and grantee is legally binding based upon agreement alone, and need not meet the requirements of adverse possession. Graves was the owner of the SE/4NE/4 of a certain presumably typical Section 24 in Dickinson County, although how or when he acquired this tract is unknown, and whether or not any of the original monuments marking the boundaries of this particular section were in place is unknown as well. In 1908, Graves conveyed a parcel described only as "the south 9 acres" of his quarter quarter to Ramsey, but where the quarter section line marking the south boundary of the Graves tract was located was unclear to these 2 men, so they called upon a surveyor for assistance in establishing the exact location of the 9 acre parcel. How the surveyor ascertained the location of the quarter line in question is unknown, but he marked the 2 northerly corners of the Ramsey parcel for these men, and they then erected a partition fence on that line, which they regarded as their mutual boundary henceforward. At an unspecified date however, presumably not long after creating the Ramsey parcel, Graves sold another portion of his tract, comprising the 20 acre area lying directly north of the Ramsey parcel, to an unspecified party. Both the 9 acre parcel and the 20 acre parcel were sold several times over the ensuing years, and all of the various owners of those 2 parcels honored the fenced boundary, until White acquired the 20 acre parcel in 1924. White obtained a survey, which indicated that the south line of his parcel was several feet south of the fence, so he moved it to the line that had been surveyed

for him. When McBeth, who had acquired the Ramsey parcel at an unspecified date, discovered that the fence had been moved, he filed an action against White, seeking to have the line upon which the fence had previously stood decreed to be his north boundary. The trial court ruled in McBeth's favor and the Court upheld that decision, on the basis that the old fence represented a legitimate agreed boundary, established in 1908, so White was bound by it and he had no right to relocate it, thereby quieting title in McBeth to the full area lying south of the originally fenced line. White argued that his survey had proven that the fence represented nothing more than a boundary mistake, since it had clearly been incorrectly placed in 1908, so adverse possession was inapplicable to the situation. The Court informed White however, that "there is no necessity of resorting to the doctrine of acquiring title by adverse possession" because "there was an agreement between Graves and Ramsey", which made the line marked by them an original boundary. Therefore, the Court recognized, it made no difference whether White's survey correctly identified the described location of the north line of the 9 acre parcel or not, because no subsequent survey could control the location of the line in dispute, even if correct in all technical respects. In so ruling, the Court once again held, just as it had in the Shafer case 5 years before, that a boundary agreed upon and marked on the ground in any manner by a grantor, either for the use of his grantee or along with the grantee, controls over the described location of that boundary, since such physical acts represent primary evidence of intent, regarding the location of their mutual boundary. In this instance, although no express agreement had been made between the original grantor and grantee, that the fence marked their mutual boundary, the Court concluded that the acquiescence of all of the subsequent owners of the properties bounded by the fence stood as sufficient evidence that it was regarded by all parties as an established boundary. The lack of precision manifested in the original placement of the fence was of no consequence, in the eyes of the Court, because the fence carried the same legal force and effect as an imperfectly placed original survey monument, showing once again that any object can potentially constitute a controlling boundary monument.

While we have already learned, from cases such as our last previous one, that all grantors bear serious legal responsibilities regarding boundaries, and that the Court recognizes the gravity of all acts of a grantor, there are also important judicial rules pertaining to the role of a grantor in generating a conveyance, which can have a major impact on deed validity. The case of *Johnson v Cooper* (1927) provides an excellent example of both the power of a deed created by a grantor, and also the legal limits upon the grantor's authority over any conveyance which he has thus enacted. Kessler and his wife were an elderly couple who owned and resided upon a tract of unspecified size, shape and location in Woodson County, but Kessler's wife was ill, so in 1912 he hired Johnson, who was a young woman, to serve as a personal nursemaid to his wife. Johnson lived with the Kesslers for 3 years, and attended to Kessler's wife until the aged woman passed away in 1915, at which time Johnson naturally moved out of the Kessler home and began living elsewhere. Shortly thereafter, Kessler went to his banker and without Johnson's knowledge he instructed the banker to make out a deed, conveying his tract to Johnson. The deed was prepared as requested, Kessler reviewed it and approved it, although whether he signed it or not is unknown, and he then handed it back to the banker, telling him to store it in the bank vault until Kessler's death, at which time he was to give it to Johnson. In 1920 however, Kessler grew disappointed with Johnson, since she rarely visited him, so he went

to the bank, demanded that the deed be returned to him, and he proceeded to destroy it. Shortly after Kessler's death in 1924, a bank employee evidently informed Johnson about what had happened, so she decided to file an action against Cooper, who was the administrator of the Kessler estate, in which Johnson claimed to be the owner of the Kessler tract upon which she had once resided. The trial court rejected Johnson's assertion that the subject property had been lawfully deeded to her, but the Court reversed that decision and awarded the Kessler tract to Johnson, even though she had no deed, she had never even seen the deed, and she had never even known that it existed until several years after it was destroyed. The testimony of the bank employees, who remembered all of the details of the Kessler transaction, was key to the victory of Johnson, convincing the Court that Kessler had in fact completed a valid conveyance of his land to her, without her knowledge. In so deciding, the Court applied 3 basic principles of law that determine deed validity, the first and foremost of which is the rule that physical delivery of a deed is legally binding and signifies the true moment at which the conveyance is legally completed. In addition, the Court indicated here, a deed need not be delivered to the grantee, the grantor can deliver the deed to anyone, and he thereby conclusively parts with his land, simply by giving the deed up and relinquishing physical control over it. Lastly, the Court mandated, a delivered deed is irrevocable, so nothing that a grantor does after completing a valid deed delivery matters, the land no longer belongs to him, thus he has no authority to unilaterally elect to take it back. Kessler had delivered the deed to his banker, and Johnson had become the owner of the Kessler tract at that moment, although she had no knowledge of that event until many years later, so the land at issue was not part of the Kessler estate, the Court decreed, since Kessler's destruction of the deed was an unauthorized and therefore entirely futile act on his part, which accomplished nothing.

The consequences of plain carelessness in describing land were on display in *Reitz v Cooper* (1927) which well illustrates why the Court has always maintained a very open stance toward the rectification of erroneous legal descriptions. A certain Section 25 in Sumner County was platted by the GLO at an unspecified date, and since the Arkansas River flowed southerly through the SW/4 of that section 2 riparian lots were platted west of the river. On the relevant GLO plat Lot 5 covered the southwestern part of the SW/4, while Lot 6 occupied the northwestern part of the SW/4, and both of these lots were patented to Sleigh in 1872. Sleigh soon deeded a substantial portion of Lot 6 to Carpenter, but he mistakenly described the area being conveyed as being part of Lot 5. Carpenter either overlooked this blunder, or if he was aware of it he simply ignored it, and he proceeded to take possession of the intended area lying within Lot 6, which was delineated by metes and bounds, then he began selling off parcels within that area to others. Carpenter soon conveyed a parcel containing about 5 acres to Acton, then in 1883 Acton conveyed half of that parcel to the parents of Reitz, and each of these deeds repeated the mistaken lot number, but none of the parties apparently took notice of that error. In 1891, one of the other parcels lying within Lot 6, but described as being within Lot 5, was acquired by Shore, who noticed the mistake, and obtained a quitclaim deed from Sleigh, which secured his ownership of that parcel, adjoining the property of Reitz. In an attempt to leverage his knowledge of the description error for his own profit, Shore subsequently also obtained tax deeds conveying various parcels in Lot 6 to him, including the Reitz parcel, and in 1923 he obtained another quitclaim deed from Sleigh, who still owned Lot 5, in which Sleigh quitclaimed nearly all of Lot 6 to Shore. In 1926, the Reitz parcel was conveyed to Reitz by

his elderly mother, after the death of his father, and Reitz soon discovered that Shore was claiming to be the owner of the Reitz parcel, and he also learned that Shore had leased that parcel and some other nearby parcels in Lot 6 which were owned by others to Roxana Petroleum. A chaotic flurry of litigation soon ensued, in which multiple actions were filed by several parties, but they were all combined for purposes of adjudicating the mess that had been generated by Shore's effort to capitalize upon the original description error. Invoking the principle of description reformation, the trial court ordered the erroneous lot number in the deeds held by Reitz and his innocent neighbors such as Cooper to be corrected, as requested by them, thereby nullifying all of the deeds held by Shore, except of course those associated with the single parcel that had been legitimately acquired by Shore. The Court upheld that decision, and also disallowed an adverse possession claim set forth by Shore, on the grounds that Shore had clearly acted in bad faith, by failing to notify his neighbors when he learned that their deeds contained a mistake, therefore he could not equitably be allowed to derive any benefit from any of his subsequent acquisition efforts. In so doing, the Court reiterated that description errors are subject to correction upon equitable grounds, whenever the true intended area can be identified through extrinsic evidence, thereby once again confirming that there is no right of reliance upon an erroneous legal description by anyone seeking to displace an innocent occupant of mistakenly described land.

The case of *Boyer v Champeny* (1928 & 1931) marks the first occasion upon which the Court made reference to 19-1423, which was one of a series of statutes designed to facilitate the resolution of boundary issues by county surveyors, and the Court took the opportunity provided by this controversy over the division of an island to issue notice of the limitations upon the authority of county surveyors. Nevins was the patentee of an apparently substantial island, situated in a portion of the Arkansas River passing through Sumner County, which had been platted by the GLO. The river flowed southward around this island, and in 1876 Nevins built a mill at or near the southwest corner of the island, along with a milldam extending across the west channel. In order to increase the flow of water in the west channel, he then completely dammed the east channel, although what actual influence this had upon the course of the river and the extent of the adjoining lands is unknown, and he apparently then proceeded to operate his mill for many years. In 1899, for unknown reasons, Nevins sold "a strip of land 30 feet wide off the west side" of the island, describing the north end of this strip only as "a point within 10 rods of the west end of the dam". Nevins apparently went on occupying or using the remainder of his island until 1909, when he conveyed it to Boyer, but whether or not Boyer ever occupied the island or made any use of it is unknown. Boyer evidently did not operate the mill built by Nevins, and the dams which Nevins had erected apparently became at least partially eroded or buried over the ensuing years, during which time the island appears to have grown, to an unspecified extent, through accretion and reliction. The strip parcel created in 1899 was apparently conveyed multiple times over the years, before being acquired by Champeny at an unspecified date, presumably circa 1920, but whether or not any use was ever made of that strip by anyone is unknown. In 1924, Champeny summoned the county surveyor to assist him in locating his parcel, and after meeting and conferring with both Champeny and Boyer, the surveyor produced a survey showing the Champeny parcel to be about 600 feet wide and 800 feet long. Boyer filed an appeal protesting this survey, but the trial court rejected his appeal, and the Court also approved the survey, when the matter

first reached the Court in 1928. In so doing however, the Court made it clear that the survey did not represent proof of title, and was insufficient to justify any use of the surveyed area by Champeny, stating that "The county surveyor is not a proper forum in which to litigate questions of this character ... the function of the county surveyor, in conducting a survey under the statute, is to locate corners or boundaries ... title to property is not involved in such a proceeding." Having been thus advised by the Court that he needed to file a quiet title action, if he intended to claim any portion of the Champeny parcel, Boyer proceeded to do so, leading to a second trial, presumably focused upon the true physical extent of the parcel acquired by Champeny, but once again Boyer met with defeat, as the trial court bestowed title to the surveyed area upon Champeny, and the Court upheld that decision in 1931. No details of the second trial, regarding the vast expansion of the 30 foot strip, are known, but the Court was evidently satisfied that the county surveyor had properly interpreted the legal description of the contested area, and had properly applied the principle of accretion and reliction to the circumstances, so the survey controlled the size of the Champeny parcel. Nonetheless, in so ruling, the Court reiterated in 1931 that "the surveyor had no jurisdiction to construe ambiguous deeds of conveyance to determine the intention of the parties", emphasizing that even a statutory survey properly executed by an authorized surveyor cannot be regarded as conclusive, for purposes of title and ownership, until it has been judicially adopted as controlling in a properly adjudicated quiet title action.

Although fences, trees, hedges and walls may be the objects most commonly used by land owners to signify their boundaries, any visible linear object or series of objects can function in the same manner, and as the case of *Bailey v Brown* (1928) demonstrates, some objects that are often found along property lines can represent easements, as well as boundary evidence. *Bailey* and *Cawley* were the owners of adjoining quarter sections in an unspecified portion of Atchison County, though how and when they acquired their respective tracts is unknown, and whether the line between their tracts was a section line or a quarter line is unknown as well. Both of these men evidently operated typical farms and each of them utilized the land lying along their mutual boundary as cropland. Whether or not any survey monuments existed upon the line dividing these farms is unknown, but until the late 1890s that line was marked by a fence, covering the full half mile length of their boundary, which had evidently long been accepted as the line of division, and no controversy over the validity of the fenced boundary ever arose. At that time however, drainage issues developed, and the 2 men agreed to jointly construct a ditch and a dike along their boundary, so they temporarily offset the fence 25 feet, while they built the proposed drainage channel, with the dike on *Cawley's* side of the line and the ditch on *Bailey's* side, then they returned the fence to its original position, placing it between the dike and the ditch. This arrangement worked effectively and the ditch, the dike and the fence all remained in place when *Cawley* sold his tract to *Brown* in 1910. Whether or not *Brown* was ever told by anyone that the fence marked his boundary, or that the drainage system was the product of an oral agreement, is unknown, but he accepted the presence of the fence and the dike, and no controversy arose until an unspecified date in the mid 1920s when *Bailey* informed *Brown* that he planned to remove the dike, because water was puddling on his land and he wanted to allow it to drain onto *Brown's* land, which was evidently lower. *Brown* maintained that *Bailey* had no right to enter his land or disturb the dike however, so *Bailey* filed an action against him, alleging that the drainage agreement

was never intended to be permanent, and that it was not legally binding, because it represented a violation of the statute of frauds, since it was completely undocumented. The trial court denied that Bailey's position held any validity however, ordering him to leave the existing conditions intact, and the Court upheld that ruling, on the grounds that the statute of frauds is inapplicable to undocumented agreements which have been physically carried out, concluding that the agreement at issue "embraced all of the necessary essentials" to create a permanent servitude, representing a mutual easement, which was legally binding upon both parties. Neither party had any right to disrupt the existing drainage arrangement, by eliminating either the ditch or the dike, the Court indicated, those objects stood together as both a mutual legal benefit and a mutual legal burden upon both of the properties that were involved, since they straddled the property line, and both parties acknowledged that the fenced line constituted their mutual boundary. The fence was the best evidence of the relevant boundary location, the Court observed, regardless of whether it was located precisely upon the line of record or not, because it had been the subject of mutual acquiescence by all 3 land owners for decades, and the improvements they had put in place not only marked that boundary, they represented permanent land rights, held by each party upon the land of the other, despite the complete absence of any documentation to that effect.

Although the technical procedure known as proportionate measurement, as it applies to restoration of PLSS corners, is well understood by professional land surveyors today, after several decades of implementation, that was not always the case. When the Kansas statutes mandating basic survey standards were revised in 1923, it was the clear intention of the Kansas Legislature to prevent the use of independent survey standards, which were being created and followed by some surveyors, and to emphasize the need for all surveyors to focus on preserving the original boundaries established by the GLO. The very basic and general terminology employed in those statutes proved to be problematic however, since it was sometimes misunderstood and misapplied, as the case of Stanley v County Surveyor of Sheridan County (1928) demonstrates. Stanley was the owner of the NW/4 of a certain Section 7, but when that section was platted by the GLO, and when Stanley acquired his quarter, are both unknown. At an unspecified date, presumably in the mid 1920s, a resurvey of that section was done by the county surveyor, for unknown purposes, in which the surveyor evidently found all of the original monuments around that section, except the north and south quarter corners. The surveyor found the section in question to contain an excess, along both the northerly and southerly lines, although the distances that he measured between the existing section corners are unknown, and he then apparently proceeded to reset the 2 missing quarter corners through a proper application of proportionate measurement. Stanley objected to this however, maintaining that those corners should have been placed in a manner giving all of the excess to him, at 40 chains from the northeast and southeast section corners, so he filed an appeal challenging the survey. The trial court found nothing wrong with the survey, and rejected Stanley's assertion, but he carried his appeal onward to the Court, making this the first occasion upon which the Court was required to interpret the language of statute 19-1422, which mandated that "corners must be reestablished ... adopting proportionate measurements". The Court upheld the survey, properly dismissing the procedure proposed by Stanley, but in so doing the Court revealed that it did not yet fully understand the meaning of "proportion" in the PLSS context, by noting that it was upholding the survey on the basis

that the corners had been set in a manner which split the section at issue into "four equal parts", which in reality was not what the surveyor had done. Thus the Court approved the survey, but only because the evidence was incomplete and the Court was operating under a mistaken notion as to the statutory meaning of the term "proportion". Stanley's legal team took notice of this misconception expressed by the Court however, and they successfully leveraged it to Stanley's benefit. They first convinced the Court to rehear the matter, then they clarified to the Court that in fact the surveyor had not set the quarter corners in contention "equidistant between the established government corners", leading the Court to direct the surveyor to move each of those corners to the midpoint of each section line, 6 months after the Court's original decision. Thus the Court demonstrated that it mistakenly understood the word "proportionate", as it appeared in the statute, to represent a legislative intention that all of the quarters in any given section must contain equal acreage. This unfortunate judicial error was destined to be corrected and swept into history 2 decades later, as we shall later see, but how many surveys were executed during that period, based upon this improper judicial guidance, is unknown.

The case of *Simon v Mohr* (1929) represents a powerful statement by the Court on the subject of boundary agreements, and is highly indicative of the judicial trend, which was well underway in Kansas at this time, toward honoring and enforcing such agreements. The father of Morgan owned a 480 acre tract situated in an unspecified section in Sedgwick County, and in 1875 he sold off all of his land by means of 3 conveyances, Morgan got the south half, his married sister Parkinson got half of the north half, and Myers got the other half of the north half. How these parties used their respective tracts is unknown, presumably the whole area was comprised of typical cropland, but the quarter section line forming the boundary of record between these 3 tracts was evidently unmarked, so in 1880 these 3 grantees decided to mark that line themselves. Whether or not either of the relevant quarter corners were still in place at this time is unknown, but a line of division was either ascertained or simply selected by these 3 parties and agreed upon, apparently without the assistance of a surveyor, then they proceeded to plant a hedge along the full length of that line. Henceforward, these parties and their successors all acknowledged the hedge to be their mutual boundary until 1893, when the quarter line was found to be south of the fence, by 3 feet at one end and 15 feet at the other end, during a resurvey. Morgan offered to buy the strip thus created, but no deed was executed and the hedge continued to function as the boundary, while the surveyed quarter line was disregarded by all of the parties. Simon acquired the Morgan tract in 1913, and the land use pattern continued unchanged. Mohr acquired the 2 tracts lying directly north of the Simon tract in 1919, and still the hedge was mutually regarded as the boundary until 1927, when for unknown reasons Mohr removed a portion of the hedge, maintaining that according to the 1893 resurvey it was on her land. Simon responded to this development by filing an action against Mohr, alleging that the hedge was an agreed boundary, which had become legally binding through either boundary acquiescence or adverse possession, and the trial court held that Simon was right on both counts, ruling that he owned all of the land south of the hedge. Noting that the accuracy of the 1893 resurvey was highly suspect, since no original monuments were found on the line in question during that survey, and recognizing that the agreed line may very well have been the original quarter line, the Court concurred that the hedge qualified as a legally binding boundary. Although the grantor of the 3 agreeing parties was not involved in the adoption of the hedge line, the 3

grantees and their successors were legally bound by it on the basis of their agreement alone, which was adequately supported and fully confirmed by their subsequent mutual acquiescence in that line, the Court emphasized, so it already constituted a conclusive boundary, long before the 1893 resurvey was done. Although the use of the land south of the hedge was adverse in nature, the Court observed, adverse possession was not the controlling factor in this instance, because the boundary was secured by agreement alone, thus the fact that Morgan, as the adverse land holder, had offered to buy the contested strip, was entirely inconsequential. Thus while reiterating here that land use made under an undocumented boundary agreement is genuinely adverse in character, and that land use which continues even after a survey has indicated a different boundary location is also adverse in nature, the Court stipulated that an unwritten boundary agreement can become conclusive upon the agreeing parties and all successors as a result of their mutual acquiescence in the agreed line, without the passage of the full statutory time period following the agreement.

Webb v Board of Commissioners of Neosho County (1927)

The ongoing battle for primacy between those espousing public land rights and those supporting private land rights has been a consistent theme throughout our nation's history, and judicial policy, while striving to strike a balance between these competing forces, has favored one side and then the other over long time periods. During most of the nineteenth century private land rights were generally regarded as primary, but toward the end of that century a distinct trend toward an emphasis on public interests began, which continued through the first few decades of the twentieth century. This judicial trend appeared primarily in litigation over easements, particularly those relating to highways, utilities, and other corridors of transportation and communication, but it was also evident in litigation over riparian rights, including riparian title and boundaries. The public trust doctrine, which emphasizes the importance of all water to the public, arose during this time period, and began to exert a strong influence in litigation over water rights, but as it gained strength and broad support it also came to be viewed as a factor in the adjudication of riparian title issues, and thus had an impact upon boundaries. As we have already observed, in reviewing several prior riparian cases, the concept of navigability was judicially embraced and utilized from an early time in Kansas, to mandate and enforce public title to bedlands, thereby creating boundaries that restricted private riparian titles, and meander lines were judicially leveraged for this purpose. The public interest in meandered riverbeds was thus very strongly and consistently protected by the Court for decades, up to the time of our present case, which marks a watershed moment in the history of riparian litigation, not just in Kansas, but at the national level as well. On this occasion, as we will see, the Court demonstrated that it had learned a great deal about how to properly define and limit the concept of navigability, to achieve a better balance between

public and private land rights, from certain key decisions issued by the United States Supreme Court during the 1920s. Thus here a new generation of Justices began to turn the focus of the Court back toward protection of private land rights in the riparian context, sweeping aside the extremely pro-public position that had been dominant in the riparian arena for nearly half a century by this time, thereby charting a course which was in line with recently clarified federal standards for the proper determination and establishment of navigability.

Prior to 1927 – At an unspecified date, the GLO subdivided and platted the townships through which the Neosho River passes, and in so doing meander lines were run along the banks of that river. There is no indication that any portion of the river moved in any significant way over the subsequent years, so presumably the GLO meander lines still defined the actual course of the river with reasonable accuracy during the 1920s. Webb was either a patentee, or the successor of a patentee, who acquired an unspecified amount of presumably typical agrarian land, evidently lying along both sides of the river, and thus consisting in pertinent part of riparian lots created by the GLO, at an unspecified time. How Webb used his land is unknown, but at some point in time, presumably during the 1920s, Neosho County began extracting gravel from the bed of that river, which was then put to use in constructing roadbeds to improve the county road system. Webb, as the owner of the upland along the portion of the river upon which the county was conducting this mining activity, wisely recognized that a portion of his land was being put to a distinctly public use, so he demanded compensation from the county for the gravel that was being hauled away from his property. The county refused to pay Webb anything however, so he filed an action against the county, seeking judicial verification that the area from which the gravel was being taken belonged to him, and that he was therefore entitled to payment for the material being removed from his property and put to public use elsewhere.

Webb argued that the tracts to which he held title extended to the center of the Neosho River, since that river was non-navigable, having never been used by the public as an essential avenue of commerce, despite the fact that the river had been meandered, because the presence of meander lines does not signify navigability. Webb further argued that the Supreme Court of the United States had indicated that navigability is to be determined solely upon the basis of actual or potential commercial usage, rather than by the presence of meander lines, and Kansas had no option to deviate from that federally established definition of navigability, so Neosho County could not successfully maintain that title to the portion of the meandered riverbed lying within the Webb property was held by Kansas. Neosho County argued that under established Kansas law, meander lines are valid evidence of navigability, and Kansas is free to legally define navigability in any manner, independently of any federal navigability standards, so the river was clearly navigable and Kansas held title to the entire meandered riverbed, including the portion which passed through Webb's property. The county also argued that even if use of a river

for purposes of public travel is the proper definition of navigability, the Neosho River had been used by the public, so it must be deemed to be navigable for that reason, therefore Webb held no title to the riverbed, his property extended only to the meander lines or the banks of the river and included no submerged land, so the county was under no obligation to pay him for any use of the riverbed or for any material taken from it. The trial court found Webb's position to be convincing and ruled in his favor, verifying that he held title to the entire area in controversy, so he was legally entitled to the compensation which he had requested from the county, for the public removal of gravel from the submerged portion of his property.

It was of course very clear to the Court that a single well defined question was all that needed to be answered to dispose of this conflict, and 4 of the 7 Justices of the Court wisely recognized that the time had come to bring Kansas into closer alignment with federal law pertaining to title navigability. The question to be answered was simply how to properly define navigability for purposes of title and ownership relating to all bedlands. Citing the Kregar case of 1908, previously reviewed herein, these 4 Justices had no difficulty in acknowledging that the reliance which had long been placed upon meander lines, as the primary basis for navigability in Kansas, was misguided and had clearly been rendered obsolete, by the clarification presented by the United States Supreme Court (SCOTUS) on that matter. In the 1922 case of *Oklahoma v Texas* (258 US 574) arguably the single most important boundary case in our nation's history, SCOTUS expressly ruled that meander lines do not represent or justify a navigability determination, holding that the Red River of Oklahoma was non-navigable, despite having been meandered by the GLO, thereby announcing the death of the meander based navigability concept. Shortly thereafter, in *Brewer-Elliott Oil & Gas v United States* (260 US 77) also set in Oklahoma, involving the Arkansas River, and in subsequent navigability cases as well, SCOTUS mandated that the federal definition of navigability must be honored in all of the PLSS states, since the land in those states had been patented by the federal government, revealing the folly embodied in some earlier Kansas decisions, such as the 1914 Akers case. The federal navigability standard, which is based upon the actual value of the watercourse at issue for genuine commercial use, the majority clearly realized, would need to be applied going forward, commencing at this point in time, recognizing that only those streams which have been historically vital to commerce can be properly deemed to be navigable for purposes of title to bedlands. The majority plainly saw the injustice that had been done to federal patentees and their successors through the enforcement of meander based navigability, which had deprived many riparian property owners of very substantial amounts of land that they or their ancestors had legitimately acquired, and these astute Justices resolved that they would not support any claims of state title to the beds of any additional Kansas streams upon that basis. Having concluded that the meandered status of the Neosho River was irrelevant to the resolution of the present controversy, the majority went on to assess whether or not the historic use of that river had adequately proven that it held any real value as a conduit of productive commerce, sufficient to identify it as an authentic public thoroughfare which merited navigable status:

“The Neosho River, where it passes through or by the lands in litigation ... is a meandered stream, and the lands were described ... as lots along said river ... in early days, there were used on said river, at one or more places, ferry

boats ... before the county had been supplied with bridges ... in early days some logs were floated or rafted in parts of the river to a mill or mills ... light boats, some run by motor power, have been used on the river for the transfer of passengers ... one time ... a boat traversed the river from Oswego to Humboldt ... light boats could be transferred, but could not be transported any great distance up or down the river ... without being pushed ... the riffles are very shallow and there are many of them in said river ... the Neosho River has never been used for the transportation of the products of the country ... the Neosho River ... has never been susceptible of use for the purpose of commerce ... and has never been of practical usefulness to the public as a highway in it's natural state ... although the Neosho River is a meandered stream ... the Neosho River is not a navigable stream ... riparian owners along said stream own the land to the thread or center of the stream ... the fact that a government surveyor meandered the banks of a river is ... not conclusive ... proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream.”

The position set forth by the county was thus doomed to defeat, and Webb prevailed, by a margin of just 4 to 3, as the older Justices, who had made a commitment to support meander lines as definitive evidence of navigability, in an effort to insure a strong revenue stream for the public and enrich the state, held fast to their entrenched position on that core issue. The dissent in this case, which was far longer than the majority opinion, was written by an aging Justice who had long been an ardent supporter of the broadest possible application of navigability. Still unwilling to agree that meander lines do not constitute boundaries, even after numerous SCOTUS decisions repeating that principle, the 3 dissenters continued to insist that all riparian property owners are entitled only to the acreage stated in their patents, which of course is the acreage forming the meandered upland. Viewing the contents of the various relevant Kansas statutes as being superior in legal force and effect to federal law, the dissenters remained unable to accept the concept that navigability is inherently a matter of federal law, rather than state law, because implementation of navigability by any western state restricts the physical extent of the land rights acquired by patentees of the United States. Maintaining that the United States never intended to include any meandered bedlands in any federal grants, the dissenters flatly refused to acknowledge that any riparian parties, such as Webb, could ever legally claim to own "a square foot of that riverbed", intent upon preserving every meandered lowland area in Kansas for public use and enrichment, at the expense of the riparian patentees and their successors. The 3 dissenters even went so far as to accuse the Supreme Court of the United States of having falling into error, in adopting the position that commercial navigation is the truest and best evidence of navigability, suggesting instead that any waterway which had ever been successfully navigated by even a single canoe was worthy of navigable status. Stating that "navigability is merely an academic stumbling block", the dissenters simply declined to embrace the modern definition of navigability, which has come to be accepted and approved throughout the west over the subsequent decades. The dissenters thus positioned themselves on the wrong side of history, by refusing to

participate in the enforcement of modern navigability standards, and their fervent resistance marks the last futile gasp of their passing generation. Under the principle wisely espoused on this occasion by the majority, navigability is never presumed to exist, the critical burden of proof always rests upon any party or parties who choose to assert that any given body of water is truly navigable in character for title purposes, and every body of water, whether meandered or not, is legally presumed to be non-navigable, until the contrary is satisfactorily shown.

Roxana Petroleum v Jarvis (1929)

As we have learned from our review of land rights cases from the 1920s, the Court had taken some highly significant steps by this point in time toward developing and clarifying judicial rules pertaining to modern right-of-way law. In the context of title, the Court had approved and applied the concept that the right of reversion is an appurtenant right, meaning a land right which is implicitly contained within every conveyance of real property, and thus becomes vested in each successive grantee, despite being unreferenced and undescribed in any deed, as indicated in the Rowe case of 1923. Then in the 1925 Bowers case, applying that same concept in the boundary context, the Court had demonstrated strong support for the centerline boundary principle, showing that the centerline of an extinguished right-of-way can represent a boundary created by operation of law through reversion, although that line was never described as a boundary in any documentation. At the core of the right-of-way concept is the vital distinction between fee ownership of land and land rights of other forms, such as dedications and easements, which although typically intended to be permanent, are ultimately dependent upon either ongoing land use or potential future land use for their existence. If all such land rights were truly permanent, and never ceased to be needed, the concept of reversion would be meaningless, but since right-of-way typically does not consist of fee title, and land use patterns often change as time passes, the law must address the title status of land which becomes unburdened, when a right-of-way is either terminated or relocated, and that is the role of reversion. Whenever land is described for purposes of conveyance, the principal matter for consideration is the intent of the parties, but since most conveyance documents do not fully specify that intent, with respect to every relevant form of land rights, legal presumptions regarding intent often take on great importance, potentially controlling what is, or is not, actually conveyed. As our present case ideally illustrates, the true meaning of even seemingly plain and simplistic descriptive language must be determined in proper context, and the presence of a right-of-way, situated either wholly or partially within the conveyed area, can prove to be highly problematic in that regard, necessitating the application of essential presumptions at law. Here we will watch as the legal implications of conveyances of land traversed by a right-of-way produce controversy requiring resolution by the Court,

and in so doing we will witness the substantial impact of both description interpretation and reversion upon title and boundaries.

1872 – The city of Oxford was platted in Sumner County, and the southwestern portion of the platted area occupied the NE/4 of a certain Section 14. Numerous typical city blocks and streets were platted in the NE/4 of this section, and several outlots were also shown on this plat, all lying along the southerly and westerly lines of this quarter. Cedar Street was one of the many streets which were platted at this time, and it ran east and west across the NE/4, about a quarter mile north of the south line of that quarter. The portion of the platted area lying within the NE/4 was evidently not put to residential use however, and no streets in that area were opened or used, so most if not all of Section 14 simply remained typical cropland for many subsequent years.

1873 to 1878 – At an unspecified time during this period, Rothwell acquired the portion of the NE/4 lying south of Cedar Street, and the area conveyed to him was described in his deed with reference to the Oxford plat.

1879 – Early in this year, the platted streets in the NE/4 of Section 14 were vacated, and a few months later Rothwell sold his property to Scroggin. The deed thus obtained by Scroggin presumably described the area conveyed to him in the same manner as it had been described when it was acquired by Rothwell.

1880 to 1910 – Scroggin was a land baron who lived in Illinois and owned lands in many states. During this period he evidently acquired the entire SE/4 of Section 14, but whether Scroggin ever even visited Kansas is unknown, presumably he leased his Kansas land for agricultural purposes throughout this period, although no details about how the Scroggin property was used are known. Also during this period, Rothwell married one of Scroggin's daughters, and they had several children, before Rothwell died, near the end of this period.

1911 – Scroggin conveyed a right-of-way to the Wichita and Midland Valley Railroad (WMV) which ran northward from the south line of Section 14, through the western portion of the SE/4 of that section, and then continued northward, passing through several of the blocks and outlots which had been platted in that quarter. WMV apparently then built a railroad within this right-of-way, at an unspecified date, and subsequently made use of the right-of-way in the typical manner.

1916 to 1920 – Scroggin died leaving a large number of heirs, including the surviving members of the Rothwell family, and his heirs proceeded to divide up his Kansas land, partitioning it into an unspecified number of tracts. One of these tracts, which covered the southwestern part of the NE/4 of Section 14, lying west of the railroad and south of Cedar Street, contained Blocks 89 & 90 and Outlots 22

through 25, and this tract was acquired from her fellow heirs by the widow of Scroggin. The east half of Blocks 89 & 90 and the east half of Outlot 22, all of which formed the eastern portion of this tract, comprised the west half of the WMV right-of-way, which was 390 feet in total width in this area. Thus the west half of the railroad right-of-way occupied a very substantial area, 195 feet in width and approximately a quarter mile in length, which also covered portions of the vacated streets lying between these platted tracts. After securing title to this tract unto herself, the widow of Scroggin conveyed it to Emrich, who was one of her married daughters, and who was also a sister of Rothwell's widow. Emrich then also acquired the SE/4 of Section 14 from the other heirs of her late father, which adjoined the tract that she had acquired from her mother on the south, and she then proceeded to lease all of her land to Roxana Petroleum. The portion of the NE/4 leased to Roxana was described with reference to the Oxford plat, just as it had been described in all of the prior deeds conveying that area, and the legal description which appeared in the Roxana lease acknowledged the existence of the WMV right-of-way, concluding with the phrase "less railroad right-of-way".

1921 – Rothwell's widow died, leaving several children as her heirs, and her portion of the Scroggin estate, which evidently consisted of the southeastern part of the NE/4 of Section 14, lying south of Cedar Street and east of the railroad, was partitioned among her heirs.

1922 to 1927 – Emrich and the heirs of Rothwell apparently experienced no conflicts regarding their respective land rights, until oil was discovered beneath the east half of Section 14 near the end of this period, causing the value of all of the land in the subject area to rise dramatically. Due to the presence of the exception relating to the railroad right-of-way, which appeared in the legal descriptions held by Emrich and Roxana, the Rothwell heirs believed that they still held an interest in the full area comprising the railroad right-of-way, as heirs of Scroggin. The Rothwell heirs therefore issued a lease to Jarvis, conveying oil exploration rights within the railroad right-of-way to him, and Jarvis began to place drill rigs in that right-of-way, some of which he placed west of the railroad track. WMV had no problem with the activities of Jarvis, and made no claim of fee ownership relating to the right-of-way, but upon discovering what Jarvis had done, Roxana filed an action against him, alleging that he was using land which had been leased to Roxana.

Roxana argued that the clause appearing in the legal description in the Roxana lease, reading "less railroad right-of-way", was not a fee exception, it was merely a statement made in the Roxana lease, and in the prior deeds, in recognition of the existence of the railroad right-of-way, so the Roxana lease covered the entire Emrich tract, which included all of the land west of the railroad track. Roxana further argued that the right-of-way created in 1911 represented only an easement, and that fee title to all of the land west of the railroad track therefore passed to the widow of Scroggin, and then passed

from her to Emrich, despite the presence of the exception language in the legal descriptions that were used in each transaction, so the lease issued to Jarvis did not cover any land west of the railroad track and it gave Jarvis no rights to that area. Jarvis argued that the Roxana lease clearly did not include any portion of the railroad right-of-way, due to the presence of the relevant exception language in the deeds to Emrich and her predecessor, and the Roxana lease covered only the area west of that right-of-way, so Roxana had no right to prevent Jarvis from making full use of the entire right-of-way, which represented a distinct tract. Jarvis further argued that his lease purporting to cover the full width of the railroad right-of-way was entirely valid, because it was executed by the Rothwell family as legitimate heirs of Scroggin, who was the owner of all of the land within that right-of-way at the time of his death, and the right-of-way was clearly excluded from the 1916 deed to the widow of Scroggin, so it was not part of the Emrich property. The trial court accepted the proposition set forth by Jarvis, that the contested exception language had excluded the right-of-way at issue from the Roxana lease, and from the prior deeds as well, and therefore dismissed Roxana's request to quiet title to the disputed west half of that right-of-way in Emrich.

The principal factor initially motivating this controversy was the failure of several of the parties, particularly the heirs of Rothwell, to realize that the railroad right-of-way conveyance of 1911 created only an easement, which resulted in some degree of uncertainty, if not outright confusion, over the relative rights of the various heirs of Scroggin to the land within the railroad right-of-way that he had created. This was quite clear to the Court however, leading the Court to reiterate on this occasion that any area expressly identified as a right-of-way in a deed will be legally presumed to represent an easement, as opposed to a conveyance of fee title to land, even when the parties mistakenly refer to the subject area as a "strip of land". A conveyance which is made in support of any right-of-way purpose, the Court understood, need not transfer any land in fee, because the creation of an easement produces all the land rights necessary to facilitate the intended use of the subject area, and in this case, the deed executed by Scroggin in 1911 clearly granted only an easement to WMV, in the view of the Court. Having established that the land within the right-of-way in contention was in fact still owned in fee by Scroggin when he died, the Court turned to the secondary and more problematic question, regarding the legal implication of the exception clause, which first appeared in the 1916 description by which the Emrich tract was created. On this pivotal point the Court agreed with Roxana, that an exception, such as "less railroad right-of-way" in a legal description does not prevent fee title to that right-of-way from passing from grantor to grantee. Applying the widely accepted principle that every grantor bears a heavy burden, to explicitly identify any portion of the grantor's land which is not intended to pass to the grantee, the Court found that the west half of the right-of-way had been acquired in fee by Scroggin's widow, and was thus part of the Emrich tract, as contended by Roxana. A grantor cannot successfully claim to have retained ownership of land through the use of a right-of-way exception, the Court stipulated, because such an exception merely informs the grantee that the subject property bears an easement, it does not clearly inform the grantee that the right-of-way is not being conveyed in fee to him. Having concluded that neither the Scroggin estate nor the widow of Scroggin had retained fee ownership of any of the land comprising the contested right-of-way, the Court decreed that the west half of that right-of-way was legally part of the Emrich tract, and was therefore covered by the Roxana

lease rather than the Jarvis lease, reversing the lower court decision to the contrary. Thus the Court poignantly illustrated that not every exception stated in a legal description can be presumed to have been intended to prevent fee title to the excepted area from passing to the grantee:

“Deeds of land abutting on a railroad right-of-way ... convey the interest of the grantors in the right-of-way ... descriptions followed by the expressions "less railroad right-of-way" and "excepting railroad right-of-way" convey the interest of the grantors in the right-of-way ... the phrase right-of-way as applied to the interest of a railroad company in land, means an easement ... the Scroggin right-of-way deed was expressed to be "for a right-of-way over and across", and it is not debatable that only ... an easement was conveyed ... the rule adopted in this state is that intent to include the highway is inferred ... the highway rule applies to railroad rights-of-way, the reasons for the rule are the same in one case as in the other ... the purpose to exclude the adjoining way must be disclosed by express declaration ... in the instrument ... a grantor ... can easily frame his deed according to the general rule ... the notion that each one of the heirs ... intended to keep and to hold ... the strips of servient soil seems to this Court quite fanciful ... the grantors estate consisted of full ownership of the land ... diminished only by the estate of the railroad company ... the words "less railroad right-of-way" refer to the railroad company's estate ... the words do not make it expressly appear that ... the estate of the grantors should not pass ... an instrument ... conveying a strip of land to a railroad ... will not vest an absolute title in the railroad ... the interest conveyed is limited by the use for which the land is acquired, and when that use is abandoned the property will revert ... the deed did not make it clearly or dimly appear that any interest of the grantor was excepted ... the Emrich lease to Roxana .. passed all the interest of the lessors to the lessee for the purpose described.”

Although the Rothwell heirs went down to defeat, as the grantors of Jarvis in the Roxana case, they decided to file an action against another group of Scroggin heirs, which came to the Court just a year later as *Rothwell v Veail* (1930). In that action, the Rothwells asserted that they still owned the south half of the vacated right-of-way of Cedar Street, which as noted in the timeline above, ran along the north boundary of the properties involved in the Roxana case. The Rothwells, having apparently learned surprisingly little from their experience in the Roxana case, alleged that fee title to the south half of Cedar Street was never conveyed away by their late father, because no reference was made to that vacated public right-of-way in his 1879 deed to Scroggin. The Court upheld a lower court ruling against the Rothwells however, reminding them that land need not be described in a deed in order to be conveyed, because the burden always rests upon the grantor to expressly reserve any area that he desires to retain. The Court agreed with the Rothwells that the south half of Cedar Street was acquired in fee by their ancestor, upon being

vacated in 1879, through the automatic operation of reversion, but the Court also observed that Rothwell had failed to explicitly reserve that 20 foot strip unto himself in his deed to Scroggin, so it had passed to Scroggin, right along with the rest of the Rothwell property. In so holding, the Court again confirmed that any legal description calling out platted lots or blocks necessarily includes any abutting reverted right-of-way, or any reversion rights associated with the described land, because such rights are legally appurtenant to every conveyance. Quite similarly, just 6 months after issuing the Roxana decision, the Court again demonstrated it's strong commitment to the principle that retention of land or land rights by grantors must be sternly limited in *Barker v Lashbrook* (1929). Barker was once the owner of a presumably typical quarter section, which she had sold in 1887, by means of a deed containing a legal description stating that there were "3.81 acres taken by the Kansas City, Wyandotte & Northwestern Railway" within her quarter. Lashbrook eventually acquired some of the land in that quarter, and since his property adjoined the railroad right-of-way, he began making use of the 3.81 acre area after it was abandoned, presumably during the 1920s. When Barker learned that the right-of-way had been abandoned, she filed an action against Lashbrook, alleging that she had never sold the 3.81 acre area, so upon abandonment it had reverted to her, and the trial court agreed, quieting title to that area in her. On appeal however, Lashbrook protested that the abandoned right-of-way had reverted to him, as the current adjoining land owner, rather than Barker, and the Court concurred, quieting title to the contested area in Lashbrook, while informing Barker that she had not retained any land in 1887, and she had in fact deeded away her entire quarter at that time, thus she could derive no benefit from any subsequent reversion. Reversion rights, the Court specified once again in this instance, are appurtenant land rights, which always pass to each subsequent grantee, without being mentioned in any deed, leaving each grantor in succession with no retained land rights pertaining to the conveyed area. As we will have occasion to note going forward, the Court has very consistently maintained this highly restrictive position toward grantors who purport to hold reversionary interests in land ever since this time.

The 1930s - Honoring Reliance on Established Boundaries

As we have seen, litigation concerning land rights issues in Kansas proceeded at a strong pace throughout the first 3 decades of the twentieth century, and the Court responded to the need for adjudication and resolution of those issues, establishing many important precedents in so doing. The arrival of the Great Depression, along with the Dust Bowl, dramatically slowed the rate at which such litigation reached the Court during the 1930s however, as fewer people had enough money to pursue litigation, and for several years many conflicts generated by personal pettiness simply never developed, as they might have during more prosperous times, because people were focused primarily on survival. With regard to riparian title and boundary issues, the homesteading era played out and at last reached it's end at this time, so controversies triggered by newcomers attempting to squeeze themselves in between existing properties by leveraging the island school land concept finally ceased, thereby eliminating one frequent source of conflict. Islands and former islands remained inherently problematic however, and as we will see, one of the

most interesting Kansas cases of this decade was centered upon the proper determination of boundaries in the island context. In addition, having set forth a very solid set of principles with respect to right-of-way law, clarifying the legal operation of vacation and reversion and the legal effect they have upon title and property boundaries, the Court had effectively reduced the number of cases that would arise going forward on that topic. Railroad right-of-way was destined to remain a particularly perplexing subject however, primarily due to the difficulty frequently encountered in attempting to ascertain whether the rights acquired and held by the various railroads in different locations represented fee title or simply easements, and this would constitute an ongoing source of litigation for several more decades. Most notably from a boundary perspective, the trend toward enforcement of established boundaries continued to gain traction and broad judicial acceptance during this decade, both in Kansas and elsewhere. The Court wisely recognized that the earliest original boundary evidence in Kansas was becoming truly ancient by this point in time, making the Court quite justifiably hesitant to allow resurveys to disrupt long established boundaries. This resulted in an increasing judicial emphasis upon the value of boundary agreements, including enhanced respect for physical conditions which indicated that existing boundaries had been implicitly agreed upon in the distant past, motivated by the ultimate judicial objective in the boundary law arena, which is the protection of all potentially original boundaries.

A wide variety of factors can play an important role in boundary determination, and the case of *Howell v Kelly* (1930) is highly illustrative of that fact, as it demonstrates both the power of the equitable concept of estoppel, which can have a controlling effect upon boundary locations, and the potentially controlling significance of surveyor testimony. Malloy was the owner of a rectangular tract, having unspecified dimensions but containing about 21 acres, which was situated just west of Kansas City. In 1903, Malloy was divorced and his tract was divided, as the west 9 acres was judicially granted to his former wife, although whether or not the new boundary thereby created was marked or visible on the ground at that time is unknown. In 1904, Malloy sold his remaining land to Howell, describing that area as 12.37 acres, and Howell wisely ordered a survey, to clarify the location of her west property line. Once that line was marked for her use, Howell had a fence built, running northward from her southwest property corner, about half the distance to the northwest corner of her parcel. Kelly, who was a daughter of Malloy, and was evidently occupying the 9 acre parcel along with her mother, apparently observed the new fence that had been erected for Howell, and she then extended that fence northward, all the way to the north line of her parcel, although what knowledge she may have had, if any, regarding the location of the northeast corner of the 9 acre parcel, is unknown. Over the ensuing years, these neighboring parties lived in harmony, each of them fully satisfied with the fence and always honoring it as their mutual boundary, and at an unspecified date, Kelly acquired the 9 acre tract from her mother. In 1928, Howell decided to subdivide her parcel, so once again she ordered a survey, to verify her parcel boundaries. Howell's surveyor spoke with Kelly, who apparently approached him during the course of his work, and Kelly informed him that the fence represented an agreed boundary, with which she was fully satisfied, instructing Howell's surveyor to adopt the fence as the west line of the Howell parcel, and the surveyor proceeded to do so, based upon what he had been told by Kelly. After the Howell parcel had been subdivided however, and the new lots had been sold, and houses had been built upon those lots, Kelly pointed out that her northeast

property corner was 16 feet east of the fence, so Howell was forced to file an action, seeking to have the fenced line judicially approved as a legally binding agreed boundary. The trial court accepted Howell's proposition and quieted title in her to the full area east of the fence, finding that the fence was indeed a legitimate agreed boundary, which was not subject to alteration. Kelly protested on appeal that there was never any boundary agreement and the fence was really just a mistake, but by a majority of 4 to 3, the Court held that estoppel was applicable to this situation, and Kelly therefore could not be allowed to deny that she had conclusively accepted the fence as her east boundary. Noting that Kelly had ample opportunity to assert her rights to the boundary location of record, and had failed to do so, the Court upheld the lower court decision against her, concluding that Howell's surveyor had correctly identified the fence as the west boundary of the Howell parcel, based upon the testimony provided to him by Kelly while he was conducting the 1928 survey. Thus here once again the Court protected a long physically established and respected boundary, and the testimony of a surveyor, regarding the testimony provided to him by a land owner, was key to this outcome.

The legal consequences of platting land and selling it off with reference to the plat, as a reliable representation of the land and the rights associated with it, were quite vividly displayed in *Craig v Zitnik* (1930). Durkee was the owner of an unspecified quarter section, which was situated a short distance west of Scammon in Cherokee County. This quarter was bounded by existing public roads on the north and on the south in 1905, but existing railroad tracks made direct access to it from either the east or the west difficult. Durkee decided to plat his land at this time, so he created a plat dividing the quarter into an unspecified number of parcels, although whether or not any surveyor was involved in the creation of the Durkee plat is unknown, and this plat was never recorded. Due to the access limitations on the east and the west, the Durkee plat showed that only one road was to be created, running right through the center of his property, connecting with the public roads on the north and on the south. In 1907, using this plat, Durkee sold the southeastern parcel, which fronted upon the east side of the platted road, to Grant, who then conveyed it to Craig in 1908. Craig then built a house on her parcel, and she frequently used the platted road to reach the public road lying half a mile to the north, although who had built the new road is unknown. Over the ensuing years, Durkee sold off the rest of the parcels that he had platted, and in each case he showed the plat to the grantee, but in only one case did the deed issued by Durkee make any direct reference to the Durkee plat. By 1918, several of Durkee's grantees were evidently making regular use of the platted road, but he had no parcels left to sell, so he quitclaimed whatever rights he might still hold in the subject quarter to Zitnik, who then closed off the north end of the platted road for unknown reasons. Evidently no one protested this act by Zitnik, and the parcel owners continued to access their properties from the south until 1928, when Zitnik closed off the south end of the platted road. Craig elected to file an action against Zitnik, in which she maintained that the platted road was public and he had no right to obstruct it, but the trial court decided that no one had any right to regard the platted road as being public, because the plat had never been recorded and there was no evidence that the road had been formally dedicated, thereby approving Zitnik's complete closure of the road at issue. The Court reversed that decision however, and ordered the road to be opened at both ends, finding that Craig was right that it was a public road, over which Zitnik had no control. Zitnik had acquired nothing, the Court realized, because Durkee had no remaining land

rights in the subject quarter to convey in 1918. The fact that Durkee had never deeded the platted road to anyone was of no consequence, the Court recognized, it had become public through implied dedication, because it appeared upon the plat which he had employed in selling off his land, thus Durkee became legally incapable of unburdening that strip by conveying it, once it was put to use as a road. Thus the Court again emphasized that a plat or map of any kind can represent a legally controlling document, regardless of its quality, even though it was never recorded, and it can signalize a valid dedication even though it bears no dedication statement and no indication of any formal approval. Durkee's failure to properly plat his land could not be allowed to have any adverse impact upon his innocent grantees, such as Craig, the Court stipulated, because his grantees were all fully entitled to rely upon everything shown on the Durkee plat, including the validity of the platted road. Thus the Court provided another poignant reminder to all grantors, that using a plat as a tool of conveyance is legally equivalent to recording it, and subsequent reliance upon that plat results in a binding dedication of any implicitly public areas depicted thereupon.

The highly problematic nature of railroad deeds, and the complexities arising from the introduction of reversionary rights in the railroad context were very evident in the case of *Danielson v Woestemeyer* (1930) which provides a good illustration of a situation in which reversion is inapplicable. At an unspecified date, presumably during the late 1800s, a railroad was built running through an unspecified portion of Wyandotte County, and part of it passed through the NW/4 of a certain Section 32. Who owned this quarter at that time is unknown, but it was presumably owned by a single party, and that party granted the railroad company certain rights to facilitate the construction and use of the railroad. The relevant deed described 2 distinct acquisitions made by the railroad on that occasion, the first area being a strip which was 100 feet in width, crossing the entire NW/4 quarter, and the second area also being 100 feet in width, but being limited to 1500 feet in length, located entirely within the NW/4. The second described area was clearly outlined in this deed by metes and bounds, and it adjoined a portion of the north side of the first described strip, which was defined by the railroad track itself, being described as extending 50 feet in each direction from that track. The area thus acquired for railroad purposes was therefore a total of 200 feet in width throughout the 1500 foot long section, but was just 100 feet in width east and west of that 1500 foot long area. The deed gave no indication of how the described areas were to be used, but a house, a well and an access road were subsequently built, presumably by the railroad company, on the 1500 foot tract, and that area was subsequently used by railroad personnel. Eventually, Danielson became the owner of the land directly north of the 1500 foot tract and Woestemeyer came to own the land directly south of the railroad right-of-way. At an unspecified time, presumably during the 1920s, the railroad ceased operations, and then deeded the 1500 foot tract to Woestemeyer. When Danielson discovered Woestemeyer using the 1500 foot tract he objected, asserting that the deed to that tract held by Woestemeyer was invalid, but Woestemeyer refused to vacate that area, so Danielson filed an action against him, claiming that the 1500 foot tract belonged to Danielson, on the basis of reversion. Danielson conceded that the south 100 feet of the 200 foot wide railroad corridor had reverted to Woestemeyer, but he maintained that the north 100 feet had reverted to him, so the railroad had no right to sell that area and Woestemeyer had not legitimately acquired it, but the trial court deemed Woestemeyer's acquisition to be entirely valid. While

recognizing that Danielson's understanding of the operation of the concept of reversion was basically correct, the Court nonetheless upheld the ruling against him, confirming that Woestemeyer had legitimately acquired the contested tract in fee. The flaw in Danielson's position, the Court explained, was that reversion applies only to easements, not to tracts owned in fee by railroads, and Danielson had failed to realize that the tract in question had been acquired in fee by the railroad, so it was not subject to reversion. The different purposes for which the railroad had used the 2 acquired areas, the Court concluded, made it clear that the south 100 feet was a right-of-way easement, which had reverted to Woestemeyer, but the north 100 feet was not a right-of-way, it was a fee railroad tract, so nothing had reverted to Danielson. Thus the Court took advantage of the opportunity presented by this unusual scenario to point out that a fee tract and an easement can be acquired in the same deed, and that the principle of reversion in the railroad context applies only to those areas which constitute easements, while also highlighting the relevance of subsequent land use to the analysis of written descriptive language.

The judicial rule that avulsion does not alter title or boundaries, but operates instead to eliminate the controlling status of a river as a boundary monument, rests upon the same fundamental premise which land surveyors often apply to artificial monuments of all kinds, that a disturbed monument no longer controls, and the case of *State v Stockman* (1931) provides an ideal illustration of this principle in operation. A certain township in Wabaunsee County, traversed by the Kansas River, was platted by the GLO in 1862, and that plat indicated the presence of 2 oxbow loops in the portion of the river which passed through Section 22. These 2 loops both bulged to the east as the river flowed southward through this section, and as a result 2 typical riparian lots were platted east of the river in that section, which were then patented during the late 1800s. The river evidently remained materially unchanged in this area until 1903, when a major flood occurred, during which the course of the river was straightened, as it cut through the neck of each of these 2 looping bends and thereby abandoned a substantial portion of the platted channel, leaving the 2 aforementioned lots disconnected from the river. In 1904, a broad slough, about 150 feet in width, still occupied the abandoned river channel, making that low area useless to the owner of the 2 riparian lots. By 1909, the slough had diminished to the width of a typical creek and the former channel went dry at certain times of the year. By 1914, the extinct channel had finally gone completely dry, and had thus become useful land, part of which the owner of the 2 riparian lots began to utilize as cropland. Stockman subsequently acquired those 2 lots, and he naturally continued farming the whole area which had been used by his predecessor. At an unspecified date however, presumably circa 1930, Kansas officials evidently informed him that Kansas still owned the full width of the abandoned channel, as that area was defined by the GLO meander lines, but Stockman did not concur, and he insisted that he had the right to go on using the dry riverbed, so the state filed an action against him. Stockman argued that the area within the former riverbed which he had been using was not vacated by the river through avulsion, and the trial court agreed with him, observing that the water had very gradually disappeared from the old channel, so the land thereby exposed constituted accretion or reliction, which had legally attached to the Stockman tract. The Court reversed that decision however, holding instead that the state had presented evidence which was sufficient to prove that an avulsive event had occurred in 1903, at which time the river permanently departed from the relevant portion of its platted channel. The fact that some water lingered in the old channel for several

years, the Court explained, was entirely irrelevant, so it made no difference how long it took for the extinct channel to fully dry out. An oxbow loop abandonment, the Court specified, always represents an act of avulsion, because the formation of a distinct and independent second river channel is the legal signature of avulsion. The flood of 1903 was the only relevant event, the Court pointed out, making the 1862 meander lines permanent upland boundaries at that moment, so the presence or absence of water in the slack channel after that time could not result in either accretion or reliction, and could not increase the size of the Stockman tract, because after 1903 that portion of the river was no longer a boundary monument. Thus the Court clarified that the mere presence or absence of water is not indicative of either accretion or avulsion, that determination is governed solely by the specific manner in which the river relocated itself. Had the river accretively migrated to the west prior to 1903, then the location of the river immediately prior to the flood would have controlled the west boundary of the Stockman tract, and the meander lines would have been irrelevant, but since the evidence indicated no river movement prior to 1903, the meander lines became legally binding boundaries at that time.

As has been previously noted herein, one of the primary purposes served by the doctrine of adverse possession is the protection of victims of flawed tax delinquency proceedings. The statute of limitations supporting adverse possession operates to validate bogus tax deeds, which were executed by inept or careless county personnel, and are therefore fatally defective in some technical respect, which is typically invisible to the innocent holder of the deed. Adverse possession however, requires land use, and as we have seen in reviewing several early Kansas cases, not every tax deed holder qualifies for such protection under the law, since many tax deed holders are absentee owners who never even attempt to make any actual use of their land. The case of *Bayha v Doty* (1932) shows that there is also another reason why one who has held a tax deed for decades may nonetheless one day find that he owns nothing. A presumably typical quarter section in Seward County was patented to Kirkpatrick in 1887. This quarter was then conveyed by him to Waters in 1898, Waters conveyed it to Clark in 1901, and Clark conveyed it to Churchman in 1906, who then conveyed it to Holbert. Holbert evidently became the first party ever to make any actual or substantial use of this land in 1906, although whether Holbert resided upon his property or not is unknown. After occupying or otherwise regularly using this quarter for many years, Holbert conveyed it to Bayha at an unspecified date, presumably circa 1930. Unknown to either Holbert or Bayha however, Doty held a tax deed, by means of which this same quarter had been conveyed to him in 1907, and he had been paying taxes on it ever since that date. The tax deed held by Doty was originally issued by the county in 1896, and Doty had acquired the quarter in question from the original tax deed holder in 1907, at which point in time he became the legal owner of this quarter, since the 1896 tax deed was valid in all respects. Therefore, Holbert's 1906 deed was invalid, and Holbert was an adverse possessor, without ever knowing it, because Doty evidently never visited the subject area. When Doty finally appeared, nearly a quarter of a century after acquiring this quarter, and the situation became clear to Bayha, he filed an action against Doty, seeking to quiet his title by means of adverse possession, and the trial court ruled in his favor. Doty conceded that he had lost the property at issue through adverse possession, but he insisted that Bayha must be required to reimburse him for all of the taxes that he had paid upon that property, thereby demanding in effect that Bayha must be required to buy the contested quarter from him. The Court had no sympathy for Doty however, pointing out

that he had been allowed ample time under the law to secure his title, and he had taken no steps whatsoever to do so, therefore all of the adverse land use which had transpired was the direct result of his own negligence, for which he could not expect to be financially compensated. The tax title acquired by Doty in 1907 was fully valid and legally effective at that point in time, it had subsequently become worthless, but only as a result of Doty's own failure to monitor the status of his land, so in the view taken by the Court, Doty was unworthy of any protection under the laws which were intended to safeguard tax deed holders, because his loss was entirely upon his own hands, and he was not a victim of any bungled tax foreclosure. Thus on this occasion the Court confirmed that an owner of record who loses his land to adverse possession is entitled to no compensation for that loss, and a successful adverse possessor cannot be legally required to pay for the land which he has adversely acquired.

Acreage was the principal focus of the Court in *Hoyne v Schneider* (1933 & 1934) a case which featured both extensive surveyor testimony and a review of the history of the PLSS by the Court. Rarely has the Court seen fit to engage in a detailed review of the procedural rules or guidelines that control survey work, but on this occasion the Court did so, in order to justify its position on an acreage dispute in the PLSS context. The patriarch of the Hoyne family was evidently a typical settler who acquired the SW/4 of a certain Section 18 in Saline County at an unspecified date. How this quarter was used during his lifetime is unknown, he may or may not have physically divided the SW/4 into distinct areas by fencing various parts of it. When he died in 1915 it was discovered that he had left the west half of the SW/4 to one of his sons and the east half to another one of his sons. Whether or not any physically marked line of division existed in 1915, or was subsequently marked in any way, is unknown, but no discord appears to have arisen during the years when these 2 adjoining areas were used by the sons of the patentee. Eventually, the east half came into the ownership of Hoyne, who was apparently either a daughter or granddaughter of the patentee, and the west half was acquired by Schneider, presumably circa 1930. One of these parties evidently had occasion to look at the GLO plat of the township containing this section, at some unspecified point in time, and it was then noted that the east and west halves of Section 18 did not contain the same acreage, the east half contained the usual 80 acres but the west half contained 90 acres. Which one of the parties first learned about this is unknown, but they were evidently unable to agree on the location of their mutual boundary, so the county engineer was summoned, and in 1931 he performed a resurvey which verified that there were about 170 acres in the SW/4, confirming that the west half was about 10 acres larger than the east half, per the GLO plat. Hoyne was unsatisfied with this division however, so she filed an action challenging the resurvey, in which she insisted that the Hoyne quarter must be divided on an equal acreage basis. The trial court agreed with Hoyne, and ordered the surveyor to split the quarter at issue between the litigants, by marking a line of division which would leave each of them with 85 acres. The Court reversed that decision however, finding that the surveyor had properly adhered to the GLO plat, because the use of the terms "east half" and "west half" must be regarded as calls for the boundaries depicted on the GLO plat, and not as calls for a new division of the subject property based upon acreage. The terms "half" and "quarter" the Court emphasized, legally refer to either platted or physically established boundaries, rather than acreage, when they are utilized in the PLSS context. Because the quarter in question was created by the GLO, and was described using GLO terminology,

the Court stipulated, no intention to deviate from the typical GLO division procedure could be found in the legal descriptions held by the litigants, thus division of the subject property in a manner resulting in equal acreage was unjustified. Moreover, this rule is applicable to all land divisions at or above the level of the nominal 40 acre PLSS unit, the Court specified here, so the terms "half" and "quarter" have no relevance to acreage until a sixteenth or a platted lot or a smaller area is divided, at which point equal acreage division becomes acceptable.

“... where land is conveyed in sections or subdivisions of sections ... a presumption arises that reference is made to the public surveys of the United States ... the words "east half" and "west half" in a deed, while naturally importing an equal division, may lose that effect when it appears that at the time some fixed line or known boundary or monument divided the premises somewhere near the center, so that the expression more properly refers to one of such parts than to a mathematical division which has never been made. The expression in the deed is controlled by ... monuments and boundaries existing.”

We have seen that unrecorded documents, including both plats and deeds, can carry controlling significance, and this remains true even if the document is destroyed after being used, because legal force and effect does not reside in the document itself, it lies solely in what the document meant to the parties at the moment of conveyance. Conversely however, in some instances even recorded documents which appear to be accurate, complete and entirely legitimate may have no controlling value at all, and the case of *Poteet v Knappenberger* (1934) provides a good example of this. Brown and his wife were apparently an elderly and childless couple who owned a tract of unspecified size, shape and location in Reno County, which they farmed and resided upon. In 1924, apparently suspecting that he was near death, Brown made out his will, and he also deeded all of his interest in the Brown farm to his wife, making her the sole owner thereof. In 1925 however, Brown's wife evidently became seriously ill, so it then appeared likely that she would die first, and for that reason the Browns visited their banker's office in Penalosa, and had him create a deed conveying the farm from back to Brown. This deed was properly composed and it was duly signed and acknowledged on this occasion, but it was not taken from the bank, instead it was deposited into a safe deposit box, where it remained along with other assets of the Browns, since they had instructed the banker that it was to take effect only if Brown's wife died before Brown. Brown died in February of 1932, his wife then died in July of that year, and Knappenberger was appointed to serve as the administrator of their estate. When the deed was discovered, Knappenberger had it recorded, which appeared to have the legal effect of placing the real property that comprised the farm within the parameters of Brown's will, while removing that property from the will of Brown's wife. Poteet was evidently either an heir or a creditor of Brown's wife, so the deed recorded by Knappenberger threatened to deprive Poteet of any interest in the farm, and for that reason Poteet elected to file an action challenging the validity of that deed. The testimony of Brown's banker, who related all the details of what transpired in his office, controlled the outcome, and the trial court declared the 1925 deed to be invalid, on the grounds that no legally effective delivery of that deed had ever taken place. The Court upheld that decision,

confirming Poteet's victory by concurring that the deed in question held no legal force or effect, despite being complete and accurate and recorded, because although Brown as the grantee had obtained the deed, it was not delivered unto him with the intention of operating as an immediate conveyance. The banker's testimony, the Court observed, made it clear that the deed was a conditional conveyance, and the condition upon which it was to become effective was never fulfilled, so the deed was worthless and Knappenberger had no capacity to render it reliable by recording it. Thus the Court clarified that physical delivery of a deed, even when accompanied by subsequent possession of the deed by the grantee, does not represent a completed conveyance, if there was no intent to convey the land at the moment of delivery. Testimony indicating that a deed was created and delivered in the absence of intent to convey, the Court thus reminded all grantors and grantees, can negate the value of that deed, leaving it legally ineffective. In addition, the Court reiterated here that recording a deed merely makes it's existence a matter of public notice, and does nothing to increase or enhance it's validity, demonstrating that a deficient deed is neither empowered nor made reliable by virtue of being recorded.

The Court continued to extend the line of Kansas cases focused upon the value of boundary agreements in an urban context, while expressly limiting the efficacy of resurveys at this time, with it's decision in the case of *Schlender v Maretoli* (1934). Schlender acquired a group of several platted lots in Leavenworth in 1887, but when the block in which these lots were situated was platted is unknown, so this area may well have been vacant. In 1897, the owner of Lot 24 in this block erected a fence upon the east side of his lot, and he evidently placed this fence about 5 feet west of the east line of Lot 24. Henceforward, he apparently never used the east 5 feet of Lot 24, although what knowledge he may have had regarding the location of his lot corners is unknown, and there is no indication that any lot corner stakes or other monuments were ever set or found anywhere in this particular block. In 1904, Lot 24 was conveyed to Maretoli and Lot 25, lying directly east of Lot 24, was acquired by Schlender, who had already owned Lot 26 and other lots farther to the east for 17 years. Lot 25 was presumably still vacant, and whether or not Schlender ever placed any buildings upon it is unknown, but over the ensuing years he evidently used all of the land east of Maretoli's fence in some unspecified way, during which period both men regarded the fenced line as their mutual boundary, on the assumption that it stood upon the line between Lots 24 & 25. After about 10 additional years, the 1897 fence needed to be replaced, and Schlender collaborated with Maretoli in rebuilding it, as both men continued to operate under the apparent presumption that it had been built as a division fence. Another 15 years or more then passed, during which time these neighbors lived in apparent harmony, until for unknown reasons Maretoli obtained a survey of his lot in 1932, which indicated that his east lot line was 5 feet east of the fence. Upon being thus informed, Maretoli relocated the fence to the surveyed line, thereby compelling Schlender to file an action alleging that the fenced line was an agreed boundary. The trial court ruled in Schlender's favor, accepting the survey as a valid indication of the lot line location, but holding that Schlender had acquired the east 5 feet of Lot 24 through adverse possession. On appeal, Maretoli protested that the treatment of the fenced line as a boundary was clearly a plain mistake, while pointing out that under the mistake doctrine adverse possession was inapplicable to this scenario. The Court agreed with Maretoli on that point, yet upheld the lower court decision in favor of Schlender, observing that it made no difference whether adverse possession had taken place or not, since the fence

represented a legitimate and binding agreed boundary, because it was in place prior to the acquisitions made by either party, thus they were both bound to honor it, since they had equal notice of its presence. The principle of boundary agreement, the Court reminded the litigants, can and often does operate independently of adverse possession, as well as serving as a potential trigger for adverse land use. Both men had clearly acquiesced in the fenced line as their mutual boundary, the Court noted, and their cooperation in rebuilding it provided conclusive evidence that they had both fully accepted it as such, in the eyes of the Court. Any fence which has been mutually adopted as a partition or division fence, the Court indicated on this occasion, can represent valid and controlling boundary evidence, which is not subject to rejection or relocation, regardless of its origin. In addition, such an agreed and established boundary, the Court decreed here, cannot be overcome by any subsequent survey, regardless of the accuracy of the survey work, again demonstrating that boundary locations are ultimately controlled by acts of the land owners themselves, which can operate to physically expand or reduce their respective titles.

Less than 2 months after deciding our previous case, the Court ruled upon another boundary dispute in the case of *Baker v Jones* (1935) once again illustrating that the right to rely upon legal descriptions and surveys as boundary evidence is limited, while emphasizing that the acts of the parties serve as the primary and controlling evidence of their intent regarding boundary locations. Courtney owned a tract of unspecified size, shape and location in Douglas County, comprised of cropland, a portion of which he decided to subdivide, so he had that area platted into an unspecified number of lots at an unspecified date, but no lot corners were ever set on the ground. Shortly thereafter, Courtney conveyed Lot 31 of this subdivision to Smith, who intended to build a house on his lot, so the 2 men walked the area for the purpose of determining where to place the house. Courtney pointed out a certain furrow, and he informed Smith that it marked the west line of Lot 31, so the Smith house was then built just east of the furrow. How long Smith owned Lot 31 is unknown, but Lot 30 evidently remained unsold during that time period, and it was still undeveloped when Smith conveyed Lot 31 to Jones, at an unspecified date, who then became the occupant of the house built by Smith. Courtney subsequently sold a group of several lots including Lot 30 to Baker, who at an unspecified date, presumably circa 1930, ordered a survey, which indicated that the line between Lots 30 & 31 ran through the existing house. Nothing is known about how this survey was conducted, but Jones elected not to challenge the accuracy of the survey, yet he refused to relocate the house, so Baker was compelled to file an action against him, seeking to have Jones judicially ordered to move his house. Based upon testimony indicating that Courtney and Smith had agreed that the furrow was intended to represent the west line of the lot deeded to Smith, the trial court held that the furrow was an agreed boundary, thereby expanding Lot 31 westward to that line, while reducing the platted width of Lot 30 by 29 feet. The Court upheld that ruling over the protests of Baker, who insisted that the plat and his legal description, clearly calling for all of Lot 30 as platted, must control. Baker had no valid basis for complaint, the Court explained, because the existing conditions on the ground were fully visible and evident to him at the time of his acquisition, and he made no effort to determine the location of the platted lot lines, or to dispute the use of the furrow as a boundary, prior to making his acquisition. Baker had thus stepped into the shoes of his grantor, the Court pointed out, so he was not at liberty to ignore or reject the agreed boundary, he was bound by the agreed line which his grantor had established, just as

Courtney himself was bound by it, regardless of how the land conveyed to Baker was described, and regardless of whether Baker's survey was accurate or not. Thus the Court demonstrated that any visible line can represent controlling boundary evidence, if it was pointed out as a boundary by a grantor to a grantee, because such an act provides the strongest evidence of the boundary location that was truly intended to control by the grantor, despite the presence of documentary evidence suggesting another boundary location. In addition, the Court indicated here, a grantee who has been informed of his boundaries by his grantor bears no obligation to verify those boundaries by means of a survey, he can rely safely upon his grantor's representations, while a subsequent grantee bears the burden of properly ascertaining the boundaries of the land being conveyed to him, since a subsequent grantee is legally required to take notice of all that has transpired on the ground prior to his arrival. Thus here the Court provided another poignant reminder that successors of a grantor who has previously conveyed part of his land are legally required to honor any boundaries which were physically established by the grantor, and neither legal descriptions nor surveys can be safely relied upon to negate or overturn such boundaries.

Easements represent permanent land rights, some of which have expressly defined boundaries while others do not, but the well known boundary principle of monument control can also apply to easements that were created for the purpose of protecting a specific object, as the case of *Stanolind Pipe Line v Ellis* (1935) ideally illustrates. Browning was the owner of a tract of unspecified size, shape and location, presumably comprised of rural agrarian land, although whether this tract was vacant or was being utilized in some way is unknown. In 1923, she granted the right to place a pipeline across her property to Sinclair, by means of a written contractual agreement, the construction of the pipeline was subsequently completed at an unspecified date, and the pipeline was later acquired and operated by Stanolind. Browning died in 1931 and her land was partitioned by her heirs, who may or may not have known that the pipeline existed, and they may or may not have known where it was located, even if they knew that it existed, since there is no indication that it's location was marked on the surface in any manner, and the path followed by the pipeline was left undefined by the document created in 1923. The portion of the Browning tract crossed by the pipeline was then conveyed to Ellis in 1933, and when he subsequently discovered the existence of the pipeline beneath his land he evidently decided, for unknown reasons, that he wanted it removed. To silence Ellis, Stanolind filed a quiet title action against him, alleging that Stanolind was the holder of an easement which Ellis had no right to disturb, and the trial court quieted the title of Stanolind as requested, holding that the Ellis property was burdened with an easement, thereby preventing him from utilizing his property in any way that might damage or endanger the pipeline. Ellis protested on appeal that the location of the pipeline was never described in any way, and he maintained that since the word "easement" did not appear anywhere in the 1923 grant, the alleged easement had not been legally created, therefore he had the right to revoke the 1923 agreement and demand that the pipeline be removed. The Court dismissed the assertion of Ellis that the location of the rights claimed by Stanolind had never been adequately defined, stating that "if there was any uncertainty as to where the pipeline should be laid, it was made certain by the laying thereof", acknowledging the pipeline as a physical monument, controlling the location of the easement which was created to protect it. The legal description used in 1923 made no reference to either the

location or the width of the easement, but those shortcomings were insufficient to prevent the legal creation of the intended easement, in the eyes of the Court, because there was no absolute need to specify any location or width, the resulting easement simply covered whatever portion of the Browning tract needed to be protected to allow the pipeline to function as intended, nothing more and nothing less. Regarding the nature of the land rights created in 1923, the Court concluded that Browning intended to grant an easement, rather than a mere revocable privilege in the form of a license, as contended by Ellis, because the 1923 document expressly stated that the pipeline agreement was to be legally binding upon all successors, thus Ellis had no more right to insist upon removal of the pipeline than did Browning. Moreover, the Court also declared, an easement would have come into existence when the pipeline was put in place, even if the 1923 agreement had been merely oral and entirely unwritten, because a license authorizing land use, created by means of an oral agreement, becomes irrevocable once the grantee of the license has acted in reliance upon it, thus the construction of the pipeline itself necessarily resulted in the creation of an easement protecting it, even in the complete absence of any documentation.

Less than 2 years after deciding the Poteet case of 1934, in which as we have seen a deed was deemed to be invalid despite being complete, accurate and recorded, the Court again had occasion to analyze and determine the validity of a comparable recorded deed in the case of *Mundell v Franse* (1936). Mundell was the owner of a presumably typical half quarter, which was being utilized as cropland, although how or when she had acquired this tract is unknown, and she evidently did not reside upon it, she lived elsewhere and rented her land out to a tenant farmer. Mundell was apparently a widow with an unspecified number of adult children, including Franse, who was her married daughter. The relationship between this mother and daughter was apparently a good one in 1929, because at that time Mundell agreed to convey the tract in question to Franse, and a deed was duly prepared for that purpose. Whether or not Mundell originally intended to deed her land to Franse as soon as the deed was available for use, prior to the composition of the deed, is unknown, but once the deed was ready, Mundell evidently informed Franse that she intended to keep the deed, so Franse would not get her land until after her mother's demise. Mundell apparently kept the deed in her home, and whether or not Franse knew where it was kept is unknown, but she evidently had access to her mother's residence. Franse was apparently unsatisfied with this arrangement, and she either feared that her mother would change her mind about the proposed conveyance, or else the daughter simply became desperate enough for money to knowingly violate her mother's wishes, because in 1931 Franse took the deed from her mother's home and recorded it, without her mother's permission. There is no indication that Franse forged her mother's signature, so Mundell had apparently signed the deed in question, and the contents of this deed were evidently complete and accurate in all respects, but the deed was recorded without the approval of the grantor. Whether or not Franse told her mother that she had recorded the deed just a few days after taking it is unknown, but Mundell's tenant went on using the Mundell tract without any disturbance from Franse for 3 years, until Franse evicted him from the premises in 1934, and took full control of the entire half quarter unto herself. Upon learning what her daughter had done, Mundell filed an action against Franse, seeking to have her own deed judicially nullified, and the trial court did so, quieting title to the contested tract in Mundell, as requested by her. Franse pointed out that she had acquired possession of the deed at issue, alleging that it had been legally delivered to her,

and it was therefore a valid deed, which could not be struck down, but the Court disagreed and upheld the lower court ruling depriving her of the disputed tract. Observing that the deed was illegitimately taken by the grantee, without the authorization of her grantor, the Court found that no valid deed delivery had taken place, even if the deed did physically pass directly from the hand of the grantor to the hand of the grantee. Any deed that does not embody the true intent of the grantor can be invalidated, the Court informed Franse, because physical delivery of a deed, without the requisite intent on the part of the grantor, is worthless and does not constitute a completed conveyance. In addition, here the Court again demonstrated that a recorded deed, which contains no errors or observable deficiencies of any kind, can be nullified on the basis of parol evidence alone, just as it had done in the 1934 Poteet case.

The case of *Van Sandt v Royster* (1938) provides an excellent example of the powerful principle of notice in operation, and shows how that concept is judicially exercised in the easement context for the purpose of protecting established land uses, thereby preventing the creation of what would otherwise be encroachments. A certain platted block in Chanute was bounded on the north by Tenth Street and on the west by Highland Avenue, although when this block was platted is unknown. Bailey was evidently the owner of all the lots in the northwestern portion of this block, and she lived in a house which was situated on the third lot east of Highland Avenue, so Lots 19 & 20, which were vacant, lay in between Bailey's house and Highland Avenue. In 1904, a public sewer line was installed in Highland Avenue, and a sewer lateral was run westward from Bailey's house, connecting it to this new sewer main. The dimensions of these lots and the exact location of this lateral are both unknown, but the lateral evidently passed through both Lots 19 and 20, presumably somewhere near the middle of those lots. While this construction work was underway, Bailey sold both Lot 19 and Lot 20, so the new owners of those lots both knew where the sewer lateral was located, and they both soon built houses on their lots, which they then connected to Bailey's lateral. These sewer laterals apparently functioned properly for many years, and no sewage problems arose, but the location of the Bailey lateral was unknown to subsequent owners of these lots, because no reference to it appeared in any of the deeds by which any of these lots were conveyed. In 1934 however, Lot 19, situated on the corner of Tenth & Highland, was acquired by Van Sandt, and one day shortly thereafter he found his basement full of raw sewage. When the work was done to fix the sewer problem, Van Sandt was informed that the sewage coming from the 2 lots lying to the east of his lot was draining across his lot, and he also learned that no easement pertaining to the existing lateral had ever been documented, so he filed an action against Royster and Gray, who had become the owners of the other 2 lots served by the lateral in question. Van Sandt charged that the offending lateral was an encroachment upon his property and demanded that it be removed, but the trial court denied that request, finding that Van Sandt's lot was burdened with an undocumented easement in favor of the 2 neighboring lots, allowing the lateral to remain in use in its established location. Van Sandt protested on appeal that he had no way of knowing that the problematic lateral existed when he acquired his lot, insisting that he was an innocent purchaser, and contending that the lateral was merely an encroachment which was subject to removal, but the Court disagreed and upheld the lower court decision, confirming that the lateral was protected by an implied easement. An undocumented easement had arisen by implication, the Court concluded, because all of the grantees of each of the lots had acquired their lots

with notice of the fact that the relevant houses were all equipped with modern plumbing, so the fact that the lateral itself was invisible was irrelevant, in the view taken by the Court, every lot owner, including Van Sandt, should have known that it existed. Thus the Court adopted the position that any land use which is intended to be permanent can result in the creation of an undocumented easement, protecting that ongoing land use whenever title to the land upon which that use is being made is conveyed. An object which predates a conveyance of land cannot always be regarded as an encroachment, just because it is undocumented, the Court clarified here, since each grantee has a duty to take notice of any use that is being made of the land which he is acquiring, and any existing objects within the area being acquired must be recognized as potential easements burdening the subject property.

Although the Court had chosen to support and protect physically established boundaries, allowing them to control over boundaries of record, in those instances where there was evidence of an agreed boundary, as several of our previous cases have shown, the Court remained intent upon preventing adverse possession from becoming a tool for boundary adjustment. As the case of *Steinbruck v Babb* (1938) demonstrates, the Court continued to staunchly enforce the mistake doctrine during this period, thereby preventing adverse possession from being used for purposes of boundary control, in the absence of any evidence of a boundary agreement. Hill was the owner of a tract of unspecified size, shape and location in Geary County, which consisted of typical farmland lying along the north side of the Republican River. In 1907, Hill sold the western portion of his tract to Steinbruck, and the new boundary line dividing the Hill tract was properly monumented by a surveyor, so the location of that line was clear to both Hill and Steinbruck. These 2 men then decided to construct a livestock chute, centered upon their mutual boundary line, so each one of them built a fence, offset 3 feet from that line, forming a 6 foot wide passageway allowing their animals to reach the river. Hill then sold the remainder of his tract in 1908, and after being owned by various others, it was acquired by Babb in 1918. Over the ensuing years, the west fence was apparently well kept up by Steinbruck, while the east fence was not kept up, and the use of the livestock chute diminished or ceased, so Babb began using all of the land lying east of the west fence, and Steinbruck evidently never objected to this. At an unspecified time, presumably circa 1935, Babb died and his widow apparently informed Steinbruck that she owned all of the land east of the remaining fence, forcing Steinbruck to file an action, seeking judicial confirmation that he still owned all of the land lying west of the monumented boundary line. Steinbruck ordered a resurvey, which verified that the original line of division was still in place, as monumented in 1907, and the trial court ruled in his favor on that basis. Babb's widow alleged that she had never known about the monumented line, and maintained that she always believed that Steinbruck's fence marked the boundary in contention, insisting that the Babbs had acquired the portion of the Steinbruck tract lying east of that fence through adverse possession. The Court nonetheless upheld the lower court decision against her, holding that there had been no adverse land use, because she and her late husband had simply made a plain boundary mistake. Noting that the disputed boundary had been clearly marked at all times, and observing that no agreement to relocate that boundary had ever been made, the Court concluded that neither Babb nor his widow had any valid basis upon which to either believe or contend that Steinbruck's fence was a boundary fence, since the evidence clearly indicated that it was never intended to function as a division fence. Thus the Court took the

position that a fence which was deliberately offset from a known boundary line cannot support adverse possession, since such a fence was never intended to mark a division of land, so the notion that such a fence marks a boundary represents a plain mistake, which is not equivalent to genuinely adverse intent stemming from a boundary agreement. Intent and notice are the 2 core elements of adverse possession, in the view of the Court, and both of those elements must be present before adverse possession can legally overcome record boundaries. Since the Babbs regarded the fence at issue as a boundary only because they mistakenly thought it was located on the boundary line of record, their land use did not qualify as adverse, in the eyes of the Court, that mistake on their part revealed that they really intended to honor the boundary location of record, so they could derive no benefit from the 15 year statute of limitations.

While deeds are powerful legal documents, which are presumed to be correct and legally effective, until the contrary is shown, even an entirely accurate recorded deed, which embodies the true intent of it's author, can be without value, as the case of *Hush v Reeder* (1939) well illustrates. Healy acquired a 320 acre tract in 1873, and he resided upon it with his first wife and their children until 1885, when the Healys were divorced, at which time his former wife took their children and moved away. In 1886 Healy remarried, and he continued to occupy and utilize his entire homestead, along with his second wife and their children until 1900, when he was divorced again. Healy and his second wife then split the family farm, she and their children got half of it, leaving Healy as the sole owner of the other 160 acres. How Healy's remaining land was used after 1900 is unknown, but he eventually moved to Louisiana, where he composed a deed conveying his 160 acre Kansas tract to the 5 children of his second wife, in 5 equal shares. During a visit to Kansas in 1910, Healy gave this deed to Foster, who was one of his grandsons, but Foster gave it back to Healy, who then placed it in a safe deposit box at the First National Bank of El Dorado. The deed remained untouched by anyone until 1925, when Healy obtained another safe deposit box, this one at the Citizens State Bank of El Dorado, and he then moved all of his stored papers to that location. Foster continued to attend to his grandfather's business affairs in Kansas, when Healy was in Louisiana, and Foster had full access to all of Healy's assets and papers at all times, but he never did anything with the deed. In 1929, Healy visited Reeder, who was one of his daughters, living in Kansas City, and was one of the grantees named in the deed, and knowing that he was near death, he gave her a key to the safe deposit box containing the deed. After Healy's death, Reeder went to El Dorado and obtained the deed and recorded it. When she eventually learned what had taken place, Hush, who was one of Healy's daughters by his first wife, and was not among the grantees named in the deed, filed an action alleging that the deed was void and that she was entitled to a share of the land described therein, as an heir of Healy. The trial court rejected the contentions set forth by Hush however, and deemed the contested deed to be valid, finding that it had been properly delivered, from Healy to Foster in 1910, so it had legally taken effect at that time, thereby cutting Hush out of Healy's estate. The Court reversed that decision however, and agreed with Hush that the deed held by Reeder was utterly worthless, because Healy had never legally delivered it to anyone. Although Healy handed the deed to Foster in 1910, the Court found that the evidence indicated that Healy did not intend the deed to take effect at that time, so in fact it had been physically delivered without the requisite intent on the part of the grantor, nullifying the legal value of that act by Healy. The fact that Healy retained physical control over the deed, by moving it in 1925,

revealed that he still intended to assert legal control over it, which indicated that no conveyance had taken place in 1910, in the eyes of the Court. Thus here the Court mandated that a valid deed delivery requires intent on the part of the grantor to fully relinquish all control over the deed, so a deed delivered without such an intention conveys nothing, and any deed which the grantor retains and controls at all times does not represent a completed conveyance. Healy very clearly intended Reeder and her siblings to have his land, and not Hush, the Court recognized, but when a grantor dies the intent expressed by that grantor in any deed which was never legally delivered by him dies with him, and a deed left for the intended grantee to find after the grantor's death is not the legal equivalent of a will, so such a deed cannot be honored.

As this decade drew to a close, the Court handed down a decision of particular significance to land surveyors, emphasizing the importance and value of surveys defining riparian tracts, in the case of *Ohio Oil v Shaffer* (1939). As previously noted herein, beginning in 1907 the Kansas Legislature produced a series of laws pertaining to the conveyance of dry navigable Kansas riverbed lands by the state, and one such law enacted in 1913 mandated the execution of accretion surveys by county surveyors, in order to quantify such land for purposes of taxation. In 1914, an accretion survey was conducted upon the land of Hill, who owned 2 typical riparian lots that had been platted by the GLO in 1871, lying along the east side of the Arkansas River in Reno County. This 1914 survey resulted in the creation of 2 accretion tracts containing a total of 21 acres, increasing the documented acreage owned by Hill to a total of 109 acres. As the river's steady westward retreat progressed, 2 more such surveys were done, in 1929 the addition of another 12.54 acres to the Hill property was documented, and by 1933 another 17.79 acres had been reclaimed from the riverbed. Thus the Hill property consisted of 6 distinct contiguous tracts, including the 4 tracts created by the county accretion surveys, along with the 2 GLO lots defining the upland that existed in 1871. In 1932, Hill executed a 5 year oil and gas lease to Stecher, which covered only the 12.54 acre area, and then in 1934 he executed another such lease to Coats, which covered the area lying to the east of the area that he had leased 2 years earlier. No friction evidently occurred between Stecher and Coats, and they apparently used their respective areas without conflict during the ensuing years. In 1937, Hill renewed Stecher's lease for another 5 years, and the 17.79 acre area adjoining the river was added to it, yet still no controversy arose, as Coats raised no challenge to the presence of Stecher on the western portion of the Hill tract, and Stecher was unconcerned with the operations conducted on the eastern portion thereof by Coats. Subsequently however, the Coats lease was acquired by Ohio Oil, while the Stecher lease was acquired by Shaffer, and Ohio Oil objected to the presence of Shaffer, so Ohio Oil filed an action, alleging that their lease covered all of Hill's property, and demanding that Shaffer be ordered to vacate the premises. The objection raised by Ohio Oil was based directly upon the *Cushenbery* decision of 1925, previously reviewed herein, and was motivated by the fact that the Court ruled on that occasion that the lease held by Waite-Phillips, covering the upland portion of the relevant property, also legally covered any and all accretion to that property. Since Ohio Oil was the holder of the lease covering all of the upland in this instance, they maintained that Shaffer had no right to make any use of any of the accretion to the Hill property. The trial court wisely recognized the essential difference between these 2 highly similar scenarios however, and rejected the position set forth by Ohio Oil, with which decision the Court concurred, upholding Shaffer's lease as fully valid, while restricting the

operations of Ohio Oil to the area expressly described in their lease. The key difference, which negated the argument made by Ohio Oil, the Court observed, was the fact that in this case, unlike the Cushenbery case, the accreted land in contention had been legally documented by means of county accretion surveys, which converted the surveyed portions of the former riverbed into defined tracts, that were legally separate and distinct from the upland portion of the Hill property. Thus the Court highlighted the efficacy of riparian surveys completed by county surveyors, as valuable documentation of the physical expansion of patented riparian lots beyond the original GLO meander lines and into the dry riverbeds of Kansas, thereby stipulating that land can be legally described with reference to subsequent surveys just as properly as it can be described with reference to GLO surveys.

Haas v Nemeth (1934)

The statute of frauds protects land rights by eliminating opportunities for fraud to be perpetrated in the process of conveying land. By mandating the creation of proper documentation of all conveyances of land or permanent land rights, the statute of frauds insures that the title being conveyed and acquired in any given land rights transaction is clearly understood and well known by all of the relevant parties. If the statute of frauds did not exist, unscrupulous individuals would be free to lie, and to cheat innocent people, by making deceptive statements or false promises about land rights and later denying that they ever made any such statement or promise, which of course would result in utterly rampant litigation over land rights, since every transaction could potentially become embroiled in controversy. Thus the statute of frauds serves a crucial purpose, by requiring all of the essential terms of any conveyance agreement to be written down, so that information can be objectively reviewed, if controversy over what was conveyed later arises, making it possible to readily ascertain and enforce the true intentions of the relevant parties, as documented by them. The primary objective of the statute of frauds is to bring security to title, by putting in place the clarity and certainty which well composed documentation provides, but since an adequate legal description is one of the mandatory components of any written land rights transaction, the statute of frauds can also become a factor in the arena of boundary law. The extent to which the statute of frauds can control boundary locations however, is a matter for the Supreme Court of each state to evaluate and pass judgment upon, since it is the role of the judicial system to determine the true meaning, and to state the ultimate legal effect, of all statutes. As our present case illustrates, the Court has historically been cognizant of the distinction between title and boundary issues, and has thus consistently limited the application of the statute of frauds in the boundary context, in a manner which is analogous to the limitations that the Court has placed upon adverse possession. Just as we have watched the Court enable and facilitate the enforcement of oral boundary agreements, through the legal channel provided by the

statute of limitations supporting adverse possession, here we will look on as the Court again protects physically well established land rights, resulting from an undocumented boundary adjustment, by declining to allow the statute of frauds to extend beyond the realm of title law into the realm of boundary law.

1923 – Wudthe was the owner of a certain tract situated in the Decatur County town of Traer. The Wudthe tract was a uniform 180 feet in width from north to south, and it was bounded by Superior Avenue on the west and by a railroad right-of-way on the east, but the railroad followed a northeasterly course, so the northerly line of the Wudthe tract was somewhat longer than its southerly line, which was 280 feet in length. Wudthe's house stood near Superior Avenue, and the west 150 feet of his tract were unfenced, but the rear portion of his property was fenced, and Wudthe made little if any use of that fenced area. Nemeth owned the tract lying directly south of the Wudthe tract, and the Nemeth tract was also bounded by Superior Avenue and the railroad right-of-way, but it was somewhat smaller than Wudthe's tract, due to the southwesterly course of the railroad. Whether or not either of these adjoining tracts had ever been surveyed, and how the boundaries of record may have been marked, are both unknown, but there was never any controversy over the location of any of the described boundaries of either of these properties. Nemeth had a barn in the northeast corner of his tract, which he wanted to enlarge, so he visited Wudthe and asked him to convey the south 25 feet of the fenced rear portion of the Wudthe tract to Nemeth, and Wudthe agreed to do so. Nemeth paid Wudthe the agreed price for the 25 foot strip, then he moved Wudthe's fence 25 feet north, and proceeded to build an addition onto his barn occupying that strip. Both men were fully satisfied with their bargain, and they fully agreed and understood that it was intended to be a permanent arrangement, but Wudthe never executed any deed to Nemeth, and Nemeth evidently never asked him for one.

1924 to 1928 – Both Wudthe and Nemeth continued to occupy their respective properties, and they both honored their boundary agreement throughout this period.

1929 – Wudthe sold his property to Goschel, but the deed executed by Wudthe made no reference to his boundary agreement with Nemeth, it described the Wudthe tract just as that tract had been described when Wudthe acquired it. Goschel was fully informed about the boundary adjustment however, as both Wudthe and Nemeth showed him the relevant area and told him that the south 25 feet of the Wudthe tract lying directly south of the fence was part of the Nemeth tract. Goschel evidently had no concerns regarding this boundary relocation, and there was apparently never any further discussion about it between Goschel and Nemeth.

1930 – Goschel deeded his property to Haas, again using the same description of that tract which had been used previously, with no reference at all to the status of

the 25 foot strip that had been acquired by Nemeth. What Goschel may have told Haas about the 25 foot strip is unknown, but Nemeth showed the area that he was using to Haas and explained to him that the area south of the fence belonged to him. Haas never expressly agreed that the fence, as relocated 25 feet northward by Nemeth, marked the eastern portion of their mutual boundary, but Haas proceeded to acquire the Goschel tract with full knowledge of the situation.

1931 to 1933 – Haas honored the fence as part of his south boundary for over a year after making his acquisition, but in 1932 Nemeth and his wife were divorced, the Nemeth tract became the property of the divorcee, and Nemeth left the area. After Nemeth's departure, his ex-wife continued to make use of the 25 foot strip, but Haas believed that she had no right to do so, since the legal description in the divorce decree made no reference to that strip, therefore he elected to file an action against her, alleging that she had never acquired the 25 foot strip, and that it belonged to him.

Haas argued that the 25 foot strip was clearly included in his deed, and in all of the prior deeds in his chain of title as well, so it was clearly part of his property, regardless of how that area had been used since 1923. Haas further argued that the agreement made by Wudthe and Nemeth in 1923 was not a valid conveyance of land, because it stood in clear violation of the statute of frauds, being entirely unwritten, and therefore being unsupported by any legal description whatsoever. Nemeth's ex-wife argued that the statute of frauds was inapplicable to the transaction conducted in 1923 by her ex-husband and Wudthe, because their agreement had been fully executed and performed by both of the agreeing parties, so it was a complete and legally binding transaction, despite being entirely undocumented. Nemeth's ex-wife further argued that all of the successors of Wudthe had been given full notice of the partial boundary relocation which had been enacted in 1923, so both Goschel and Haas had acquired the northerly tract with the knowledge that it had been reduced in size, by the removal of the 25 foot strip in question from that tract, therefore Haas had no right to assert that the 1923 agreement was invalid on the grounds that it was undocumented. The trial court found the argument set forth by Nemeth's ex-wife to be convincing, and held that Haas had no valid basis upon which to challenge her title to the area at issue, viewing the 1923 agreement as a boundary adjustment rather than a conveyance of title, and therefore declining to allow the statute of frauds to nullify that agreed boundary.

The agreement made in 1923 was a flagrant violation of the statute of frauds, the Court obviously realized, if it represented an attempt to convey land without any documentation, but on the other hand it could just as readily be viewed as a boundary line adjustment, in which event it was outside the parameters of that statute, which imposed no prohibition on such agreements. None of the documented conveyances of the northerly tract violated the statute of frauds, in the eyes of the Court, because each one contained a legal description of the subject property, so title to the northerly tract had been legitimately conveyed in both 1929 and 1930, the only source of conflict was the incomplete status of the legal descriptions that had been used in those deeds, which the Court saw as a mere boundary issue, that did not prevent the passage of title. Since adverse possession was

unavailable, due to the fact that 15 years had not passed, in order to uphold the 1923 agreement as an acceptable boundary adjustment, rather than an illegitimate conveyance of land, the Court took the position that the transfer of the 25 foot strip from the northerly tract to the southerly tract was immune to the statute of frauds, because it had been fully carried out on the ground by the parties. Haas had apparently accepted the situation only because he believed that it was not legal and was therefore not permanent, supposing that the 1923 agreement would effectively expire one day, whenever Nemeth departed from the scene, which had occurred, quite conveniently for Haas, after only a fairly short period of time. Under the equitable principles which are applicable to the resolution of all title issues however, the Court recognized that Haas could not be allowed to close his eyes to the scenario with which he was confronted when he proposed to acquire the northerly tract, he had been placed upon notice of all that had taken place, leading the Court to conclude that the principle of notice removed the 1923 transaction from the statute of frauds. Although the 1923 agreement did not satisfy the statute of frauds, the Court determined that it constituted a valid exception to that statute, because compliance with the statutory requirement for documentation would have provided Haas with no better notice than he already had, from the existing observable conditions on the ground, which coincided with and fully supported the verbal information that had been communicated to him at the time of his acquisition. Emphasizing that physical acts of the parties represent the primary evidence of their true intentions, while documentary evidence is merely an acceptable alternative form of notice, the Court upheld the lower court decision awarding the contested strip to Nemeth's ex-wife:

“Nemeth ... wanted to buy a strip 25 feet wide off of the south side of the Wudthe tract ... Wudthe asked his wife ... and Wudthe then said he would sell it ... Nemeth brought a check ... it was understood between them that Nemeth had purchased the land ... Nemeth took up the fence ... moved it to the north ... and thereafter built an addition to his barn which extended onto the 25 foot strip ... and used it with his premises ... Nemeth told Haas about this 25 foot strip ... and showed him where the lines and corners were ... the 25 foot strip was fenced in with the Nemeth property ... Goschel and Haas ... both saw the tract and knew it was being occupied by Nemeth ... appellant contends that the sale of the 25 foot tract being in parol, sufficient facts are not shown to take it out of the statute of frauds. We cannot concur in this view. This was a completed sale. The purchase price, which no one contends was inadequate, was paid in full, complete possession was given by the vendors and taken by the vendee, who made lasting and valuable improvements on the property ... the statute of frauds does not apply to fully executed contracts ... Goschel and Haas were told, before or at the time they purchased, of the prior sale of the controverted tract to Nemeth ... this was sufficient to put them on notice ... they are in no position to say that they purchased in ignorance of his claim ... possession of real estate is constructive notice to all the world of the rights of the one in possession.”

As can be seen, the use of the land made by Nemeth was a vital factor, had he never put the disputed strip to any actual use, the challenged transaction would have remained incomplete and subject to potential nullification under the statute of frauds, but because Nemeth's land use provided full notice of his deal with Wudthe, all of Wudthe's successors were bound to honor their grantor's unwritten agreement. Documentation ultimately serves only to provide notice, the Court clarified here, thus whenever the key notice requirement is met, either by conditions providing physical notice through existing land use, or by verbally communicated information, the statute of frauds can be regarded as superfluous and set aside. On this occasion, the Court thereby approved several concepts that are essential to a thorough analysis of title and boundary issues, including the premise that an undocumented conveyance of part of an existing lot, parcel or tract can either relocate existing boundaries of record or disable their power to control title. Boundary agreements, the Court well understood, are not conveyances, and since the statute of frauds applies only to conveyances, boundary adjustment agreements can be deemed to fall outside the scope of the statute of frauds. Fencing alone can provide full notice to all the world of a valid land rights agreement, and can be equal in value to documentation for that purpose, the Court also confirmed here, when the fence in question is emblematic of dominion over land, which is founded upon a genuine though undocumented agreement. In addition, as this decision demonstrates, fences and other objects cannot be dismissed as mere encroachments subject to removal, when it can be shown that they serve to mark an agreed boundary, such objects can then become valuable and potentially controlling boundary evidence. Subsequent grantees, the Court also indicated here, who are placed on notice of boundary locations by visible objects or other existing conditions, may not qualify for the status of an innocent grantee, in which case they may well find themselves bound to honor oral conveyances previously made by their grantor. From this outcome we can once again observe that an unwritten agreement adjusting or relocating a boundary does not always require the passage of a full statutory period to become binding, it can be supported by many relevant principles of equity as well, and the Court is prepared to enforce all agreed boundaries, whenever doing so is justified. This result also makes it very clear that reliance upon a legal description can prove to be unjustifiable, and therefore very unwise, when the contents of that description are contradicted by existing physical conditions that are visible on the ground. The 25 foot strip had thus become part of the southerly tract, despite being described as part of the northerly tract, but since neither of the litigants requested judicial correction of their legal descriptions, no description reformation was deemed to be necessary by the Court.

Intfen v Hutson (1937)

By the mid 1930s, all of the basic legal and equitable principles pertaining to the resolution of riparian boundary and title issues in Kansas had been put in place and had been fairly well clarified by the Court. The manner in which the navigability status of any body of water is to be determined, for purposes of bedland title, had finally been brought to a position of reasonable clarity by the United States Supreme Court, in a series of

landmark cases, concluding with *United States v Oregon* (1935) (295 US 1) in which the land rights of riparian patentees and their successors were protected against excessive efforts to leverage navigability by the states. Nearly half a century after the 1882 case of *Wood v Fowler*, previously reviewed herein, the Court had acknowledged, in deciding the *Webb* case of 1927, featured herein, that the navigability status of all Kansas streams which had not previously been judicially addressed would need to be determined through the application of federal navigability standards. So by this point in time it had become clear that no navigable waterways remained legally unidentified as such in Kansas, yet due to the presence of the obviously navigable Missouri River, along with the Arkansas and Kansas Rivers, the navigable status of which had been judicially established decades earlier, the boundary and title principles that are applicable to navigable streams continued to be of importance in Kansas. Although the homesteading era had ended, greatly reducing the once frequent occurrence of controversies over the existence or formation of islands or alleged islands, the potential for litigation centered upon the status of land which formed, or allegedly formed, as an island was still present, as the case we are about to review demonstrates. Since location issues were central to the proper resolution of this conflict, in this instance the Court set forth the key historical developments in the relevant area with unusual completeness and detail, making this arguably the best described Kansas riparian case ever documented. In addition, this case emphasizes the importance of fully understanding the operation of the essential principles governing accretion and avulsion, while also highlighting the need to present strong historical evidence, sufficient to meet the high burden of proof that applies to all such matters, in order to prevail in a contest involving riparian title and boundary issues.

Prior to 1881 – The townships along the Missouri River in Atchison County were surveyed and platted by the GLO at an unspecified date. In one such township, the NW/4 of Section 28 was invaded by the river, but only to a fairly slight extent, as the west bank of the river was found to be just a short distance west of the north quarter corner of that section at the time of the GLO survey, so the NW/4 was platted as containing 157 acres. The historically established floodplain of the river was typically broad in this area, and it was clearly defined by bluffs, which marked the ancient river channel, that had been occupied by the water prior to the era of civilization. The bluff lying to the west of the river in this area was about a quarter mile west of the platted location of the west bank of the river, so the northeasterly part of the NW/4 of Section 28 was comprised of lowland, which was highly subject to flooding, but that portion of the NW/4 was nonetheless patented and put to use during this period. During the latter part of this period however, the river evidently migrated steadily westward, far enough to consume roughly half of the NE/4NW/4 of Section 28, leaving only about 20 acres of upland, lying in the westerly portion of the NE/4NW/4, between the river and the bluff. All of the other land in this area was evidently also patented to various unknown parties and it was presumably used in

the typical manner for many years.

1881 to 1883 – At this time a series of floods occurred, causing the river to rise and broaden dramatically in this area. At the peak of this flooding, the river nearly filled the ancient riverbed, as the water extended almost from bluff to bluff, so at this time only about 4 acres of useful upland remained in the portion of the north half of the NW/4 of Section 28 lying east of the bluff. Who owned the north half of the NW/4 at this time is unknown, but the 4 acre area was evidently occupied, although that area may have been temporarily evacuated during the flooding.

1884 to 1903 – During the early part of this period the river receded from the high levels which it had reached during the flooding, and by the end of this period the exposed upland portion of the north half of the NW/4 lying between the bluff and the river was once again about 20 acres. How many different parties owned this tract during this period, and how they used their land, are both unknown, but by the end of this period Moore had become the owner of the land stretching eastward toward the river from the bluff.

1904 – Moore conveyed his tract to Intfen, describing it as "all that part of the north half of the NW/4 ... lying east of the foot of the bluffs, containing 20 acres more or less".

1905 to 1912 – The Intfens took possession of the tract that they had acquired and they presumably used it as a typical family farm henceforward.

1913 to 1917 – At the outset of this period the Intfens noticed that an island was forming in the river, directly east of their land, but they could not tell exactly how far it was from their farm, and they made no effort to mark or to measure the location where it first appeared. During this period they watched as the island rapidly grew and expanded, while the river channel separating the island from their farm steadily narrowed.

1918 – Intfen obtained a tax deed, which contained the same legal description that appeared in his 1904 deed from Moore. Intfen evidently believed that by obtaining this deed he had secured title to the island unto himself, but there is no indication that he ever made any actual use of the island, and whether he ever even set foot on it or not is unknown.

1919 to 1930 – During this period the island continued to steadily increase in size, as the river channel running east of the island became the main channel, and the channel to the west of the island was reduced to a mere slough. A series of vagrants, drifters and squatters apparently occupied the island at various times, and at least one shanty was evidently erected on the island by unknown parties, but Intfen was apparently unconcerned by their presence, so he took no action against them.

1931 to 1936 – Intfen died in 1931, leaving his land to his widow, then in 1932 Hutson took sole possession of the island, with the intention of making it his permanent residence, and he commenced farming operations on the island, although how he accessed the island is unknown. Hutson obtained a quitclaim deed from one of the prior occupants of the island, but how that area was described in this deed is unknown, and he also began paying taxes on the island. Toward the end of this period the slough finally dried up completely, so the island became directly connected to the Intfen property. Intfen's widow wanted the island and she believed that she held title to it, so when she learned that Hutson was claiming that he owned it, and it became clear that he had no intention of leaving, she filed an action against him, seeking to have him judicially ordered to turn control of his farm over to her and vacate the area.

Intfen's widow argued that she was the owner of all of the land lying within the north half of the NW/4 east of the bluff, including the island, because as an owner of a riparian tract she was entitled to any and all land which had formed by means of accretion or reliction within the platted boundaries of her tract. She further argued that the flooding which had occurred during the 1880s was an avulsive act, so title to the entire portion of the north half of the NW/4 that was submerged at that time, which was virtually that entire tract, had remained in her predecessors, and no part of that area had passed into the ownership of Kansas, despite being submerged beneath a navigable river, thus the island had arisen from land that was owned by the Intfens and it was part of her tract on that basis. She also asserted that the 1918 tax deed obtained by her late husband was executed for the purpose of verifying that the land which was already part of the island at that time was part of the Intfen tract, so she held title to the island as it stood at that time, and all of the subsequent accretion or reliction which had become attached to it as well, therefore she had the right to order Hutson off that land. Hutson argued only that the island had not formed within the Intfen tract, he maintained that it had originated within the platted portion of the riverbed, so it was never part of the Intfen tract, and he was therefore free to occupy and acquire the whole expanded island, despite the fact that it was located partially within the platted boundaries of the Intfen tract, just as he had done. The trial court ruled that Intfen's widow had failed to meet her burden as a plaintiff to prove that her title to the land in contention was clearly valid and superior to the title of her opponent, rejecting the proposition that she held any interest in the island, and instructing her to allow Hutson to utilize the island undisturbed.

Intfen's widow occupied a potentially victorious position, and her legal team demonstrated reasonable knowledge of the relevant principles of law applicable to riparian properties, yet she was destined to experience defeat, because the arguments she set forth all failed to adequately address one key item, and that was the location component of the island's origin. Intfen's widow correctly understood that under Kansas law avulsion cannot deprive a private land owner of title to any land, or shift title to any land which was avulsively submerged into state ownership, so it is quite possible that an island can arise from a navigable river as private land in Kansas, under the basic principle that any new island belongs to whoever owned the land upon which it formed, at the time of its emergence. She was also right about the legal implications relevant to the interaction

between accretion and avulsion, so if the island had in fact sprung from avulsively submerged land, within the Intfen tract, she would have owned the entire island, regardless of how much it had expanded through accretive growth, and regardless of how far it had subsequently extended itself into any other quarters or other sections. The fatal flaw in the widow's position however, the Court observed, was the fact that there was no evidence proving exactly where the island had first broken the surface of the river, because the Intfens never obtained a survey, which could have located the highest spot on the island, and thus supplied crucial evidence of it's exact point of emergence. There was testimony by others, presumably Hutson's cohorts, that the island had actually first appeared about half a mile east of the Intfen farm, in the eastern half of the river, which occupied the western part of the NE/4 of Section 28, and that area was part of the platted riverbed, so if the island really originated there, it was all property of Kansas, regardless of how much of the NW/4 it had subsequently consumed. Although a large portion of the island, as it stood at the time of the trial, was clearly in the west half of Section 28, the Court concurred in the conclusion reached by the trial court, that the island had first arisen somewhere east of the NW/4 and it had simply grown in a westward direction through accretion and reliction, until it finally sealed the Intfen tract off completely from the river, by devouring the entire west channel. Intfen had wisely realized that the island's radical growth could one day terminate the riparian status of his property, and his concern had proven to be justified, but the tax deed he obtained in 1918 was utterly useless, the Court noted, because it made no specific reference to the island. Moreover, if the island had truly originated outside the NW/4, the Court recognized, no deed could legally halt it's ongoing expansion, or prevent it from engulfing part of the NW/4, as it closed off the west channel, while carrying the title of Kansas along with it as it grew. The expansion of the island, the Court explained, which the Intfens had ironically seen as being beneficial to them after 1918, was actually devastating to their rights, as their land was robbed of it's riparian character, and their access to the river was lost, to the sequence of aquatic events which had taken place:

“... 1881 to 1883 the river cut westward ... suddenly and violently by avulsion ... about 1913 a bar commenced to form ... the current of the river changed ... and began to deposit sand and silt ... the bar increased gradually ... defendant in 1932 entered into possession of the accreted land ... this bar continued to grow and ultimately extended westward until it reached ... the eastern edge of plaintiff's land ... appellant contends ... that being caused by avulsion she did not lose title to her submerged real estate, and that when later reliction occurred ... and her lands reappeared above water level, she became entitled thereto ... even though it be conceded that plaintiff's loss of land was occasioned by avulsion ... that land must have reappeared within the limits of the land taken away by avulsion ... the bar commenced to form ... east of the east boundary of plaintiff's tract ... accretions thereto brought the western edge of the island thus formed to the eastern boundary of plaintiff's lands ... the island arose outside of any boundary of plaintiff's lands ... accretion or reliction must be made to the contiguous land and must operate to produce an expansion of shore line outward ... plaintiff's east boundary line was the

slough ... plaintiff has no title, legal or equitable, to the so-called accretion lands ... unless by reason of a deed issued by the sheriff to her husband ... in 1918 ... the description was the same as that in Intfen's deed from Moore in 1904 ... the description in the deed ... did not cover the bar or island ... the bar started to form ... a long time thereafter ... the accretions were to the bar or island and not to plaintiff's lands ... plaintiff's contention that she ... has the paramount title cannot be sustained ... it became immaterial what defendant's title was."

Although the Court regarded the evidence presented by Intfen's widow as sufficient to prove that the events of the 1880s constituted avulsion, that matter was of no benefit to her, because that was only half of what she needed to prove in order to prevail, and her cause was doomed by her failure to show exactly where the island had originated in 1913. Unless it could be shown that the island arose from land which had become part of the river only by virtue of avulsion, the widow could not prevail, and without a survey she had no real hope of accomplishing that, but of course she may have decided not to obtain a survey because she knew that the island formed to the east of her tract, so a survey would not support her position. In denying that the widow's claim of title to the disputed island held any validity, the Court upheld several important points of riparian law in Kansas, such as the fact that a navigable stream can exist on private land, if its presence in that location resulted from an act of avulsion. Both the location in which an island developed and the time at which it first appeared can be highly relevant to the determination of title to any island that was not platted by the GLO, the Court stipulated, because title to such an unplatted island is governed by title to the spot where it first emerged from the streambed, at the moment of emergence. This case also highlights the fact that the bed of a river channel, the position of which has shifted by means of an avulsive event, can be partially privately owned and partially state owned, and typical accretive river movement can produce a complex sequence of legally significant events, substantially impacting boundary locations, when such movement occurs in combination with an act of avulsion, either before or after the avulsion, or both before and after, as was the case here. In addition, here the Court indicated that accretion and reliction to islands is unlimited, so an island can grow beyond any PLSS line, or any other boundary of record, as in this instance the island at issue eventually expanded into 4 quarters in 2 sections, thereby reducing the titles of multiple riparian owners, while enlarging the state property comprising the island. In negating the 1918 deed, the Court applied the principle that the land embraced within a legal description must be determined by the circumstances which existed when that description was created and used, and not the conditions which were in place when that same description was merely repeated, holding that the description used in 1918 could not possibly have been intended to include the island, because it was composed in 1904 or earlier, well before the island came into existence. In the end, Hutson had done enough to destroy the widow's claim of title to the contested island, but he had gained nothing, because he not proven that he was the holder of a valid chain of title emanating from a state patent conveying the island to one of his predecessors. The actual ownership of the island was thus left uncertain, but the location of the boundary between the 2 subject properties was hereby established by the Court, along the line traced by the last drop of water which had flowed down the slough, since that was the line of contact, where the

island's westward accretive progress was finally halted, when it reached the Intfen tract.

The 1940s - Defining the Relationship Between Boundaries and Descriptions

The pace of land rights litigation in Kansas remained relatively slow during the fifth decade of the nineteenth century, as an intense focus upon support for the national effort to achieve victory in the Second World War supplanted the hardships experienced during the previous decade. Along with the national economy, the Kansas economy began to recover from the severe poverty of the 1930s during this period, but land values remained historically low, so relatively few people were motivated to expend funds for the purpose of land rights clarification. By this point in time, the modern judicial trend toward unification of all forms of action involving land rights was well established and in force nationwide, as the development of modern society had resulted in the abandonment of the ancient partition between legal and equitable actions, leaving only the modern distinction between civil and criminal actions. In land rights litigation, under the umbrella of civil action, litigants are free to frame the issues that are to be resolved as they see fit, and since boundary issues are inextricably tied to title issues, arguments that are set forth in the course of litigating a boundary dispute often introduce title issues, bringing equity into play, along with the law. Legal descriptions represent the intersection of title law and boundary law, because the purpose of a legal description is to linguistically define the physical extent of a specific title, by identifying and enumerating the physical limits which outline that title. As all surveyors know, this can be accomplished in a wide variety of ways, either by calling out physical boundaries, which are marked by objects, either natural or artificial, that are visible on the ground, or by utilizing numerical values, such as lot numbers, acreage values, bearings, distances and coordinates, or by any combination of these methods that may be best suited to the circumstances. Whatever form or method is employed however, every legal description necessarily implicates some form of physical evidence, in the course of defining any given area for purposes of title, because every title exists in a physically connected spatial relationship with all other existing titles. Thus in modern adjudication, the partition between boundary and title issues is seldom raised, and no absolute barrier can be erected to exclude issues of either kind from consideration, in the course of land rights litigation. As we have already observed, and as we will see again in reviewing the decisions of the Court from this period, legal descriptions are not judicially regarded as an absolute source of controlling information, they are subject instead to judicial reformation, whenever the equitable factors which ultimately control the physical extent of all titles make it necessary to adjust or redefine the boundary component of 2 or more adjoining titles.

The case of *Pessemier v Nichols* (1941) provides an important lesson on the proper role of land surveyors, by illustrating the restrictions which the law places upon the work of subsequent surveyors and the stern limitations upon their authority which the Court is prepared to enforce, while also highlighting the Court's intense drive to protect all original surveys. A certain township in Pottawatomie County, traversed by the Kansas River, was platted by the GLO in 1862. The river ran southward through the NW/4 of Section 10 in this township at that time, so a riparian lot was platted, occupying the portion

of the NW/4 lying east of the river. The river's location apparently remained stable for decades, but flooding which occurred between 1903 and 1915 eventually relocated the river about a quarter mile to the east. Pessemier acquired the aforementioned lot along with the whole NE/4 of Section 10 in 1913, and then in 1917 his father acquired a tract of unspecified size, which evidently adjoined Pessemier's tract on the south. Hupe leased the land acquired by Pessemier's father, but he evidently also began using some of Pessemier's land lying west of the relocated river, so Pessemier filed an action against him, in which Pessemier prevailed, as the Court upheld Pessemier's title to the portion of the NE/4 lying west of the river in *Pessemier v Hupe* (1926) on the basis that the river had moved eastward avulsively. Shortly thereafter, Pessemier acquired a portion of the abandoned river bed lying in Pottawatomie County, and Hupe acquired an adjoining portion thereof lying in Wabaunsee County. Both of these parcels acquired in 1926 were comprised of vacated bedland that had been platted in 1917, at which time the relevant county surveyors had established the centerline of the abandoned bed and depicted several lots lying within the former channel upon plats which they had created. No protest or appeal concerning the 1917 plats was ever filed, and an unspecified number of acquisitions were made in reliance upon them, including those made by Pessemier and Hupe, who sold his former bedland to Nichols in 1929. No conflict appears to have arisen between Pessemier and Nichols until 1938, when the county line was resurveyed, and for unknown reasons it's location was shifted, increasing the Nichols parcel by about 9 acres, at the expense of the Pessemier parcel. Nichols then took control of the 9 acre area, so Pessemier filed an action against him, alleging that the 1938 corrective resurvey was void, because all of the relevant land had already been conveyed into private ownership, thus the 2 county surveyors had no authority to relocate the boundary in question, but the trial court decided that the corrected county boundary line was legally binding and Pessemier's property had been thereby reduced. In 1941 the Court reversed that decision however, upholding the boundary platted in 1917 as the true boundary between Pessemier and Nichols, while observing that the relocation of the county boundary was illegitimate, because no survey can operate to divest a land owner of title which he acquired with reference to a prior survey, and the 1938 boundary alteration would have that effect upon the Pessemier parcel. The quality of the 1917 survey work, the Court realized, was irrelevant, because it was original survey work, upon which all of the grantees of the various portions of the extinct channel had the right to fully rely, moreover the 1917 surveys were statutory surveys, and were therefore just as legally conclusive as original surveys done by the GLO. Even though the 1938 resurvey was also a statutory resurvey, and it was presumably more precisely executed than the 1917 surveys, it was of no benefit to Nichols, the Court concluded, because corrective surveys can never have any impact upon any existing title, and even county surveyors are without authority to disturb any established boundaries, under the guise of corrective action.

The distinction between a fee conveyance and one creating an easement can hinge upon several factors, and can sometimes even depend upon the presence or absence of a single word, when a deed is untitled, or the deed's title gives no clue about the nature of the rights being created, as is often the case. Making this determination accurately is critical to the land rights of adjoining property owners, since the location of their fee boundaries and the extent of the acreage which each of them owns in fee are both dependent upon it, and the case of *Nott v Beightel* (1942) provides a good example of the importance of one of the

major factors involved in making that determination. In 1889, the Union Pacific Railroad (UPRR) acquired 2 platted and apparently vacant lots in the Jackson County town of Holton, but the deed to UPRR made no reference to how those lots were to be used. UPRR subsequently placed railroad tracks and related equipment on these lots and used them, along with other adjoining properties which UPRR had also acquired, for typical railroad operational support purposes, presumably as part of a railyard. These railroad operations continued for many years, and in 1919 UPRR leased an area of unspecified size, which included these 2 lots, to Beightel, who built a grain elevator and some related structures on the 2 lots, which he operated henceforward. In 1935 however, UPRR decided to cease operations in the subject area and removed all of the railroad tracks from that area, making Beightel's lease useless to him, so he stopped making his lease payments. How this land was used during the next few years is unknown, presumably it sat idle, but then in 1938 Beightel evidently decided that he wanted to acquire the 2 lots, so he obtained a quitclaim deed from the party who had deeded them to UPRR in 1889. Also in 1938 however, UPRR quitclaimed the 2 lots to Nott, who took possession of them and refused to allow Beightel to enter the area to use or maintain the existing structures and equipment. Since Beightel continued to insist that the 2 lots belonged to him, Nott was forced to file an action seeking to quiet his title to those lots, and the trial court decreed that Nott's deed was superior to the deed held by Beightel, confirming that Nott owned the 2 lots in fee and Beightel had acquired nothing. Beightel protested that Nott's deed was worthless, because UPRR could not sell the relevant lots to Nott or anyone else, since UPRR had acquired only a right-of-way easement in 1889, and had never acquired the contested lots in fee. The Court upheld the lower court ruling however, informing Beightel that although railroads can acquire right-of-way, which represents only an easement, railroads can also acquire land in fee. Because the 1889 deed did not employ the terms "right-of-way" or "easement", and it contained no reversion clause, the Court found nothing indicating that UPRR had acquired anything less than the full fee interest in the lots at issue by virtue of that deed, so just like any other land owner, UPRR was free to deed those lots to anyone at any time, as it had done in 1938. Thus the Court reiterated on this occasion that reversion is applicable only to easements, so it is inapplicable to any land that was acquired in fee, and land acquired by a railroad from a private party, by means of a deed containing no reversionary language or other limiting language, will be presumed to represent a typical fee conveyance. By failing to keep making his lease payments, Beightel had lost his structures and the related equipment which he had placed upon the UPRR lots, along with his rights to the land itself, so here he learned the hard lesson that the mere presence of a railroad track does not convert land which was acquired in fee into a right-of-way easement.

The significance of the right of all grantees to rely completely upon a plat employed by their grantor, and upon all statements made by the grantor in conjunction with the plat as well, has rarely been more vividly displayed than it was in *Kasper v Miller* (1945). Kerr was the owner of a substantial tract of vacant land lying west of Eighteenth Street and north of State Avenue in Kansas City, which he decided to commit to develop in 1915. A group of developers, which included Kasper and Hoel, then acquired an unspecified portion of that property and proceeded to create the Westheight Manor Addition. By 1920, this new residential subdivision had been platted, and Hoel was designated by the group to serve as their real estate agent, in charge of conducting all lot sales, so he began selling off the platted lots to numerous individuals. In one portion of the

platted area a triangular block had been created, which was identified on the plat as Block 10, but this block was not divided into lots, and it was evidently unlabeled aside from the block number, yet no reference was made to it in the dedication statement that appeared on the plat. Hoel wrote "Park" in the space occupied by Block 10 on his copy of the plat, and he showed the plat thus marked to many of the lot buyers, including Miller, while informing them that Block 10 was intended to become a public park one day. By 1927, most if not all of the platted lots had been sold and many of them were improved and occupied, but Block 10 remained vacant, and it was acquired by the Kasper family at this time. The children of the owners of the lots in the surrounding blocks began using Block 10 as a playground on a regular basis, and they continued to do so for many years, without objection from anyone. At various times, city personnel planted trees in Block 10, and they occasionally maintained the grounds, but no structures were ever erected within the boundaries of that block. In 1938, the lot owners apparently learned that Kasper had plans to make some use of Block 10, so they petitioned Kansas City, asking that it be officially adopted as a public park, but the city took no action upon their request. In 1939, Kasper broke ground in Block 10 on a new construction project, apparently intending to develop the land in some unspecified manner, but the lot owners insisted that it must remain vacant and open for their use as a park, so Kasper was forced to file an action against them, seeking to have his right to make other use of that block judicially verified. The trial court rejected his assertion however, ruling that he had no right to develop Block 10 in any manner, and the Court upheld that decision, declaring that Block 10 had become a public park through common law dedication. Because Hoel had expressly informed the lot buyers that Block 10 would become a public park, and he had told them that it would always be available for that purpose, Hoel and his successors were estopped from ever utilizing that block in any other way, the Court informed Kasper, despite the fact that none of the land in question had ever been either formally dedicated or formally accepted by any public officials. The investment of public funds in improving the land at issue had operated as a sufficient public acceptance of the existence of the park, the Court indicated, making the implied dedication of that block conclusive, even in the absence of any explicit approval by any public officers. Thus here the Court emphasized that grantees of platted lots are fully entitled to rely upon all representations concerning the platted area that are made to them by their grantor, or any agent acting on behalf of the grantor, while also once again demonstrating the power of the equitable principle known as estoppel, which can effectuate a legally binding undocumented dedication.

Although the Court takes the use of plats for conveyancing purposes very seriously, recognizing plats as reliable indicators of intended land use, as illustrated by our last previous case, the Court has rejected the concept of plat control for other purposes, such as reversion, which is governed instead by title in Kansas, as the case of *Luttgen v Ergenbright* (1946) demonstrates. In 1920, Schweiter's Fourth Addition was platted, occupying the west 165 feet of a certain quarter section that was owned by Schweiter on the east side of Wichita. This subdivision consisted of a single row of lots, all of which were 120 feet in length, and the west 30 feet comprised a dedicated street, while the east 15 feet comprised a dedicated alley, but none of the platted lots were sold for several years, and the alley was eventually vacated. In 1932, Luttgen acquired a group of these lots, although what use she made of them, if any, is unknown. In 1938, Schweiter's Sixth Addition was platted, and the east boundary of the Fourth Addition formed the west boundary of the

Sixth Addition. Schweiter then sold all of the lots lying along the west boundary of the Sixth Addition and in 1942 Ergenbright acquired one of those lots, which happened to be situated directly east of the Luttgen property. When Ergenbright fenced her property however, instead of stopping her fence at the west boundary of the Sixth Addition, she ran it 7.5 feet further west, enclosing the east half of the vacated alley along with her lot. When Luttgen discovered what Ergenbright had done, Luttgen filed an action, seeking judicial verification that she held title to the full 15 foot width of the portion of the vacated alley adjoining her lots. The trial court rejected Luttgen's position regarding the alley however, and decreed that it had not reverted fully to the lots with which it had been platted, only the west half of the alley had merged with Luttgen's lots upon vacation, so the centerline of the alley was in fact the boundary between the Luttgen and Ergenbright properties, and the fence had been correctly placed upon that line. Luttgen protested that the entire platted alley was clearly intended to be part of the Fourth Addition, and no part of it could be legally regarded as part of the Sixth Addition, but the Court upheld the lower court decision against her, stating that the creation of the platted boundary between the 2 relevant subdivisions by Schweiter did not represent "a separation of his lands". Since Schweiter owned all the land to the east of the alley in 1920, as well as all the land to the west of it, the boundary between the 2 platted areas had become irrelevant in the eyes of the Court, and half of the alley reverted to each of those properties, thus the centerline of the alley had legally become the true west boundary of the Sixth Addition through reversion, long before that subdivision was created. The creation of the alley in 1920 produced rights of reversion, which were initially held by Schweiter, as the owner of the lands lying on both sides of the alley, but not all of his reversion rights had passed to the buyers of the lots in the Fourth Addition. Schweiter's reversion rights to the east half of the alley remained associated with the land lying east of the alley, so those rights passed instead to the buyers of the lots in the Sixth Addition, such as Ergenbright, effectively extending the boundary of that subdivision 7.5 feet to the west, as she very astutely realized. Had the east boundary of the Fourth Addition been the east boundary of Schweiter's land in 1920, Luttgen's position would have been correct and she would have prevailed, because no portion of any dedicated area lying along a platted boundary could legally revert to any property with which it was unassociated by virtue of title at the time of the platting, but since that was not the case here, Luttgen was vanquished. Thus the Court mandated that the legal operation of reversion is controlled by land ownership, rather than by platted boundaries, so in Kansas any vacated strip reverts in part to the properties on both sides of that strip, in accord with the centerline boundary principle, regardless of any platted boundaries, unless it can be shown that the plattor did not also own the adjoining land.

Among the most common myths in the realm of land rights is the notion that mortgaged property is under the primary control of the mortgage holder, rather than the land owner, but Home Owners Loan Corporation (HOLC) v Oakson (1946) clarifies that the contrary is the case. Oakson was the owner of a presumably typical platted lot in East Pittsburg, which was 175 feet in length and 50 feet in width. How and when he acquired this lot are both unknown, but his title to the lot was never challenged, and at an unspecified date he applied to HOLC for a mortgage, so an appraiser was sent to view the Oakson lot. The appraiser observed that the east 70 feet of the lot was occupied by a store building, while the west 105 feet was occupied by a house, along with a garage and a pond, which were used in conjunction with the residence, rather than the store. The appraiser

proceeded to appraise only the residential portion of the lot, but he took no steps to have the legal description of the property modified to exclude the commercial portion of the lot, so Oakson's mortgage appeared to burden his entire lot, due to the presence of the legal description calling for the whole lot in the mortgage documentation, even though the commercial area was never intended to be mortgaged. In 1938, Oakson defaulted on his mortgage and HOLC sought to foreclose upon his lot, but based upon the testimony of the appraiser, the trial court decided that the legal description used in the mortgage was inaccurate and needed to be modified, so the trial judge ordered that description to be reformed, in order to remove the east 70 feet of the Oakson lot, thereby allowing HOLC to obtain title to only the west 105 feet of that lot. HOLC maintained that the fact that HOLC had paid taxes on the entire lot proved that the whole lot had been mortgaged and Oakson could present no evidence to the contrary, while also asserting that the legal description used in the mortgage was legally binding and could not be reformed, but the Court upheld the decision to split the lot, creating a new original boundary, in order to allow Oakson to keep the east 70 feet of his property. In so doing, the Court reiterated that a legal description can be reformed to exclude land which was included in that description by virtue of a mutual mistake, explaining that equity has the power to correct all boundary and description issues, even in the context of an otherwise purely legal action. In addition, once again on this occasion the Court indicated that extrinsic evidence, including testimony, is always acceptable for the purpose of proving that a legal description either contains or represents a mistake of a mutual nature, thereby justifying its correction. Any legal description which was used in a manner that runs contrary to the actual intentions of the parties at the time of the conveyance or transaction, the Court thus held, cannot be regarded as binding, and is subject to reformation, deeming the description error which was made in this instance to be a "mere technicality". Description reformation is available to equitably correct all genuinely mistaken legal descriptions, the Court also confirmed, regardless of the purpose, form or type of document in which the description appears, and a party who mortgaged his property does not thereby lose his right to request description reformation, whenever it is merited in the interest of justice. Described boundaries of mortgaged land are just as subject to rectification as those of unencumbered land, the Court recognized, because a mortgagee holds no title or other rights associated with land ownership, prior to completion of a foreclosure, thus land owners retain primary control over their property, despite the presence of financial encumbrances upon it.

The case of *Farmers State Bank of Clay Center (FSB) v Lanning* (1946) provides a classic example of successful adverse possession between cotenants, in the context of title rather than boundaries, illustrating the importance of the specific nature of the false or deficient title, known as color of title, which is held by the adverse party, while also demonstrating that adverse possession can be completed by a corporation. Hanna and McGinnis were co-owners of a 490 acre tract, consisting of typical farmland, situated in an unspecified part of Montgomery County. Prior to 1919, the subject property had comprised the McGinnis family farm, and along with her husband McGinnis had presumably raised their children on the farm, but by the 1920s the McGinnis children had evidently all reached adulthood and left the area. During the 1920s, McGinnis and her husband apparently also moved away from the subject property, presumably relocating to a retirement home, and the farm was apparently left vacant for a period of time, then in 1929 Hanna deeded the entire tract to FSB, and FSB leased it to a tenant farmer. Over the

ensuing years, the tenant farmer made typical agricultural use of the whole tract, under his lease from FSB, regularly harvesting hay from part of the land while using the rest of it as pasture, although whether he ever resided on the property or not is unknown. Both McGinnis and Hanna died in 1933, and the husband of McGinnis died in 1937, without ever having questioned the use that was being made of the subject property or objected to it in any way. The children of McGinnis also never challenged the validity of the title to the subject property held by FSB, having presumably been told by their parents that the entire tract had been sold to FSB, until 1945, when a group of heirs of McGinnis, under the leadership of Lanning, who was apparently a married daughter of McGinnis, learned that their late mother had never conveyed her interest in the farm to anyone. Lanning and an unspecified number of other descendants of McGinnis then informed FSB that they owned half of the subject property through inheritance, as the legal heirs of McGinnis, since she still owned an undeeded half interest in that tract at the time of her death, thereby forcing FSB to file a quiet title action against all of the McGinnis heirs. FSB asserted that the McGinnis interest in the subject property had been eradicated through adverse possession, and the trial court agreed, quieting title to the entire tract in FSB as requested. Noting that the property in question had been adversely used for a full 15 years, from 1929 to 1944, the Court upheld that lower court ruling, while observing that the heirs had discovered their unknown land rights one year too late, so their legal window of opportunity, to set forth and litigate those rights, had closed upon them. The heirs protested that the use of the land made by the tenant farmer, under the authority of FSB, was not adverse, because everyone, including the heirs, had been innocently unaware for many years that their mother had never deeded away her share of the farm, but the Court reminded them that neither ignorance of land rights nor being an absentee owner can shield any property owner from adverse possession. Since the 1929 deed purported to convey full and sole title to FSB, the Court was convinced that FSB had innocently utilized all of the land at issue, under the reasonable presumption that no other ownership interests in that land existed, so in the eyes of the Court FSB stood in the shoes of an adverse claimant acting in good faith, due to the nature of the color of title held by FSB. Thus the Court indicated that one legal cotenant can complete adverse possession against a fellow legal cotenant, or group of cotenants, even if the adverse party is a corporate entity, who uses the relevant land only through a third party, and even if the vanquished cotenants never knew that they had any land rights to lose.

The case of *Craig v Paulk* (1947) marks one of only a very few occasions when the Court has expressly passed judgment upon specific survey evidence, thereby providing a rare quantified indication of what the Court considers to be a genuinely substantial survey measurement error. Paulk was the owner of the NE/4 of a certain Section 31 in Harper County, while Craig owned the adjoining NW/4 of Section 32, but the date of the GLO survey of the relevant township is unknown. Both of these men evidently acquired their respective properties in the early 1940s, and presumably they both used their tracts as typical cropland. A road ran along the line between Sections 31 and 32, but there was also a line of old Cottonwood trees, situated about 200 feet east of the road, which apparently also ran the full length of Section 32, and for unknown reasons Paulk believed that the tree line, rather than the road, marked the section line. Craig was unwilling to concede that the road was not on the section line however, so the county surveyor was summoned to investigate the situation and inform the adjoining parties of the true section line location. The county

surveyor found no original survey evidence anywhere along the road or anywhere along the tree line, though whether he looked for any quarter corners or not is unknown, but he found what he deemed to be original GLO stone monuments at the northwest corner of Section 31 and at the northeast corner of Section 32, and the line formed by these 2 monuments measured just 11 feet over 2 miles. He also found a stone of unknown origin along the north line of Section 32, which was situated only about 30 feet west of the tree line, but he rejected this stone, since it was about 170 feet east of the road, which was at or near the midpoint of the monumented 2 mile line. Paulk refused to accept the surveyor's rejection of the tree line however, and continued to maintain that the trees had been planted on the section line, so Craig was compelled to file an action against him, seeking to have the surveyor's conclusion that the road was the best evidence of the disputed section line location judicially approved. The trial court found the work of the county surveyor to be acceptable, ruling in Craig's favor on that basis, and the Court concurred, deeming the surveyor's decision to reject both the tree line and the stone of unknown origin to be appropriate under the circumstances. Since Paulk was unable to supply any evidence indicating how or why the section corner at issue would have been set by the GLO 170 feet or more out of its logical position, in relation to the accepted corners lying to both the east and the west of the corner in dispute, the Court was unwilling to view either the tree line or the unexplained stone as valid boundary evidence. Paulk made no claim of adverse possession, but the Court nonetheless noted that any such claim would have been futile, since Paulk's belief that the tree line represented the section line was clearly a mistake, and adverse possession can never be based upon a plain boundary mistake, indicating that the Court was still prepared to exercise the mistake doctrine to prevent adverse possession from nullifying boundaries of record at this time. Thus the Court verified that monument rejection can be acceptable, when it is properly based upon proof of the standard of care in measurement exhibited by the original survey, while also taking notice of statute 19-1414, which states that any surveys not executed under the statutorily prescribed boundary resolution process are legally inconclusive, although such surveys can become conclusive, through judicial adoption, as was the case here.

Despite the Court's consistent guidance, targeted at preventing use of the statute of frauds as a device to be leveraged by those who have simply changed their mind about making a conveyance of land, and wish to escape their conveyance commitment, the Court has often been required to outline the limitations that relate to the application of the statute of frauds, as it did in *Vining v Ledgerwood* (1947). Ledgerwood was a married woman who owned an unspecified amount of real property, which she evidently held separately from her husband, and among the land holdings of Ledgerwood were 4 presumably typical contiguous platted lots in Topeka, which fronted upon Storey Street, and which were occupied by 2 buildings. Ledgerwood offered her Topeka lots for sale, Vining responded, and their subsequent negotiations resulted in a conveyance agreement. No formal documents were employed by these parties however, in memorializing their conveyance agreement, Ledgerwood simply gave Vining a brief handwritten note, containing the relevant information, upon which they had agreed, and Vining gave Ledgerwood a check for the agreed price of the property being conveyed. The note given to Vining, which was signed by Ledgerwood, described the land to be conveyed only as "135 Storey" and "137 Storey", and it recited the price to be paid for each of these 2 properties as well. Before cashing Vining's check however, Ledgerwood evidently discussed this transaction with her

husband, and as a result of that conversation she apparently became convinced that she should not go through with the transaction, so she informed Vining that their deal was off. Vining insisted that Ledgerwood had no option to nix their agreement, but she refused to deed her lots to him, so he was left with no alternative but to file an action against her, seeking to have her judicially compelled to complete their agreed transaction. The trial court found the contested agreement to be fully valid and legally binding, and ordered Ledgerwood to deed the subject properties to Vining for the agreed price. The Court observed that the transaction had been adequately documented, and confirmed that Vining was right that Ledgerwood could not retract her commitment to sell the 4 lots to him for the price stipulated in the note comprising the conveyance contract. Ledgerwood did not raise any issue concerning the value of her lots, nor did she deny that any agreement had been reached, but she maintained that the note in question represented a violation of the statute of frauds, and was legally worthless, because it contained no valid legal description of the land at issue. The Court informed her however, that a grantor cannot leverage any inadequacy in a legal description that was composed either by or for the grantor as a means by which to negate the grantor's commitment to convey their property. The exceedingly truncated descriptive phrases which Ledgerwood had elected to use to identify the lots in contention, the Court went on to clarify to her, could not operate as a legal escape hatch, allowing her to dodge the legal consequences of her agreement with Vining, because those descriptions were legally sufficient to satisfy the statute of frauds, since the intended land could be "readily ascertained" from the written evidence. Thus the Court reiterated on this occasion that even extremely minimal written descriptive evidence can meet the requirements of the statute of frauds, while also indicating that in accord with equity, the composer of a legal description will not be allowed to turn any fundamentally deficient description, which that party created, into a legal point of advantage for their own benefit.

As we have noted in reviewing several previous cases, the Court has consistently interpreted the objectives and the consequences of condemnation actions narrowly, with respect to the nature of the land rights obtained through such actions, always mindful of the principle that nothing more can be taken from any private party or parties by means of condemnation than is genuinely necessary to support the designated public land use. When a public right-of-way is created through condemnation in Kansas, under this view taken by the Court, only an easement is produced, so no new fee boundaries are created, and the principles of reversion become potentially relevant to the future fate of the condemned area, because nothing more than the land rights associated with an easement are required to enable the public to make the intended use of the described area. This rule had prevailed in Kansas as a general principle for many decades by this point in time, having first been set forth by the Court during the 1870s, as documented earlier herein, and having been judicially upheld on numerous subsequent occasions, perhaps most notably in the 1905 Abercrombie case, wherein the Court expounded at length upon the policy supporting this rule. In 1945 however, cognizant of the rapidly oncoming need to acquire substantial amounts of land to facilitate improved vehicular transportation in the automotive age, the Kansas Legislature enacted General Statute 68-413, a law which indicated that any areas acquired by the Kansas Department of Transportation through condemnation could be sold by Kansas. This provision of the statute necessarily implied that the title acquired by Kansas, as a result of any successful condemnation, was a fee title, which of course ran

directly contrary to the precedent that had been historically established by the Court, with regard to acquisitions made for any right-of-way purpose. Thus a very elementary conflict of law was created, between long established judicial precedent pertaining to the legal character of any public right-of-way in Kansas, and the policy of selling off unused right-of-way, which had been adopted by the Kansas Department of Transportation, under the authority of 68-413. Observing this situation, within 2 years of the enactment of this law, the Attorney General of Kansas realized that judicial clarification was needed, so he submitted the issue to the Court, and the Court consented to decide the matter, in an original action entitled *State v State Highway Commission* (1947). The Attorney General set forth the basic proposition that statute 68-413 could be deemed to be unconstitutional and struck down, because there was simply no need for Kansas to acquire any land in fee for any highway right-of-way purposes, and this position was in line with all prior rulings of the Court in comparable right-of-way cases. Nevertheless, in recognition of the need to secure vast amounts of private land unto the public, in order to support a modern highway system, which the Court recognized was fully intended to be genuinely permanent, the Court elected to allow 68-413 to stand, and decreed that under the law Kansas can and does acquire highway right-of-way in fee by virtue of successful condemnations which are completed for that purpose. Although the Court commented, in so doing, that the wisdom of this legislative action was questionable, the Court conceded that the legislative will had been adequately expressed, and on this occasion therefore chose to approve fee condemnation of land in Kansas for state highway purposes, making the principles of reversion inapplicable to acquisitions made under statute 68-413.

Although the Court remained determined to enforce the mistake doctrine at this time, in order to prevent adverse possession from effectively altering boundaries of record, the once dominant character of that doctrine had been seriously eroded, and the case of *Wagner v Thompson* (1947) perpetuated that judicial trend. During the 1880s, Goodman and Dean owned adjoining metes and bounds tracts, which were both bounded on the west by a portion of the Big Blue River. When these tracts were created is unknown, but the location of the described dividing line between Goodman and Dean was unknown or unclear to them, so in 1882 they contacted the county surveyor, and asked him to run out their mutual boundary line. Nothing is known about how this survey was done, but these land owners were fully satisfied with it, and they proceeded to build a fence on the surveyed line, which they both honored henceforward as their mutual boundary. Goodman owned the land north of this division line, and over the ensuing years he developed an orchard and a vineyard, utilizing all of the land on his side of the fence, while Dean farmed all of the land south of it, and no boundary controversy ever arose between them. How many others owned the Goodman and Dean tracts over the next several decades is unknown, but no one ever questioned the fenced boundary, and by 1940 Wagner had become the owner of the Goodman property, while Thompson had acquired the Dean property. Thompson then ordered a survey of his land, and when his surveyor informed him that his northerly boundary was an unspecified distance north of the fence, Thompson accepted his surveyor's suggestion that he actually owned about 5 acres north of the fence, and he informed Wagner accordingly. Upon learning about Thompson's survey, Wagner filed an action seeking to quiet his title to the full area lying north of the fence, and the trial court quieted title in him as requested, on the grounds that adverse possession had conclusively secured the fenced boundary decades earlier, making Thompson's survey

irrelevant. Thompson asserted on appeal that his survey was clearly superior to be 1882 survey, maintaining that his survey had proven that the line upon which the fence was built was simply a mistaken line, making adverse possession inapplicable to the situation under the mistake doctrine. The Court upheld the ruling against Thompson however, informing him that the fence represented more than a mere mistake, in the eyes of the Court it was a genuine agreed boundary, and the undocumented boundary agreement enacted by Goodman and Dean, when they built the fence, had in fact become legally binding through adverse possession. Mutual reliance upon a boundary line staked by a county surveyor represents a valid boundary agreement, the Court stipulated, which triggers adverse possession if the line is later shown to have been incorrectly positioned, effectively negating any errors made by the prior surveyor. Thus the Court again revealed it's intense desire to uphold the fundamental right of all parties to rely upon the work of county surveyors, rather than leaving long established land use patterns subject to perpetual reconfiguration by means of subsequent surveys, while also indicating the Court's willingness to allow adverse possession to assist in the accomplishment of that objective. A resurvey cannot relocate established boundaries, the Court thus reiterated here, regardless of the superior technical correctness that is presumably associated with recent surveys, if the resurveyed line was the subject of a prior boundary agreement, and mutual acquiescence shown by mutual reliance can provide adequate evidence of an ongoing state of boundary agreement between adjoining land owners and their predecessors. After this decision of the Court, it became clear that little value or usefulness remained in the largely forsaken mistake doctrine, and as we will soon see, the Kansas Legislature was watching and taking notes, while preparing to modernize adverse possession in the boundary context.

Just as adverse possession between cotenants and members of the same family carries elevated requirements, adverse possession involving grantors and grantees can contain additional complexities, because such parties who are engaged in an existing legal relationship have distinct responsibilities, which differ from those of parties who are legally strangers to one another, as are typical adjoining land owners. Adverse possession in the boundary context can often be completed by one grantee against another grantee however, when the supporting land use is defined well enough on the ground to engender judicial approval of a physically apparent but undocumented boundary location, and the case of *Aylesbury v Lawrence* (1948) provides a good example of such a scenario. An unspecified number of platted lots in the town of Caldwell were owned by an unspecified party, along with a separate tract of unspecified size, consisting of typical farmland, adjoining that group of platted lots. How this land was originally created and acquired, how long it was owned by the predecessor of the litigants, and what use was made of the land prior to the arrival of Lawrence, are all unknown, but the platted lots were apparently vacant for a substantial period of time, and they remained vacant when Lawrence arrived on the scene. The grantor of Lawrence decided to fence a portion of his property at an unspecified date, but whether or not he intended to enclose the portion of his property consisting of the platted lots along with his farmland is unknown. There is no indication that the corners of the platted lots were ever marked on the ground, so it appears that Lawrence's grantor simply guessed at the location of the lots, and as a result his fence unintentionally embraced an unspecified portion of the platted area, along with the unplatted part of his property. When Lawrence acquired the farmland tract is unknown, but he naturally utilized the entire fenced area, just as his grantor had done for several years, although no reference to

any of the platted lots appeared in his deed, evidently unaware that he was using much more land than his deed described. At an unspecified date, Aylesbury, who lived in Los Angeles and may never have visited Kansas, acquired all of the vacant platted lots from the grantor of Lawrence, and when she was eventually informed, by an unknown party, that Lawrence was using her land, she filed an action, seeking to have him ordered to cease doing so, and to pull the fence back to his described boundary, leaving her lots vacant. By that time however, Lawrence had been using part of the platted area as farmland for over 15 years, so the trial court rejected the position of Aylesbury, and awarded the entire fenced area to Lawrence upon the basis of adverse possession. Aylesbury protested on appeal that the grantor of both litigants had continued to use the land along with Lawrence, so the use of the contested area was never exclusive and was therefore not adverse, but the Court disagreed and upheld the decision against her, finding that the presence of their mutual grantor upon the land at issue was through the permission of Lawrence, so the grantor's presence did nothing to obviate the adverse nature of Lawrence's land use. Thus the Court held on this occasion that platted lots are not immune to adverse possession, either in whole or in part, while also highlighting the fact that adverse possession operates against absentee land owners, who have a duty to observe the existing conditions upon any land they acquire, and a responsibility to monitor all use of that land. In addition, here the Court also verified that the mere presence of an owner of record does not halt or destroy an ongoing adverse possession, if the presence of that party is authorized by the adverse holder of the land, who has demonstrated his dominion and control over the area in contention, by issuing permission to the record owner to use the adversely held area.

The role of acreage in boundary control required judicial clarification once again at the close of this decade, as the case of McHenry v Pence (1949) illustrates, leading the Court to reiterate the position which it had extensively elaborated upon over 15 years earlier, in the Hoyne case, previously reviewed herein, concerning the proper interpretation of text appearing in legal descriptions that indicate a division of land in terms of acreage. McHenry and Pence were the owners of adjoining tracts, situated in the SW/4 of a certain Section 25 in Jefferson County, presumably consisting of typical agricultural land, through which a railroad line passed. This railroad track evidently proceeded in a northwesterly direction, along an unspecified bearing, after entering the SW/4 at a point just a short distance north of the south quarter corner, and the portion of the SW/4 lying south of the railroad apparently contained 50 to 60 acres. In 1939, Pence acquired the easterly portion of that area, by means of a deed which described his tract as the "east half" of the land lying south of the railroad within the SW/4, and at that time a fence of unknown origin existed near the middle of that area, running southward from the railroad to the section line, so Pence simply began using the land lying east of the fence. Whether or not the land west of this fence was in use by anyone at the time of Pence's arrival is unknown, but in 1946 McHenry acquired the tract lying directly to the west of the Pence tract, and McHenry then evidently either obtained a survey or made some measurements of his own, in an apparent effort to determine the acreage contained within each of these 2 tracts. McHenry's tract was described in his deed as the "west half" of the land lying south of the railroad within the SW/4, but he evidently interpreted that phrase as a call for the portion of the SW/4SW/4 lying south of the track, rather than a call for acreage, so he filed an action maintaining that the east line of that sixteenth was his true

east boundary, rather than the fence, even though adopting the sixteenth line would place well over half of the acreage under his control. The trial court declined to adopt McHenry's proposition regarding the true meaning of the 2 legal descriptions in contention however, and held instead that the fence represented the best evidence of the intended boundary location, because it effectively divided the relevant area in half, in accord with the language found in both of the relevant deeds. In the course of upholding that lower court ruling, the Court indicated that McHenry's measurement evidence was inadequate and unconvincing, while also informing him that his interpretation of the deed language in question was unsupported, and confirming that the fence represented valuable extrinsic evidence, bearing upon the true intent of the deeds held by the litigants. Recognizing that the area in question was defined on the north by the path of the railroad track, which rendered the subject area distinctly irregular in shape, the Court clearly realized that there could be no justification for the position set forth by McHenry, due to the fundamentally unsymmetrical shape of the relevant area. The two descriptions in evidence were most logically intended to divide the irregularly shaped area at issue into tracts of equal acreage, and this hypothesis was strongly reinforced by the presence of the fence, since it was situated either at or very near the line of equal acreage division, in this instance therefore, the Court deemed equal acreage to be the controlling element enunciated in both of these legal descriptions. Thus on this occasion the Court adhered to the widely acknowledged principle that boundaries dividing land which is described as a fraction such as a "half" are controlled by acreage, unless either standard PLSS division procedures or an existing physically established line of division necessitate a result to the contrary.

Hough v Munford (1945)

Our next featured case returns us to the topic of description reformation, and serves particularly well as instructive material for land surveyors, since it contains detailed survey information and the alteration of the legal description in focus here is dependent upon specific data that is directly related to the disputed boundary location, which was produced during a survey. As we have learned in reviewing previous cases, legal descriptions can be judicially reformed for a wide and virtually unlimited variety of reasons, in the course of resolving either boundary disputes or title conflicts, in order to enforce the true intentions of the parties, when evidence sufficient to effectively nullify some portion of the descriptive language is presented. We have seen that descriptive terms such as "north", "south", "east" or "west" can be added, changed or removed, as may be necessary, and that distance calls can be either lengthened or shortened, in order to either include or exclude land, under the powerful principle of reformation. In addition, we have also observed that whole lots, parcels or tracts can be added to a legal description, or deleted from it, to accomplish the intentions of the parties, thereby negating omissions or other scrivener errors made when composing any given description, and as our last previous reformation case, the Oakson case of 1946 shows, previously undivided lots, parcels or tracts can be judicially divided by means of description reformation, creating

new original boundaries. Description reformation can be limited or prevented, either by conveyance of the mistakenly described land to a genuinely innocent party, or in some instances by the mere passage of time, since both of those scenarios have the capacity to render reformation inequitable, and in such cases other remedies are typically imposed by the Court. When description reformation is promptly sought however, and the original parties are both still present and available to directly litigate the controversy, as our current case illustrates, the principle of reformation is free to operate as intended, and can rectify any inaccurately described boundaries, which if left uncorrected would result in a property boundary that does not manifest the agreed intentions of the relevant parties.

1944 – Munford was the owner of a tract comprised of the southeasterly portion of Block 7 in Belleville, which had presumably been platted several decades before, although how long Munford had owned this tract by 1944, and how she had used it, are both unknown. The Munford tract extended 139 feet west and 108 feet north from the southeast corner of this block, and it contained 3 buildings, one identified as a "hospital" situated near the center of the tract, a house in the southwestern part of the tract, and a garage north of the hospital. Munford, who lived in California, decided to sell her Kansas property, so she appointed Ward, who was her attorney in Kansas, to divide her tract as needed and to conduct the anticipated transactions on her behalf. Early in 1944, Hough and his wife offered to buy the westerly portion of the Munford tract, and an agreement was reached, resulting in the composition of a conveyance contract by Ward. The parcel to be conveyed to the Houghs was described in this contract as beginning at a point on the south line of the Munford tract, lying "about 104 feet" west of the southeast corner, and the description then proceeded counter-clockwise around the Hough parcel, before concluding with a statement that the Hough parcel was to be "at least 35 feet" in width. This description also expressly stated however, that the east line of the Hough parcel was to run 1 foot west of the hospital building, and the description was followed by a clause which stated that "the exact description ... would be procured" by means of a subsequent survey. During the summer of 1944, Munford deeded the west 35 feet of her tract to Hough, who accepted that deed and began using his parcel, although the deed made no reference to the hospital, upon the presumption that his land would extend to within 1 foot of that building, as the parties had agreed, but he took no steps to verify the location of that building in relation to the described location of his east line. Later in 1944, Thomas appeared and offered to buy the remainder of the Munford tract, so Ward created a conveyance contract for Thomas, which specified that he was to get "the east 104 feet" of the Munford tract. Thomas then ordered a survey, and the surveyor placed the west line of the Thomas parcel about 5 feet west of the hospital, which was necessary in order to provide Thomas with his full 104 feet. When Hough observed the location of that line however, he protested that the line was supposed to be just 1 foot west of the

hospital, but Thomas refused give up any of the 104 feet which Munford had pledged to convey to him, and Munford proceeded to deed 104 feet to Thomas, thereby forcing Hough to file an action against both Munford and Thomas, to resolve this boundary location issue.

Hough argued that he was entitled to all of the land described in his conveyance contract, and that the legal description in his deed needed to be reformed, in order to provide him with all of the land which Munford had agreed to convey to him. Hough then specifically argued that he was entitled to 39 feet, rather than 35 feet, because 39 feet was necessary to reach the line lying 1 foot west of the hospital, and the call for the hospital was the controlling call in the legal description which appeared in his conveyance contract, so his deed had to be reformed, in order to conform to the intent that was expressed in that conveyance contract. In addition, Hough asserted that both the deed and the survey held by Thomas were powerless to control the location of the boundary line in controversy, because the location of that line had been expressly defined, by virtue of agreement between Munford and Hough, as documented in the Hough conveyance contract, prior to the arrival of Thomas. Munford and Thomas argued that the documented reference to the relationship between the hospital and the east line of the Hough parcel was not a controlling call, and that the legal description which appeared in Hough's conveyance contract was so ambiguous as to be void under the statute of frauds, so Hough had no right to rely upon it, and he was legally bound by the description in his deed, which limited him to 35 feet. The defendants also argued that Hough could have ascertained the location of the hospital building by means of a survey, prior to accepting his deed, if he cared about the location of that building, and since he failed to do so, he had no right to regard the description in his conveyance contract as being superior to the one in his deed, which had legally supplanted and displaced the obsolete description which mentioned the hospital. Munford also maintained that she had never intended to convey more than 35 feet to Hough, and that the reference to the position of the hospital building in relation to Hough's east line held no legal significance, because it did not appear in his deed, so Hough was not entitled to description reformation. The trial court rejected the reformation request made by Hough and quieted title in the east 104 feet of the Munford tract in Thomas, as requested by him, leaving Hough with only 35 feet.

The Court plainly recognized that the carelessness exhibited by Munford and Ward, with regard to the division of the Munford tract, was the real source of this conflict. Ward failed to properly ascertain the location of the hospital by means of a survey before making a descriptive reference to it, instead he simply proceeded to create an approximate legal description for the Hough conveyance contract, thereby treating the exact location of the east line of the Hough parcel as a fundamentally insignificant matter. Having taking notice of this, the Court set out to craft a decision which would serve to demonstrate that such negligent conduct on the part of grantors would not be judicially tolerated or rewarded. Hough was an innocent grantee, in the eyes of the Court, who was well within his rights in relying upon the truthfulness of his grantor and her agent, so even though the 2 deeds at issue properly coincided, precisely covering the 139 feet owned by Munford, and no overlap existed, the Court viewed Hough's insistence that his deeded description was inaccurate as being fully justified. Because the hospital building proved to be further east than it was first thought to be, Hough had been shorted, the Court concluded, cognizant

that determining the true position of such an object, which clearly represented a prominent and legitimately reliable landmark, before using it in a descriptive manner, was an obligation resting upon the grantor, rather than the grantee. Hough had bargained for the portion of the Munford tract bearing the house, along with enough space to park a car directly east of the house, and a porch had been removed from the west side of the hospital to make that possible, the Court noted, so the relationship of the hospital building to Hough's east boundary was genuinely significant to the conveyance at issue. Hough had justifiably relied upon getting all but one foot of the land west of the hospital, the Court understood, making that passing call for a physical monument the most essential component of his original legal description. There was no uncertainty regarding the location of any of the exterior boundaries of the Munford tract, and no survey errors were indicated, so it was clear to the Court that the responsibility for the mistaken location of the hospital had to be borne entirely by the litigant who had created the misleading description that was used in the Hough contract. The ambiguity presented by the approximate distances used in Hough's original legal description was also a key factor, leading the Court to conclude that the call for the hospital was in fact the most definitive call in that description, and it must therefore be regarded as controlling, so it could not be dropped from the subsequent deed description, and since that had been done, Hough was right that his deed was subject to correction, to rectify that omission. Citing the Claypoole and Cox reformation cases, both reviewed previously herein, the Court proceeded to inform Munford why her lower court triumph could not stand:

“... defendants delivered to plaintiffs a deed which purported to comply with the contract ... plaintiffs believed the deed contained the correct description ... the deed did not contain a correct description ... plaintiffs relied solely upon defendants to furnish a deed containing a correct description ... in order to make the deed conform to the intentions of the parties it should be reformed ... the contract ... stated that the exact description could not be given at that time, but that the tract was ... "north past the west end of the hospital building on a line one foot west of the west foundation of the same" ... the contract then set out that ... if it was necessary a surveyor would be procured to ascertain the proper location ... the agent in question (Ward) was the duly authorized agent of the defendants ... defendants were estopped to deny the authority of their agent or question the validity of the contract ... the description in the contract said that this land would be on a line a foot west of ... the hospital ... the description in the deed avoided any such reference ... one not skilled in discerning differences in descriptions of real estate would not understand that this east boundary line was changed ... defendants ... argue that there was no valid contract ... the trouble with that argument is that the defendants ... accepted it's benefits and carried it out ... they cannot take advantage of the statute of frauds ... when plaintiffs moved onto the premises ... there was nothing there at that time to mark the boundary ... they had no reason to believe that the description would be

other than what was contained in the contract ... where it is clear that the description in a deed is other than that intended by the parties the deed may be reformed to express the intention ... an instrument prepared by one party not in accord with a prior written agreement ... may be reformed ... reversed ... judgment for the plaintiffs.”

Ward had made the crucial mistake of treating the reference to the hospital building in the contract as a point of no importance, which he was free to discard, when in fact it identified the controlling physical evidence, and it thereby rendered the descriptive dimensions secondary in importance. As the Court's ruling here demonstrates, a passing call for a building in a legal description can operate as a controlling call for a boundary monument, which justifies description reformation, to make the described boundary location properly conform to that building in the intended manner. Moreover, the Court emphasized, a grantor cannot delete any land which was described in a conveyance contract, if the description used in the contract captures the true original intent of the parties, as it was agreed upon by them, enabling the original description to control over the description subsequently appearing in the deed. Any legal description which does not accurately express the true intentions of the parties is potentially subject to reformation, the Court also reiterated on this occasion, while once again confirming that the statute of frauds cannot be invoked to assist a grantor who has bungled a legal description, or to enable a grantor to transfer the consequences of a description error made by or on behalf of the grantor onto an innocent grantee. Here the Court also applied the basic principle that any ambiguities or defects found in a legal description will be construed against whichever party was responsible for it's creation, to the benefit of whichever party played no role in composing the misleading or inaccurate description text. The well established rule that a grantee can rely fully on any description created by his grantor, or an agent of the grantor, and the grantee bears no burden to independently verify the validity of that description by means of a survey or otherwise, was also implemented by the Court in producing this decision. Hough prevailed because he acted promptly, he was astute enough to request description reformation, and either he or his legal team recognized the building call as a controlling boundary monument. Munford was thus left liable to Thomas for the shortage of her remainder parcel, since she had only 100 feet left to convey, rather than the 104 feet which she had deeded to him, although she could seek to recover her loss from Ward, by charging him with negligence in a separate legal action. For his part, Thomas learned that a subsequent grantee of a grantor's remainder has no control over how much land he actually gets, and he cannot rely upon any deeds or surveys that he may obtain, if his grantor did not actually have the stated amount of land left to convey to him. Thus the Court delivered a powerful message, of great significance to grantors, grantees and surveyors as well, highlighting the towering importance of any references that are made to physical objects for descriptive purposes, which thereby become authentic monument calls.

Neiman v Davis (1948 & 1950)

By the end of the 1940s, the earliest Kansas statutes specifically relating to the performance of land survey work had been in place for 8 decades, having been enacted during the first decade of statehood, but those statutes outlined the role of county surveyors only in a highly general manner, leaving the many detailed aspects of survey work substantially unaddressed. As we have noted, the Court only seldom explored or considered any details of survey work in deciding the land rights cases which came to the Court's attention, because such details typically went unchallenged by the litigants, and thus did not present questions that the Court was required to decide, since the surveys involved in most cases were simply accepted as correct by the litigants, and therefore treated as factual evidence by the judiciary. When the Court was required to pass judgment upon the validity of any particular survey, the statutes naturally formed the basis for the Court's perspective, and generally any survey that was not shown to stand in violation of any specific statute was regarded as an acceptable survey, although whether or not it could have any controlling force or legal effect upon title was another matter, subject as we have seen to the numerous equitable factors which govern title. In some instances however, such as the case we are about to review, no title issues were in play, so the circumstances allowed the Court to focus exclusively on the survey work itself, since the evidence revealed a pure boundary dispute, in the form of a direct contest between 2 competing surveys, enabling the Court to base the outcome upon a determination as to which survey held greater merit. As this case illustrates, surveyor education was still relatively primitive at this point in time, in the absence of modern survey standards and surveyor licensing, which was still decades away in Kansas, and the qualifications of many county surveyors were undoubtedly questionable, but they held the statutory authority to perform surveys, and the Court generally strived to uphold their work, knowing that society genuinely needed to be able to rely upon that work. Yet on some occasions, such as this one, the Court was required to critically examine surveys, and to clarify it's view of the true meaning of the various Kansas statutes controlling land survey work, in order to provide direct guidance on survey issues by pointing out the spirit of the law, which in the context of rural resurveys, as the Court well understood, was simply to honor the work of the GLO, thereby protecting the land rights of the patentees who relied upon it, above all else.

1860 – The GLO subdivided and platted a certain township in Harvey County, and since this township was found to contain excess land, the township plat indicated that the westernmost divisions of the sections lying along the west edge of the township exceeded the standard 40 acres. In Section 19, the plat indicated the presence of 14 acres of excess land, thus the westernmost divisions of that section, proceeding from north to south, were labeled 43.40 acres, 43.46 acres, 43.54 acres and 43.60 acres on the plat.

1873 – Section 19 was patented to the Atchison, Topeka and Santa Fe Railroad (ATSF), but the railroad evidently never made any use of any portion of the SW/4 of this section.

1883 – ATSF conveyed the east half of the SW/4 to Haines, but what use he made of the land is unknown.

1885 – ATSF conveyed the west half of the SW/4 to Whitcroft, and this deed noted that 87.14 acres were being conveyed to him, per the GLO plat, but what use he made of the land is also unknown.

1886 to 1935 – The 2 halves of the SW/4 apparently remained in separate ownership throughout this period, and presumably each of these properties were conveyed numerous times, by means of the same typical PLSS legal descriptions which had been utilized by ATSF, but what use was made of the land during this period, if any, is unknown. At an unspecified date during this period, a fence was erected on or near the boundary between these tracts, but who built it, how it's location was determined or selected, and what purpose it was intended to serve, are all unknown. Also at an unspecified date during this period, Neiman acquired the west half of the SW/4, although where she resided is unknown.

1936 – Davis acquired the east half of the SW/4, and he evidently observed the location of the fence, but he was apparently uncertain as to where it stood in relation to his west boundary, so he asked Mavity, who was the county surveyor, to mark the west line of his tract. Mavity proceeded to recover the relevant existing monumentation in the subject area, and from his measurements he recognized that the SW/4 of Section 19 contained excess land, but instead of placing the line between the east and west halves of that quarter in the position specified by the GLO plat, he split the acreage within that quarter, and set the west line of the Davis tract accordingly, making the east and west halves equal in acreage. This resulted in a line 58 feet west of the existing fence, so Davis proceeded to erect a new fence on the line that had just been surveyed for him, and he began using all of the ground east of his fence. Whether or not Neiman was aware of what had been done is unknown, if she was aware of the new fence she chose to take no action with regard to it.

1945 – For unknown reasons, presumably acting upon the advice of some unknown party or parties, Neiman decided to challenge the validity of the line that had been surveyed in 1936 at this time, so she turned to Craig, who had become the county surveyor, requesting a statutory resurvey of her property. Craig completed the survey, during which he recovered all of the same controlling monumentation that Mavity had found and used, but Craig declined to follow the division procedure adopted by Mavity, instead he placed the east line of the Neiman tract in the position indicated by the GLO plat, which was evidently at or very near the original fence. When Davis learned about the Craig survey, he elected to file an official

appeal, alleging that Craig's work was erroneous.

Neiman simply argued that the line of division produced by Mavity was incorrect, and the dividing line produced by Craig was correct, because Mavity had ignored the GLO data which was relevant to the SW/4 of Section 19, while Craig had properly divided the quarter in accord with that GLO data, so the Craig survey should control and the Mavity survey should be disregarded. Davis argued that the procedure implemented by Mavity was entirely acceptable and was within the law, so his survey should control and the subsequent Craig survey should be nullified, because Craig had no right or authority to dismiss and overturn the work of his predecessor, who had accurately divided the quarter at issue into equal halves. Davis further argued that both of the relevant deeds clearly indicated that each of the respective tracts represented half of the subject quarter, and his half was the first half created, in 1883, so he could not legally be deprived of half of the land in that quarter, by virtue of the subsequent 1885 conveyance, which purported to convey more than half of the land in that quarter. The trial court found the argument set forth by Davis to be convincing, and therefore upheld the Mavity survey while striking down the Craig survey, noting in so doing that Davis had made some improvements to the area within the contested strip, while Neiman had never made any use of that area, so Davis occupied the superior equitable position, when compared with that of Neiman.

The vital distinction between title and boundary issues was perhaps never more in evidence, or more relevant to the outcome, than it was in this litigation, and the Court accurately drew that distinction here, just as it had in several similar cases which we have previously reviewed, based upon the nature of the origin of the action, as a survey appeal. The adjudication to be administered here, the Court pointed out, was narrowly limited to ascertaining which of the 2 competing surveys had been legitimately executed, and in this case a ready answer resided in one of the Kansas statutes which had been enacted for the guidance of land surveyors. No survey errors had evidently been made, the Court observed, either by the GLO or by the 2 subsequent surveyors, so the matter at hand was purely a question of judgment as to the proper application of land division methodology, and since that judgment had been made differently by 2 equally qualified surveyors, the decisive issue became which of them had acted within his authority. Mavity and the trial judge had both apparently followed the Court's previous guidance, provided in the Stanley case of 1928, previously reviewed herein, at which time the Court had directed that the boundaries of all quarter sections, including those lying along township boundaries, must be defined in a manner dividing the section into 4 areas of equal acreage. Adhering to the procedure outlined by the Court for the purpose of resetting lost quarter corners in the Stanley case, Mavity had quite logically applied that same procedure at the quarter section level, ignoring the platted but unmonumented lines within the quarter which he was assigned to survey, and the trial judge had approved his work on that basis. Not surprisingly however, the members of the Court in 1948 had somewhat better knowledge of PLSS principles than their predecessors had possessed, and they took this opportunity to put better judicial guidance upon that subject in place, thereby finally rendering the misleading Stanley dictum obsolete. Davis was right, the Court well knew, about the legal operation of the principle of senior rights, and he was also right about the rule that acreage figures appearing in deeds typically do not control boundaries, but both of those items were

irrelevant in this instance, so Davis could derive no benefit from them. The Court clearly realized that the quarter in question may well have been properly divided at some early date, since the work of Craig supported the old fence, therefore it was clear that Mavity had simply chosen to disregard the fence as possible evidence of a prior survey, and set out to independently divide the quarter, perhaps with an unjustified corrective mindset of his own, or perhaps having been urged on by Davis. The Court thus saw fit to set forth the improved knowledge of the PLSS which it had acquired since 1928, demonstrating that the Justices now held a more enlightened view of PLSS divisional methodology:

“... 1820, 3 Stat 566 provided for the sale of public lands in half quarter sections ... 1832, 4 Stat 503 directed the survey of public lands into quarter quarter sections ... the system of rectangular surveys required ... rules for disposing of shortages or overages ... added to or deducted from the western and northern ranges of sections or half sections ... provision is made for the county surveyor to procure official copies of the plats and field notes of the original surveys (in 19-1418) ... Mavity did not testify and there was no explanation of his survey ... the survey ... discloses that the north line of the quarter section was 2803.4 feet and the south line 2788.1 feet ... the north line of the west half of the NW/4 shows a measurement of 21.68 chains (on the GLO plat) ... the south line of the west half of the SW/4 shows a measurement of 21.82 chains (on the GLO plat) ... Craig found the north line of the quarter section to be 2801.9 feet long and the south line to be 2792.3 feet long ... Craig ... established ... the north line of the west half would be 21.75 chains ... and the south line of the west half would be 21.82 chains ... this is a proceeding to determine the correctness of the survey made by Craig ... the determination of the line ... by the county surveyor does not put in issue the title ... the trial court found the SW/4 had never been divided by the government survey ... the field notes (of the GLO) do not show ... any monuments at the quarter quarter corners ... but ... the plat shows the width of the west half of the SW/4 and the acreage of the 2 quarter quarters comprising it ... it did not appear that the county surveyor (Craig) erred in determining the true line ... reproducing United States government surveys ... is the duty of the county surveyor ... the railroad company ... conveyed the east and west halves ... as shown on the government plat ... the SW/4 of Section 19 ... was divided by the government survey.”

Davis and the trial judge were both fundamentally mistaken on one key point, the survey made by Mavity was not an original survey, the SW/4 had in fact been subdivided and patented in reliance upon the GLO plat, so no one, not even a county surveyor, was authorized to treat it as unsubdivided land, as Mavity had done, and for that reason the Court reversed the lower court victory of Davis. Craig's survey prevailed and controlled, because he properly recognized that his only task was to place the original boundaries which had been established by the GLO on the ground, and in fact his work

served to confirm that no boundary mistake or problem had ever existed, since the original fence conformed well with the GLO line location, so in reality Davis had needlessly challenged it. Title and boundary issues can be resolved simultaneously, in a single case, the Court confirmed, but title cannot be resolved in any action which is expressly limited to the adjudication of boundary issues, such as a survey appeal, so upon failing to discredit the Craig survey, Davis was left with no recourse in the context of the present action. Equity is not a factor in the resolution of pure boundary disputes, the Court reiterated here, because boundaries, when viewed or handled in isolation, are exclusively legal in character, so title must be introduced as an issue, before equity can control the outcome of the location aspect of any land rights litigation. All of the Kansas statutes pertaining to land surveys are intended to uphold PLSS boundary policies, principles and rules, the Court understood at this juncture, and under such rules GLO plats control the subdivision of any physically undivided land which is described in PLSS terms, down to the sixteenth level. A survey purporting to divide a quarter section, which ignores established PLSS methodology and thus violates the land rights of any patentees or their successors, is statutorily unauthorized and cannot stand, the Court held, while noting that statute 19-1418 directs county surveyors to obtain any and all relevant GLO data, and thus carries the logical implication that they are charged with making proper use of all such data, which Mavity had obviously neglected to do, negating the value of his work. Davis went on to attack the title of Neiman subsequently, but he met with defeat once again, when the Court ruled against him in 1950, finding that he had not used the ground in contention long enough to employ adverse possession to his benefit, and only then was the title of Davis conclusively constrained to the east 80 acres of the SW/4. Although Davis wound up with exactly what he deserved in the end, which was the fenced tract that he had purchased in 1936, he was nonetheless plainly harmed by his surveyor's lack of knowledge, so in that sense Davis himself was an innocent victim, who paid the price of poor surveyor education, and it was cases such as this one that spurred the creation of enhanced survey standards, which were eventually put in place in Kansas, to protect the public from such needless strife.

The 1950s - Upholding the Value of Land Rights Agreements

By the middle of the twentieth century civilization had been developing in Kansas for a full century, and vast strides had obviously been made in societal, legislative and judicial terms, producing a well organized state upon the once wild and remote frontier. Along such a path of land development however, certain losses inevitably occur, and the one of most significance to land surveyors was of course the gradual disappearance of original boundary evidence. Although the plan known as the PLSS worked very well as a vehicle for land disposal, the fact that little focus was placed upon the preservation of the original survey framework, compounded by the fact that little funding was provided or applied to support restoration of obliterated GLO monumentation, produced conditions that proved to be highly problematic throughout the west in the long run. Originally, it was envisioned that every land owner would certainly focus upon and diligently protect all of his own boundary monuments, realizing their great value to his security, and in some cases that did happen, but as generations passed away and properties repeatedly changed hands

many property owners simply made assumptions about boundary locations, unaware of the importance of actively preserving the original physical evidence of the GLO surveys. The early county surveyors played a truly vital role in the PLSS preservation scheme, and some of them undoubtedly made a strong and even heroic effort to preserve original physical boundary evidence, but others were less active, and many neglected to fully or properly document their work, so that subsequent generations could be assured that the corners recovered and perpetuated by them represented genuine original monument locations. As we have already seen, a distinct judicial trend toward approval of physically established boundaries had begun to emerge in Kansas, generated by the Court's awareness of these conditions and developments, first becoming distinctly evident in the 1920s and then continuing through the 1930s and 1940s, before reaching its zenith in the decade which we are about to review. While the prevalence of boundary disputes during this era can be attributed to the loss of original boundary evidence, the Court's inclination to resolve such controversies in favor of physically established boundaries, as opposed in many cases to resurveyed locations of described boundaries, reveals a lack of confidence in the quality of resurveys on the part of the Court at this time. The modern era of improved survey standards was destined to influence the Court's perspective on boundary resolution, but as we will later see, the judicial emphasis placed upon leaving established boundaries in a state of repose during this decade served to motivate legislation which amplified the availability and usefulness of adverse possession in Kansas, thereby counterbalancing the Court's increased confidence level with regard to the reliability of resurveys going forward.

Our first case of this decade highlights the kind of problems that can result from early land development efforts, which proved to be unsuccessful and were simply abandoned, when no steps were ever taken to legally eliminate unused boundaries that were created and depicted in a long bygone day. The case of *Kalivoda v Pugh* (1951) also shows how adverse possession can operate in the title context as a layer of additional security for all land owners, serving to validate their acquired land rights by preventing stale title issues from being raised, rather than being used as a tool for the aggressive acquisition of additional land. The town of Haworth was platted in Republic County in 1891, and most of the town was within a certain Section 36, but several blocks comprising the western portion of the platted area were within the SE/4 of the adjoining Section 35. Some buildings of unknown origin evidently once existed in an unspecified part of the platted area, but there was no indication that any of the platted lots or blocks were ever occupied or conveyed in reliance upon the 1891 plat, and by the 1920s all of those buildings had either disintegrated or been removed, so the whole area was once again vacant land, yet the plat was never formally vacated. At an unspecified date, presumably during the 1920s, Pugh acquired all or part of Section 35, and then in 1931 he conveyed the SE/4 of that section to Kalivoda, without making any reference to the 1891 plat in Kalivoda's deed. What use had been made of the SE/4 prior to the arrival of Kalivoda is unknown, but he evidently put all of that quarter to use, presumably as typical cropland or pasture, and he continued to make regular use of that whole quarter, including the area that was platted in 1891, over the ensuing years. Unknown to Kalivoda however, Pugh went on paying taxes on the platted blocks lying within the SE/4 until 1948, when Kalivoda learned of the existence of the plat and began paying the taxes on the platted blocks. Pugh then informed Kalivoda that Pugh still owned the platted blocks, since he had never deeded them to Kalivoda, leading Kalivoda to file a quiet title action, seeking judicial confirmation that Kalivoda had

in fact acquired the entire SE/4. The trial court quieted Kalivoda's title, as requested by him, and the Court upheld that decision, informing Pugh that he had no valid basis upon which to assert that he had retained any part of the SE/4 in 1931, because there was no need to make any reference to the platted area in Kalivoda's deed, in order for title to that area to pass, regardless of the presence of the platted blocks. A plat is not a document of conveyance, the Court realized, so platted lots and blocks do not legally exist until they are conveyed, by means of a deed which makes reference to the plat, thereby bestowing controlling force upon it. Until such time as any plat is utilized to facilitate a conveyance, it holds no controlling value, the land remains in the ownership of the party who platted it, and all of the lines and text on the plat carry no legal significance, so the taxes paid by Pugh could not support his challenge to Kalivoda's title. Even though Pugh had clearly conveyed the land occupied by the platted blocks to Kalivoda, the Court concluded, adverse possession was nonetheless relevant, and since Kalivoda had been using the contested area for over 15 years, it served to clinch his victory, by preventing Pugh from leveraging the fact that Kalivoda's deed made no reference to the platted area. "The deed contained no reservations or exceptions ... defendants conveyed the blocks and the lots therein to the plaintiff ... there was no necessity of re-describing that portion ... plaintiff's contention that he had good title by adverse possession is well taken", the Court explained to Pugh. Thus the Court again demonstrated that the often overlooked but true primary role of adverse possession is simply to validate both dubious and genuine acquisitions, by negating any flaws, either real or fictitious, that might be pointed out in legal descriptions which have stood unchallenged and been physically utilized for the statutory period.

There is value to society in the recordation of documents and it would be best if all documents were promptly recorded, but land owners themselves ultimately control how any transfer of their land will be handled, and no law can prevent them from exercising their right to convey their land as they see fit. As we have already seen, many cases illustrate the fact that a properly recorded deed can be worthless, despite being flawlessly prepared, if it was never actually used in making a conveyance, as measured by the legal standard of physical deed delivery, but *Hubler v Bethel Lutheran Church of Vilas (BLC) (1951)* conversely demonstrates that even a deed which none of the parties knew existed can operate as a controlling document. The members of the Hulteen family were evidently typical immigrants, who left Sweden during the 1880s and settled upon a certain half quarter in Wilson County, which was patented to them at an unspecified date. Hulteen eventually became the sole owner of that 80 acre tract, when it was left to him by his parents, and the good earth sustained him, so he simply occupied the family farm for the remainder of his solitary life, during which he fathered no children. Ecklund, who was a real estate agent with an office in Chanute, was a lifelong friend of Hulteen, so as an aged man in 1946 Hulteen turned to Ecklund, upon deciding what he wanted done with his land. Whether Hulteen was the last surviving member of his family or not is unknown, but he decided that he wanted his land to go to his church upon his passage, and he asked Ecklund to assist him in accomplishing that. Ecklund then had a deed prepared, conveying Hulteen's tract to BLC, which Hulteen signed, but rather than keeping the deed, Hulteen gave it back to Ecklund, and told him to present it to BLC after Hulteen's death. Hulteen never saw the deed again, it was stored in a safe in Ecklund's office, until Hulteen died in 1948, without having willed any of his property to anyone, and without ever having told anyone about the deed. Hubler was appointed to conduct the disposal of Hulteen's estate,

and she listed the Hulteen tract among the property that was under her authority, until Ecklund brought forth Hulteen's deed, forcing Hubler to file an action against BLC, seeking to maintain her control over the deeded tract by having the deed judicially nullified. Hubler charged that Hulteen's deed held no value because it was merely stored, and was never formally delivered by the grantor, who had died without ever making any actual use of it, but the trial court ruled against her, and the Court upheld the validity of the deed, confirming that title to the tract in question had legally passed to BLC. The fact that the deed remained unrecorded and completely unknown to the grantee for over 2 years after it's creation was of no significance, the Court informed Hubler, because it had been legally delivered by Hulteen to Ecklund in 1946, and Hulteen had permanently relinquished all control over the deed at that point in time, resulting in a conclusive conveyance. Nothing in the law prevents covert conveyances, such as the one which Hulteen had chosen to make, the Court recognized, so an unrecorded deed can stand as a controlling document, since recordation is not required to validate a deed and does nothing to augment or enhance deed validity. Here the Court confirmed that a grantor can deed his land to any grantee, contingent upon his own death, without the grantee's knowledge, and the conveyance takes immediate effect upon his death, though the existence of the deed remains entirely unknown to the grantee. In so ruling, the Court thus clarified that a legally binding deed delivery occurs whenever a grantor communicates his intention to part with control over a deed to anyone, and then does so, regardless of who takes and maintains subsequent control over the deed, and nothing that happens thereafter can negate the completed conveyance, thereby highlighting the fact that unrecorded documents can be of great importance.

Because the Court had elected to make evidence of an agreed boundary necessary to successfully invoke adverse possession in the boundary context, as many of our prior adverse possession cases have illustrated, in order to justify setting aside the mistake doctrine, when the Court deemed it appropriate to do so, the question of what evidence signifies a state of boundary agreement became vital to resolving boundary issues in Kansas. The case of *Fyler v Hartness* (1951) provides a classic example of the steadily increasing encroachment of adverse possession into the realm of boundary law, which was facilitated by the Court's highly open stance on that question during this time period, leading to the eventual demise of the mistake doctrine in Kansas. During the 1880s, a fence was built by the owner of 2 presumably typical platted lots in Hutchinson, but how he chose the location for the fence between his 2 lots, and what evidence of the platted lot line may have existed at that time, are both unknown. Over the subsequent decades, each of these 2 lots were sold several times, and the fence was pointed out by each successive grantor to each successive grantee as the boundary between these lots. One of the lots was acquired by Fyler in 1930, then the other lot was acquired by Hartness in 1945, and the fence was rebuilt by Fyler in 1946, in the position where it had always stood, without any objection from Hartness. In 1949 however, a survey was done, and Hartness was informed that the fence was actually about 5 feet on his side of the platted lot line, so he proceeded to take down the fence, to which Fyler responded by filing an action to quiet his title up to the formerly fenced line on the basis of adverse possession. Hartness pointed out that there was no evidence that any boundary agreement expressly establishing the fenced line as the boundary had ever been made, but Fyler proposed that the long acceptance of the fence by everyone who had ever owned either of the lots in question constituted sufficient evidence

that an implicit state of boundary agreement had been in place for decades, centered upon the fence. The trial court agreed with Fyler, quieting title to the disputed 5 foot strip in him, and by a majority of just 4 to 3, the Court upheld that decision, adopting the position that an implied boundary agreement is sufficient to support adverse possession, so there need not be any evidence of an expressly agreed boundary to trigger the statute of limitations. Hartness asserted that the 1949 survey had proven that the fence was mistakenly located, assuming that it was meant to serve as a boundary fence to begin with, or if it was never meant to mark the lot line at issue, then all those who had accepted it as their boundary had simply been mistaken in so doing, since they had all clearly done so only because they thought the fence was on the lot line. The majority remained unconvinced however, viewing the fence as stronger boundary evidence than the resurvey, and therefore upholding the right of all of the successive grantees to rely upon the visible line that had been pointed out to them, while utilizing adverse possession to enforce the powerful principle of repose, recognizing that the fence may well have been built on the lot line as it was originally staked, and thus comprised original boundary evidence. A grantee has no absolute obligation to order a survey prior to acquisition, but by failing to do so Hartness had bound himself to honor the fence, through his implicit acceptance of the existing conditions upon his lot, the majority observed, thereby reminding all subsequent grantees of the significance of their burden of inquiry notice, while also revealing how disinclined the majority was to allow resurveys to control over any physically established boundaries:

“Hartness ... made no protest when plaintiffs put up a new fence in 1946 ... and never asked plaintiffs to move the fence ... he didn't know where the true line was and didn't inquire about it ... he never claimed the strip in dispute until after the survey ... there had never been any agreement ... that the fence should be regarded as the boundary ... there was no direct evidence of a definite and specific agreement ... yet we think the evidence, taken as a whole, clearly shows such an agreement ... down through the years ... such a fence becomes and is the true dividing line between the lots by virtue of such agreement.”

Just 5 years after the Vining case, previously reviewed herein, *Clark v Larkin* (1952) brought a virtually identical scenario before the Court, this time however it was the grantee of a certain poorly described urban property who sought shelter under the statute of frauds, rather than the grantor, only to learn the same lesson regarding the strict limitations that have been placed upon that statute by the Court. Clark was the owner of a group of presumably typical platted lots in Hutchinson, comprising one residential property, situated at the corner of Avenue A and Elm Street, which she decided to sell in 1950. Larkin was a resident of Oklahoma, who came to see the Clark property, and after viewing the place he agreed to buy it, for the price that Clark was asking. Clark had not prepared any contract in advance however, so Larkin proposed to simply write the relevant contractual information on his down payment check, and Clark accepted that proposition. Since there was obviously little space on the check, the property description necessarily had to be written in a highly abbreviated form, therefore only the property address was utilized, and no attempt was made to spell out any lot numbers or other

detailed descriptive information, so the completed check described the subject matter of this transaction only as "405 East A". Larkin then went home to Oklahoma, and shortly thereafter Clark sent him a deed to the subject property, but Larkin returned it, informing her that their deal was off, because his wife had nixed the acquisition. Clark then proceeded to sell her lots to another party, but for a substantially lower price, and after having done so she filed an action against Larkin, seeking reimbursement from him for the loss she had suffered as a result of his decision not to acquire her land at the original agreed price, which was noted upon Larkin's down payment check. The trial court found that Larkin was liable to Clark, and ordered him to pay her the difference between the price she had gotten and the price he had agreed to pay, but Larkin protested on appeal that a mere check is not equivalent to a real estate contract, so he could not be compelled to compensate Clark for her loss. Larkin insisted that "405 East A" was a fundamentally inadequate legal description, so under the statute of frauds, his conveyance agreement with Clark was legally incomplete, therefore he could not be bound to comply with it, but the Court upheld the lower court ruling, informing him that the check was in fact a complete and fully sufficient legal contract, with which he was bound to comply. The check provided written evidence of the 3 essential terms of any conveyance of real property, the Court pointed out, because it identified the parties, the land, and the price, so it met all of the requirements of the statute of frauds. The fact that the legal description was truncated and highly incomplete was of no consequence, the Court explained, because extrinsic evidence is always available to clarify the true meaning of any written description, however abbreviated it may be, so Larkin could derive no benefit from the failure of the parties to spell out a proper description on the face of the check. A check alone, the Court thus declared, can constitute a complete and binding conveyance agreement, satisfying the documentation requirements set forth by the statute of frauds, and "405 East A" is a sufficient legal description under that statute, if both parties understood and accepted that minimal phrase as an adequate definition of the land to be conveyed. While extrinsic evidence cannot add any new terms to a contract, the Court reiterated here, it can serve to augment any deficient contractual language, such as an incomplete legal description, by showing what that language actually meant to the parties. Thus on this occasion the Court demonstrated that equity will not allow technicalities, such as missing descriptive details in this instance, to negate an otherwise valid agreement, since neither a grantor nor a grantee can be allowed to strain or contort the law to support their own personal objectives.

While the Clark case, just previously reviewed, illustrates that very minimal written evidence can satisfy the statute of frauds, the case of *Powell v Leon* (1952) which was decided by the Court on the same day, exemplifies the fact that the statute of frauds cannot even eliminate all agreements that are entirely unwritten, showing that the Court is prepared to simply jettison the statute of frauds when doing so is necessary in the interest of equity and justice. Powell and his wife were the owners of an unspecified amount of real estate, which was apparently situated in or near Pittsburg, and an unspecified portion of their property was platted urban land. How and when the Powells had acquired their property or properties in this area is unknown, and what use they made of their land is unknown as well, but in 1948 they sold a presumably typical platted lot to their son, with the apparent understanding that he would re-convey that lot to them at an unspecified time, although there was evidently no written agreement to that effect. Powell's wife died shortly thereafter however, and for unknown reasons a dispute arose between Powell and

his son following her death, concerning the lot that had been conveyed to Powell's son and possibly other nearby land as well. Powell's son apparently decided that he wanted to keep the lot in question permanently, and declined to re-convey it as he had agreed, but no further details pertaining to the dispute over that matter are known. In 1950, Powell and his son reached an oral agreement, as a result of which Powell's son verbally agreed to deed the lot in question back to his widowed father, although what other land Powell may have conveyed, given or pledged to his son to secure this agreement is unknown. Nonetheless, Powell's son evidently changed his mind again, and rather than deeding the lot at issue to his father in fulfillment of their agreement, he deeded it to Leon, who presumably tempted him to break his verbal conveyance agreement with his father by offering him more money for that lot than Powell's son could resist. Upon learning that Leon had acquired the lot, Powell filed an action against him, charging that Leon had illegally compelled Powell's son to violate the oral conveyance agreement that was made between the father and son in 1950, but the trial court upheld Leon's deed as valid, treating the broken oral agreement as worthless, since it was undocumented. The Court reversed that ruling however, finding that Leon was guilty of "intermeddling", and therefore concluded that the deed which he had obtained by persuasion from Powell's son could not be allowed to stand. Leon protested that the oral conveyance agreement of 1950 was of no legal significance and could not be enforced, because it was entirely unwritten, but the Court took the contrary view, upholding the undocumented agreement as binding upon both Powell and his son, thereby deeming it to be impossible for Leon to legitimately acquire the lot in contention. The statute of frauds is not "a vehicle for the promotion of injustice" the Court declared on this occasion, indicating that any deed can be set aside and nullified, if it stands in defiance of a prior oral conveyance agreement, while clarifying that the mere fact that an agreement was unwritten does not mean that it can simply be dismissed or ignored. No grantor can promise his land to one party and then sell it to another party, the Court thus informed the litigants, and no written evidence is needed to prove that a grantor made a binding commitment to convey his land to a particular party, which can be proven by means of extrinsic evidence such as testimony alone.

A high percentage of all conveyances of land or land rights take place between parties who are related, and in many instances such transactions, while beneficial to a certain family member or members, are distinctly adverse to the rights of other family members, yet this represents no obstacle to such conveyances in the eyes of the Court, since ultimately every land owner has full authority to dispose of his land in whatever way he wishes. Just over a month after addressing our 2 prior cases, the Court was again confronted with a dispute stemming from a verbal conveyance agreement between a father and son, in *Nielsen v Hilliard* (1952) which again illustrates that all agreements involving land rights are of genuine significance, whether documented or not. Hilliard was the owner of a presumably typical family farm, of unspecified size, shape and location, and he was married and had one daughter, but at an unspecified date, presumably during the 1920s, he was divorced, so his wife and daughter departed from the farm. Hilliard soon remarried however, and his second wife came to live with him on the farm, along with her son by a previous marriage. In 1931, the son apparently reached adulthood and decided that he wanted to leave the farm, but Hilliard convinced him to stay and participate in running the farm, by promising him that if the son stayed and worked on the farm for the rest of Hilliard's lifetime, Hilliard would leave the farm to his second wife in his will, rather than

leaving it to his daughter. The son accepted this proposition, and he continued to help Hilliard run the farm for the next 18 years, until Hilliard's death in 1949, but Hilliard died without ever fulfilling his 1931 promise and he left no will, so shortly after his death, Nielsen who was his married daughter, stepped forward and asserted that she was the owner of the farm, as the legal heir of her late father. Hilliard's widow maintained that she was the owner of the farm however, based upon the 1931 oral agreement, forcing Nielsen to file an action, seeking a decree that she had inherited the farm from her late father, as his sole surviving blood relative. The trial court upheld the validity of the undocumented 1931 agreement however, holding that Hilliard had deliberately and legitimately cut off any interest in the subject property that Nielsen may once have had, by agreeing to convey the farm to his second wife. On appeal, Nielsen protested that there was no written evidence whatsoever that Hilliard had ever intended to deprive her of her rights to the subject property, so the alleged 1931 conveyance agreement violated the statute of frauds and therefore could not be enforced, but the Court upheld the lower court decision against her, confirming that Hilliard's widow was the sole owner of the farm. The 1931 verbal agreement had been fully performed by the son of Hilliard's widow, the Court observed, for the benefit of his mother, so it had thereby become binding upon Hilliard, and the fact that he never followed through on his conveyance promise was of no significance, the farm nonetheless passed to his widow upon his death, in fulfillment of his part of the 1931 agreement. Any unwritten conveyance agreement, once proven to have been "fairly and equitably entered", which is subsequently validated by the acts of the oral grantee, thereby becomes binding upon the oral grantor and his successors, the Court reiterated in so ruling, regardless of the absence of any documentation supporting that agreement. An unwritten agreement that is carried into effect on the ground, through the actions of the parties, represents an exception to the statute of frauds, the Court thus verified here, and family members are not barred from entering binding oral conveyance agreements, which can operate to negate the property interests of other family members, who would otherwise have obtained the contested title by virtue of being legitimate heirs.

Most land surveyors and land owners presumably understand the general concept that adverse possession is inoperative in the presence of public land rights, and most are also aware that a vacated public right-of-way is no longer public in character, but the case of *Tucker v Hankey* (1952) provides a very good illustration of how these 2 principles can combine to effectively relocate a property boundary. In 1904, Benton acquired a presumably typical rectangular platted lot in Kiowa, which was situated in the west half of a block that was divided by a 20 foot wide platted alley, which ran north and south. Whether or not Benton was the original owner of his lot is unknown, but it appears that no use was ever made of the alley for purposes of travel, so Benton naturally treated it as part of his lot, and the lot lying directly to the east on the opposite side of the alley was unoccupied, so no one evidently commented upon his use of that 20 foot strip. In 1909, the alley was officially vacated, and in 1913 Benton fenced the full width of the relevant portion of the alley in with his lot, then he built a barn which occupied most of the alley's width. Benton continued to regard the alley as part of his lot for at least another 25 years, during all of which time the lot east of the fence evidently remained idle and unused. In 1941, the lot east of Benton's fence was finally put to some unspecified use, but the owner of that lot never questioned the location of the fence, apparently viewing it as his west boundary. When Benton departed is unknown, but in 1948 the westerly lot was acquired by Hankey,

who simply continued using the whole area west of the fence, and in 1950 the still vacant easterly lot was acquired by Tucker. Shortly thereafter, Tucker asked Hankey for permission to take down part of the fence, so Tucker could use part of the alley to bring in building materials, while he was building a house on the east lot, and Hankey gave Tucker permission to do so. Once Tucker's house was built, Hankey insisted that Tucker put the fence back up and stop using the alley, leading Tucker to file an action in which he alleged that he was the owner of the east half of the alley, by virtue of reversion, but the trial court held that the east 10 feet of the alley had become part of Hankey's lot through adverse possession. In 1909 the alley had ceased to be public, both of the lots at issue had thereby legally expanded by 10 feet, and the centerline of the alley had become the boundary of both lots, the Court recognized, but since that centerline boundary was never used, and no public rights existed to prevent the accrual of adverse possession, Benton had adversely acquired the east half of the alley by the mid 1920s. The full width of the fenced portion of the alley had in effect become part of the west lot, and the entire fenced area had then passed from Benton to each of his successors, including Hankey, in accord with the principle of privity between all grantors and their grantees, the Court acknowledged, in upholding the ruling in Hankey's favor. The former alley was no longer immune to adverse possession after 1909, the Court pointed out to Tucker, while also concluding that the treatment of the east line of the alley as a boundary by all of the prior parties could not be characterized as a mere boundary mistake, and therefore did not prevent the use of the disputed strip from being adverse in nature. Hankey's victory was clinched by his own testimony, in which he wisely stated that he considered the fence to be his east boundary regardless of where it was located in relation to the alley, thereby demonstrating the key element of genuinely adverse intent. Tucker protested that he had made actual use of the alley, so Hankey had failed to exclusively hold that area, thereby negating adverse possession, but the Court readily dismissed that assertion, explaining that permissive use of land which is adversely held or acquired, made by the owner of record, supports the adverse claim rather than harming it, because the permission issued by the adverse holder proves that he was the party exercising actual dominion over the land in contention.

As has been noted previously herein, it appears that the Court's inclination to reject or discard resurveys, rather than allowing them to control, was motivated in part by the questionable quality of resurveys, prior to the advent of modern survey standards and licensure, and the case of *Keller v Moore* (1953) presents just such a scenario. Coffeyville was platted in 1871, and on that plat the block lying south of Fifteenth Street and east of Walnut Street was designated as Block 108, the western portion of which was identified as Lot 6, but the length of the west line of Lot 6 was left unspecified. The southwest corner of Lot 6 was however, shown on that plat as being directly east of the point where the southerly right-of-way line of another street ended, at the west right-of-way line of Walnut Street. Yet the length of the west side of Lot 6 was subsequently rendered unclear, because an 1896 survey showed that distance as 490 feet, but a 1909 survey of the tract lying directly south of Lot 6, known as Block 108A, showed that same lot dimension as being 458 feet. How Lot 6 was used prior to the late 1940s is unknown, it may well have remained vacant and unused for decades, but Moore acquired that lot in 1946 and he then mortgaged it to Keller. In 1948, the county engineer surveyed Lot 6 for Moore and this survey indicated that the southwest corner of Moore's lot was 490 feet south of Fifteenth Street, based upon the 1896 resurvey. The county engineer then surveyed Block 108A in 1950

however, and at that time he identified the northwest corner of that tract as being just 458 feet south of Fifteenth Street, per the 1909 resurvey, in direct although presumably unintentional contradiction of his own prior work. Keller then filed a foreclosure action against Moore, while Moore filed an appeal protesting the 1950 resurvey, and these 2 actions were merged for purposes of adjudication, since they both involved Lot 6. Viewing the 1950 resurvey as a correction of the 1948 resurvey, the trial court deemed the contested 32 foot strip to be part of Block 108A, and upheld the 1950 resurvey, limiting Lot 6 to 458 feet. On appeal however, Keller and Moore both pointed out that the 1948 resurvey had in fact been completed in conformance with a verbal boundary agreement which Moore had made in 1946 with the owners of Block 108A, under which it was agreed that a certain gas meter, just east of Walnut Street, marked the boundary between the 2 platted blocks at issue. In addition, Moore had built a gas station on Lot 6, in reliance upon the 1948 resurvey, and the boundary shown on the 1950 resurvey ran through the south entrance drive to the gas station. Recognizing the uncertainty over the location of the disputed boundary, which had been created by the original plat and perpetuated by the conflicting subsequent surveys, the Court reversed that lower court ruling and quieted title extending southward to the agreed line in Moore, on the grounds that the 1946 oral boundary agreement was both entirely legitimate and legally binding upon all parties. The agreed line represented the controlling boundary evidence, the Court concluded, regardless of the correctness or validity of any surveys, because surveys cannot alter vested land rights, either written or unwritten, and equitable title extending to the agreed line had vested in Moore, by virtue of his agreement with his neighbors, although the agreed line, which ran eastward an unspecified distance from Walnut Street, was marked at only one end, by only a single object. Undocumented boundary agreements, such as the one seen here, can become binding and can effectively negate boundary locations of record, the Court thus reiterated on this occasion, regardless of whether or not a full statutory period has elapsed since the date when the agreement was made, and indeed only a few years had passed in this case. Upholding the right of reliance for land development purposes was very clearly the primary factor motivating the Court's decision here, reflecting both the right to rely upon an agreed boundary, and the right to rely upon a resurvey which provides apparent validation of a previously agreed line, thus illustrating how the Court protects innocent reliance against potential disturbance resulting from subsequent resurveys.

As the decades passed, many of the numerous land acquisitions which had been made at an early date for school purposes in Kansas came into question, since a substantial number of those acquisitions had been made rather loosely, if measured by modern acquisition standards, and *Casner v Common School District No. 7* (1954) shows that the Court was fully prepared to protect all public land rights thus acquired. Seitz was the owner of the SE/4 of a certain Section 9 in Sumner County, and in 1908 School District No. 7 required some land for use as a school site, so the Seitz property was selected and he was asked to convey a parcel for that purpose. The size, shape and location within the SE/4 of the requested area is unknown, but Seitz agreed to that proposal and deeded a portion of his tract to the district, presumably comprised of a typical square acre situated in or near one corner of his tract, as was usually done. The deed conveying this parcel was recorded, the land was soon put to the intended use as a schoolground, and no controversy ever arose regarding this acquisition. In 1913 however, it was determined that a larger school building was needed, so the district proposed to expand the existing site by acquiring an additional

parcel adjoining the one acquired in 1908, and Seitz complied with this request as well. Seitz deeded the second school parcel to the district in 1913, but how this parcel was described is unknown, because the district neglected to record this deed and it was eventually lost. The enlarged school building, which was completed shortly thereafter, extended beyond the boundary of the original parcel, as anticipated, and covered an unspecified portion of the land comprising the second parcel. Seitz then collaborated with employees of the district in erecting a fence around the expanded site, and all of the parties subsequently recognized and treated that fence as representing the boundary of the property acquired by the district. Seitz died in 1933, but the use of the school site continued until 1950, when Casner, who was a descendant of Seitz, discovered that the deed held by School District No. 7 did not cover the full fenced area being used by the district, and she decided to file an action challenging the fenced boundary location. The trial court decided the matter in favor of the district however, quieting title to the whole fenced area as a legitimate school site, on the grounds that adverse possession of the entire contested area by the district had made the absence of the 1913 deed irrelevant, and the fence had become the boundary of the district property, regardless of whether it had been placed on the described parcel lines or not. Emphasizing that the evidence clearly indicated that a second parcel had been deeded to the district in 1913, the Court upheld that lower court ruling, thus confirming that even a public entity, such as a school district, can complete adverse possession. In so doing, the Court once again demonstrated that adverse possession provides a legal mechanism by which even legitimately acquired land rights can be secured on an adverse basis, thereby validating both unclear and missing documentation, such as lost deeds, while negating the need to recover and produce unavailable or otherwise problematic documentary evidence in order to secure title. Adverse possession is focused upon the intent of the occupant, and not that of the land owner of record, the Court reiterated here, and the intent of the occupying party or parties is best determined objectively, by observing the manner in which they used the land. Any form of land use that provides notice of a potentially adverse presence to an owner of record supports adverse possession, the Court also observed on this occasion, indicating that a record owner who acquiesces in the use of some portion of his land by others has no assurance that the relevant area will be subsequently restored unto him upon demand.

As the Court's inclination to uphold oral agreements involving land rights became increasingly clear, such claims naturally became more commonplace, and the case of *Bryson v Good* (1954) shows that such informal agreements, if satisfactorily proven to have been made, can overcome not just deeds, but any form of written conveyance documentation. Good was apparently a typical Kansas citizen, presumably a farmer, who was married in 1895 and was widowed in 1945. Good apparently never had any children, so upon the passing of his wife he was left alone, but he was not poor, he evidently had a fair amount of money and he owned a quarter section in Rice County. Shortly after his wife's death, Good purchased a house in Lyons, which was the residence of the Bryson family, but rather than asking them to leave their home, he proposed to move into the house along with them, and they accepted this proposition. The Brysons took care of Good for about a year, before moving to Oklahoma, but Good evidently did not like living alone so he soon asked them to move back into the house in Lyons, and they did so in 1946, after only a short absence. In order to compel the Brysons to return, Good promised to leave his quarter section to Mrs. Bryson in his will, as compensation for the nursing services which

she performed for him on a daily basis. This arrangement continued until 1951, when Good married a sister of his late wife, and she moved into the house and became his primary caregiver. Also in 1951, for unknown reasons, Good deeded the property upon which the Bryson house stood back to the Brysons, but he and his wife continued to live in that house, along with the Bryson family. Good died in 1952 however, and it was then discovered that when he made out his will he had not left his quarter section to Bryson as promised, he had left his land to his second wife instead, but he had also willed several thousand dollars worth of stock which he owned to Bryson. Good's widow maintained that the stock was willed to Bryson to balance Good's decision not to carry out his promise to leave her his land, but Bryson filed an action against the widow, seeking a judicial decree that Bryson was entitled to both the stock and the quarter section. Based upon testimony verifying the existence of the 1946 oral conveyance agreement between Good and Bryson, the trial court deemed that agreement to be valid and binding, and held that it effectively nullified the clause in Good's will leaving his quarter to his widow. The Court agreed that the conveyance promise made by Good was valid and binding, and upheld the lower court order requiring the widow to deed the quarter at issue to Bryson, while dismissing the widow's allegation that the stock was intended by Good to replace the land which he had decided not to give to Bryson, because Good had no right to retract his promise to convey the land in question to Bryson for any reason. Once Bryson had performed her part of the 1946 agreement, the Court explained, by taking care of Good as he had requested, she had acquired equitable title to the relevant land, so the contested quarter was no longer under Good's control when he made out his will. Thus the Court again exercised the principle that an oral conveyance agreement will be upheld if evidence of any kind confirms its existence, and indicates that it was carried out in good faith by the grantee. This decision of the Court also confirms that a will, as well as a deed, can be negated by an oral promise previously made by the deceased to convey his or her land, because a written conveyance of land which is in fact no longer the property of the grantor holds no value. Extrinsic evidence, such as testimony supporting a verbal agreement, the Court once again held here, can serve to verify and validate the existence of an undocumented conveyance agreement, resulting in a transfer of title, and thereby rendering any subsequent written documentation that conflicts with the prior unwritten agreement ineffectual.

By the 1950s, a century had passed since the time of the original surveys and the early settlement of Kansas, and the Court was highly cognizant that this made evidence of early undocumented land use agreements very difficult for litigants to produce, just as evidence of authentic original GLO monumentation was becoming very scarce. This circumstance, and the Court's high awareness of it, undoubtedly played a role in the Court's increasing inclination to view acquiescence in existing land use patterns as boundary evidence, and *Spencer v Supernois* (1954) stands as a typical example of this trend toward heavy reliance upon physical evidence of any kind for purposes of judicial boundary control, regardless of its origin. Spencer was the owner of a tract of unspecified size, apparently consisting of presumably typical cropland, which was evidently situated on the west side of Newton. In 1929, she conveyed the eastern portion of her property to Wear, and the land thus acquired by Wear was of the typical aliquot form, having approximate dimensions of 660 feet east to west and 330 feet north to south, although where that area sat in relation to any section lines is unknown. Wear then ordered a survey of the land that he had acquired, and shortly thereafter he proceeded to fence his property, but for unknown

reasons he deliberately left the west 30 feet of his tract, bordering the remaining land of Spencer, unfenced. Over the ensuing years, Spencer treated Wear's west fence as her eastern boundary, presumably unaware that Wear had elected not to place that fence upon the line of record dividing these 2 tracts. How Wear used the land on his side of this fence is unknown, but the land on Spencer's side of the fence was subsequently under her control at all times, being cultivated and harvested, either by or for Spencer, along with her adjoining land, every year for the next 2 decades. At an unspecified date, presumably circa 1950, Wear sold his tract to Supernois, who then had that entire tract platted as the South Breeze Addition to Newton, and the west 60 feet of the subject property was dedicated as a public road upon this plat. When she discovered that a road was to be built partially on her side of the fence however, Spencer reacted by filing an action, in which she alleged that the fence was an agreed boundary, asserting that she owned the west 30 feet of the platted area on that basis. The trial court upheld the position set forth by Spencer, and quieted title to the 30 foot strip in contention in her, on the grounds that the evidence indicated that the fence had become an implicitly agreed boundary, not through adverse possession, but as a result of the mutual acquiescence of both Spencer and Wear in the treatment of that fence as a boundary. Supernois protested on appeal that the use of the 30 feet lying directly west of the fence by Spencer was never adverse to the rights of Wear, and the Court concurred with him on that point, but went on to inform him that adverse possession was irrelevant to the situation. Boundary locations can be controlled by undocumented agreements, the Court reiterated here, clarifying that the acts, conduct and behavior of the parties can comprise sufficient evidence of the existence of a state of boundary agreement, even in the absence of any expressly agreed boundary line. Citing 7 prior Kansas boundary agreement cases which we have reviewed herein, beginning with the 1887 Sheldon case and concluding with the Fyler case of 1951, the Court declared on this occasion that it was "committed to the rule" that acquiescence can control boundary locations for purposes of title, as a factor operating independently of both adverse possession and the statute of frauds. Mutual acquiescence of adjoining parties alone, the Court thus determined here, can enable any physically marked line to become a definitive boundary, even if the intensity of the land use made with reference to that line is relatively minimal, and this can occur without the passage of any particular amount of time.

The legal implications of a building encroachment again came under consideration by the Court in *Kansas Power & Light (KPL) v Waters* (1954) a case which well illustrates just how much the perspective of the Court had changed over the past several decades on the subject of adverse possession in the boundary context. Although the Court had staunchly adhered to the mistake doctrine for many decades, in an effort to prevent adverse possession from altering property boundaries, the Court's decision in this case signaled that the end of the mistake doctrine's period of dominance in Kansas was rapidly approaching. Jones was the owner of 2 typical adjoining rectangular 50 foot wide platted lots in Emporia, which fronted on the west side of Merchant Street, and these 2 lots extended west 140 feet to an alley. Jones sold off the east 50 feet of these 2 lots, and an office building covering that entire 50 foot by 100 foot area was erected in 1924. Attached to this building however, was a freight elevator, which was 26 feet in length and which projected 5 feet west from the southwest corner of the building, extending 5 feet onto the property retained by Jones. How Jones used the westerly 90 feet of these 2 lots, if he ever used that area at all, is unknown, but he never expressed any concern over the presence of the freight

elevator, and he may or may not have ever realized that it was on his property. Kansas Electric Power, the predecessor of KPL, acquired the new office building and the parcel which it occupied and began making use thereof in 1925. A driveway evidently existed, branching eastward off the platted alley, which provided access to the rear of the office building, and the surface of the freight elevator, which was just a few feet above grade, was used as a loading dock. This use continued without any protest or interruption for several years, although the freight elevator was retired at an unspecified date and the concrete pit which had housed the elevator was converted into a trash receptacle. In 1948, Waters acquired the eastern portion of the west 90 feet of these lots, adjoining the KPL parcel, and he operated a restaurant on the northern portion of his parcel, but he objected to the presence of the loading dock, which he realized was encroaching upon the southeastern part of his property. Waters eventually demanded that KPL remove the encroaching structure, but KPL responded by filing an action against him, seeking judicial confirmation that the portion of the Waters parcel covered by the encroaching pit had been acquired by KPL through adverse possession. The trial court rejected the position set forth by KPL, holding that KPL could derive no benefit from adverse possession, because the concrete structure at issue had been built over the property line by mistake, and a boundary error of that nature cannot support adverse possession, adhering to the mistake doctrine. The Court reversed that decision however, observing that the use of the encroaching structure in association with the KPL building had clearly been genuinely adverse in nature since 1924, and concluding that the area occupied by the pit had already been adversely acquired by 1939, viewing the matter as being unrelated to the preservation of the remainder of the parcel boundary of record, outside the relevant 26 foot long area. Therefore the Court quieted title in KPL to the disputed area, by creating a 5 foot jog in the boundary of record, thereby approving the utilization of adverse possession in the boundary context for the benefit of a public utility. Waters thus learned the hard lesson, which many others would later learn as well, that a grantee cannot safely acquire land upon the presumption that he can order any encroachments to be removed later, if the encroaching object or objects were visible to him when he made his acquisition, and if he does so, he may well find himself legally bound to honor the existing conditions, as they stood upon his arrival.

Land surveyors frequently encounter easements in the course of survey work, and most surveyors can properly recognize any easement that is accurately described, but as the case of *Hale v Ziegler* (1956) demonstrates, highly valuable and important easement rights, which should not be overlooked, often legitimately exist in both poorly described and undescribed locations. The Olanders owned Lot 459 in Topeka, which was a presumably typical rectangular lot extending westward about 160 feet from Van Buren Street to a platted alley. What use they made of this lot, if any, is unknown, but in 1912 they split their lot and conveyed the eastern portion thereof to Alexander. In addition, so that he could utilize the alley, they also deeded to Alexander "a right-of-way of 10 feet to the alley on the rear", without identifying the intended location of the right-of-way thereby created. Whether Alexander made any use of his portion of Lot 459 is unknown, but in 1914 he conveyed it to the Zieglers, along with the aforementioned right-of-way. When the Zieglers began using their right of passage between their property and the alley is unknown, and whether they drove along an existing path of travel or built a driveway of their own is unknown as well, but by 1927, when the Olanders conveyed the rear part of

Lot 459 to Teat, the Zieglers were driving through that area on a regular basis. Teat may or may not have ever made any use of his parcel, but he never challenged the right of the Zieglers to drive across his land. In 1946, Hale acquired the Teat parcel, which may still have been vacant, but at an unspecified date Hale evidently decided to make use of his portion of Lot 459, and he wanted the Zieglers to stop using that area, so he filed an action challenging their right to drive upon his land. Hale maintained that the Zieglers held no access easement, and had no right to drive between their parcel and the alley, because no location for their right-of-way had ever been described, and he also pointed out the fact that the Olanders 1927 deed to Teat made no reference to any such right, which in his view showed that they had never intended to create any permanent easement burdening the west parcel. The trial court rejected Hale's arguments however, and ruled that the Zieglers did in fact have a valid access easement, in the location of the 10 foot strip upon which they had been regularly driving for about 30 years, which Hale had no right to disturb. The Court upheld that decision, informing Hale that under the law an access easement having either a poorly described location, or no described location at all, is nonetheless valid, and is legally defined by the location which was actually put into use for the intended purpose. In addition, the fact that the Olanders made no reference to the existing easement when they deeded away the remainder of their land in 1927 was entirely immaterial, the Court explained, because once the easement was created, the Olanders had no authority to destroy it, regardless of whether or not any use had been made of the easement at that point in time. Hale was utterly powerless to eliminate or diminish the access easement, the Court recognized, because the successors of a grantor who created an easement cannot escape the legal burden thus passed down to them from their grantor, regardless of how poorly the easement may have been described when it was created. The easement in question was both genuine and appurtenant to the Ziegler parcel, the Court observed, despite being poorly defined in locational terms in 1912, because the language by which it was created manifested the intention to impose a permanent right of passage, and not a merely temporary or personal license or permit, upon the parcel which had been acquired by Hale. Thus the Court clarified on this occasion that easement boundaries are not description dependent, they can be legally left undefined in a deed, to be subsequently defined on the ground through appropriate land use, although properly defined boundaries are certainly preferable.

The case of *Grape v Laiblin* (1957) which required the Court to address the topic of riparian title and boundaries at this juncture for the first time in over 15 years, serves to highlight a common misconception relating to riparian land ownership in the context of islands, which stems from the Court's position on submergence resulting from avulsion. The NW/4 of a certain Section 20 in Atchison County, was acquired by the Dugan family in 1865, and at that time the west bank of the Missouri River passed through the eastern portion of that quarter. Over the subsequent decades the other land in this area was acquired by various other parties, while the Dugan family continued to own the NW/4. How this quarter was used for several decades is unknown, but from about 1890 to about 1920 it was frequently flooded and the river's location shifted substantially, presumably on several separate occasions. By 1922, the river had erosively consumed the northeasterly portion of the NW/4, but around that date an island began to form in the portion of the river flowing through the adjoining Section 17. During the 1920s the water level evidently diminished significantly, so by 1928 the island had expanded greatly to the south and to the

west, and it then merged with the west bank of the river, occupying about 30 acres within the NW/4 of Section 20 in so doing. The Dugans evidently never used any of the land comprising the former island however, as the island grew the owners of the land in Section 17 just continually extended their land use southward, until the extinct channel eventually became the boundary between the Dugans and their neighbors on the north. In 1954, Grape acquired the Dugan property, but he wanted all of the land then existing within the NW/4 of Section 20, so he asked the Dugans for a deed covering the whole quarter and they fulfilled his request, presumably by issuing a quitclaim deed to him. Grape then filed an action seeking to quiet his title to the southwestern part of the former island, which was the portion that had intruded into his quarter, against Laiblin and several other owners of land in Section 17. The trial court declined to quiet title to any portion of the accreted or relicted 30 acre area in Grape however, and the Court upheld that decision, because he had no valid claim to that area, having failed to prove how the island had formed, and moreover, he had filed his action against the wrong opponents, since none of the defendants owned the land at issue either, although they had long been using that area. Kansas acquires title to all land lost to a navigable river within the boundaries of the state through erosion, the Court informed the litigants, and the state presumptively owns all islands in navigable streams which did not appear on any GLO plat, because all such islands, like the one appearing in this case, presumably arose after statehood, so the island in question was judicially presumed to be property of Kansas. Grape could have prevailed, if he could have proven that the river had moved avulsively, and that the island had formed within the avulsively submerged portion of the Dugan tract, but in fact he could prove neither of those things, so his fate was sealed, and the money he had paid the Dugans for the additional area went for naught, all due to his lack of knowledge of riparian principles. Here the Court also reiterated that accretion and reliction are not halted by section lines or any other PLSS boundaries, so any amount of any section, even an entire section or sections, can be completely eradicated as a result of extreme river movement, if that movement occurs by means of erosion, as opposed to avulsion, since in the case of a navigable waterway the bedland title of the state progresses right along with the erosion. A riparian owner cannot successfully claim to own any portion of an island or former island merely because it has grown into his described area or physically merged with his upland property, Grape found out, while also learning that riparian property, such as that of the Dugans, can be sealed off completely from river access by island expansion.

Just as our last previous case highlighted a prominent misconception about which islands are public and which of them are private, the case of *Manville v Gronniger* (1958) illustrates the fact that many riparian land owners fail to realize that land formed through accretion or reliction is subject to adverse possession, just like all other privately held land. The father of Manville owned a riparian tract of unspecified shape, situated in an unspecified location in Doniphan County, which was described as containing 227 acres, bounded on the east by the Missouri River. The Manville tract had supposedly originated as an island, but by the 1930s it may have become attached to the Kansas bank of the river, and it may also have merged with another island or islands, leaving the boundaries of that tract quite unclear. In 1938, Gronniger acquired a riparian tract supposedly containing about 700 acres, which was evidently located in the vicinity of the Manville property. How Gronniger's tract was described is unknown, but he apparently believed that his tract included some of the land lying east of the Manville tract, between that tract and the river.

Most, if not all, of the land claimed by Gronniger had evidently formed through either accretion or reliction, and there was no suggestion that any avulsive river movement had taken place in the subject area, but whose property the accreted land had legally attached to was highly unclear. Shortly after Gronniger's acquisition, Manville's father built a fence an unspecified distance west of the river, leaving an unspecified amount of land between the fence and the river, which was never subsequently used by the Manville family. In 1941, Pendleton started farming part of the area east of the Manville fence, claiming that it was actually part of a Missouri tract which he had acquired, but Gronniger asserted his ownership of that area and forced Pendleton off the land. Gronniger also leased part of the accreted area to a tenant farmer from 1940 to 1943, at which time the water level of the river rose, rendering the low lying area useless for purposes of cultivation for several years, but Gronniger continued to monitor activity in that area and he frequently drove squatters off the land. During 1953 and 1954 however, the water level subsided, so Gronniger bulldozed the brush in the area east of the Manville fence and prepared that area for cultivation. By this time Manville's father had evidently died, leaving his property to Manville, and in 1955 Manville obtained a quitclaim deed allegedly conveying the whole accreted area to him, whereupon he filed an action against Gronniger, seeking to force him to relinquish the area between the fence and the river to Manville. Since it was very unclear which party was actually the record owner of the accreted area in contention, the trial court readily embraced the adverse possession argument set forth by Gronniger, who asserted that he had been in sole possession of the disputed area since Manville's father fenced it out in 1938. The Court upheld that decision, confirming Gronniger's title to all the land east of the fence, over the protests of Manville, who insisted that Gronniger's use of the contested area was insubstantial, and was therefore insufficient to support adverse possession. In so doing, the Court pointed out that the land use required to support adverse possession is typically commensurate to the nature of the land itself, so even very minimal use of land can qualify as legitimate adverse use, if the land itself is only minimally useful. All privately held accretion and reliction is subject to adverse possession, the Court thus informed Manville, and fencing land out, as his father had done, invites and facilitates adverse possession, which in this instance had been completed by Gronniger, not by means of any intensive land use on his part, but rather through the dominion that he exerted over the frequently inundated area, simply by keeping it free of trespassers.

As we have previously observed, and as we will see again in future cases, the use of land comprising part of a railroad right-of-way for other purposes can be highly problematic and can often lead to controversy, as it did in the case of *Taylor Investment v Kansas City Power & Light (KCPL)* (1958). The Missouri and Kansas Interurban Railway acquired an 80 foot wide railroad right-of-way passing through a portion of Johnson County in 1905, and a railroad was soon built and put into operation within that right-of-way. One portion of this right-of-way crossed a 120 acre tract lying along Switzer Road, which was owned by an unspecified party at the time when the right-of-way was acquired. The deed describing this portion of the railroad right-of-way expressly stated that when the railroad ceased to operate the rights associated with the right-of-way would be terminated and the strip would then once again become unburdened land, through reversion. In 1919 however, the railway company authorized a power company, which would later go on to become part of KCPL, to construct a typical overhead power line within the railroad right-of-way, running parallel with the tracks and crossing the

aforementioned 120 acre tract, among many others. Who owned the 120 acre tract at this time is unknown, but no permanent land rights relating to this power line were ever granted to KCPL or its predecessor by anyone, the power line was built entirely in reliance upon the existence of the railroad right-of-way. This power line was put into service in 1920, and it continued to function henceforward, even after the use of the railroad track permanently ceased in 1940. Taylor acquired the 120 acre tract in 1955 and he wanted to subdivide the land, but the power line represented an obstacle to his subdivision plan, so he filed an action against KCPL, demanding that the line be removed because it constituted an unauthorized use of his land. The trial court ruled against him however, on the grounds that the long use of the power line had resulted in the formation of a prescriptive easement, protecting the line and preventing Taylor from insisting upon its removal. The Court upheld the lower court's decision that Taylor had no right to disturb the power line in any way, despite the fact that the railroad right-of-way in which it had once resided no longer existed, even though the Court determined in so deciding that the trial judge was mistaken in declaring the existence of a prescriptive easement. No easement was created by means of prescription, the Court found, because the railroad company was authorized to share its right-of-way with the power company, so the use of that right-of-way for power line purposes was not adverse in nature. Taylor maintained that once the railroad right-of-way ceased to exist in 1940, the power line was left entirely unprotected, so he had the right to order it to be removed, but the Court informed him that estoppel prevented him from doing so. Since the power line was visible to Taylor when he acquired the land at issue, the Court pointed out, Taylor had no right to reject its presence upon his land, because upon making his acquisition he had accepted his land with that existing visible burden, so an easement protecting the power line had formed at that moment, without any need for the passage of any amount of time. Thus the Court applied the well established principle that a purchaser of land bearing any visible object is on physical notice of the existence of the burden which it represents, whether he actually saw the object before buying the land or not, and his opportunity to protest the presence of any such burden upon the land ends when he agrees to acquire that land. On this occasion, the Court stated that its decision to protect the power line in question was based upon public policy, which "stays the hand of the courts", once again revealing the Court's strong inclination to uphold all land rights that are beneficial to the public, but in fact the principle of physical notice can be vitally important under a broad variety of circumstances.

As the 1950s drew to a close, it was becoming very clear that the mistake doctrine, which was designed to prevent adverse possession from entering the realm of boundary law, had been rendered largely irrelevant by the routine use of the exceptions to that concept which the Court had approved, and the case of *Boese v Crane* (1958) provides a classic example of such a scenario. Dimsdale was the owner of a presumably typical residential lot in Kansas City, the dimensions of which are unknown, but his lot fronted upon the north side of Cleveland Avenue. In 1925 Dimsdale built a garage near the northwest corner of his lot, but how he positioned the garage is unknown, and there is no indication that he found any evidence of the location of his lot corners, or that he ever obtained the assistance of a surveyor. Nevertheless, he believed that he had placed the garage entirely upon his own land, and no one ever protested the location of the garage during the period of time when Dimsdale owned his lot. Over the ensuing years, Dimsdale regularly mowed the lawn on the west side of his garage, although the ground lying a few

feet to the west of the garage was somewhat higher than his lot, so he was able to mow only a strip that was 1 to 2 feet in width, between the garage and the foot of the embankment. Boese acquired the lot lying directly west of Dimsdale's lot in 1951, but he made no objection to the presence of the garage, evidently supposing that it was located entirely upon Dimsdale's lot. In 1954 however, Boese decided to place a garage in the northeast corner of his lot, and in order to do so he needed to build a retaining wall to support the ground beneath the east side of the garage. Stakes of unknown origin were present at this time, and Boese apparently thought they marked the east line of his lot, so he built his retaining wall on the line formed by those stakes, then he placed the east edge of his garage on the formerly sloping ground that was now supported by the wall, which was only about a foot from Dimsdale's garage. Shortly thereafter, Dimsdale conveyed his lot to Crane, and a controversy soon arose over the lot line location, so in 1955 Boese ordered a survey, which indicated that the lot line passed through Crane's garage, leading Boese to file an action seeking to have Crane ordered to move his garage. The trial court decreed that Dimsdale had acquired the portion of the Boese lot lying east of the wall through adverse possession, and the Court upheld that decision, over the protest of Boese, who insisted that Dimsdale had clearly built his garage over the lot line by mistake, so his use of the easterly part of the west lot did not qualify as adverse possession. Both Dimsdale and Boese had acted in reliance upon the stake located at or near their mutual rear lot corner, the Court concluded, so the mistake doctrine was inapplicable to the situation, thus it could not prevent the line upon which the wall had been built from becoming the dividing line between the properties of the litigants, regardless of the lot line location of record. The 1955 resurvey had revealed the existence of a problem, but it was powerless to control the disputed boundary location, the Court recognized, because the line formerly marked by the toe of the slope, and now marked by the wall, had been adversely regarded as the true lot line for nearly 30 years, far in excess of the 15 year statutory period. Crane testified that he never claimed to own any land extending beyond the record boundaries of his lot, but the Court explained that such testimony was of no legal force or effect, because the adverse period had already been completed by Dimsdale, many years before either Crane or Boese had arrived in the area. The knowledge of the litigants regarding the contested lot line location was thus irrelevant in the eyes of the Court, the fact that Dimsdale had maintained the land west of his garage, to the base of the slope, was sufficient to incorporate that portion of the adjoining lot into his title, which he then conveyed in its entirety to Crane, adjusting the lot line in effect, as an accommodation of the established land use pattern.

Common School District No. 45 v Burr (1955)

Our next featured case presents us with an opportunity to observe and understand the limitations which both legal and equitable principles place upon the potential controlling force embodied in legal descriptions, upon which land surveyors so often rely. At the outset, its important to recognize that the role of the legal description is inherently limited, because like all other text, a description merely represents a platform for the communication of an idea. While the presence of a legal description is vital to the proper

completion of any conveyance, as mandated by the statute of frauds, the description used in any conveyance of land or land rights really serves only 2 purposes. First and foremost, a legal description serves as the means by which the grantor communicates the locative aspect of what is being conveyed to the grantee, and then, once the conveyance is completed, the recorded description communicates the physical extent of the title which the grantee acquired to all the world, thereby making the spatial component of the title held by the grantee a matter of public notice. As all surveyors know, an accurate and complete legal description ideally provides clear definition of boundary locations, and it is in that regard which surveyors rely upon descriptions, when using them for boundary definition purposes. But as we also know, nothing in this world exists in isolation, everything is related to that which contacts, adjoins or surrounds it, so no legal description can properly be viewed as independent and entirely complete within itself, each one actually constitutes just one piece of a large puzzle, in which not all of the pieces may have been accurately carved out. As our present case demonstrates, there are other crucial factors which can fulfill the same purpose for which legal descriptions are created, and those factors can communicate equally essential information about the real intentions of the relevant parties, regarding the use or division of land, representing valuable and potentially controlling evidence of both title and boundaries, which should not be bypassed or dismissed. Although it is certainly true that creating accurate legal descriptions is among the most important functions of the professional land surveyor, it should also be understood that expecting to find perfection in all existing legal descriptions is unrealistic, and as we shall learn here, legal descriptions can be set aside and may not control land rights, where those rights have been defined and become established on the ground by physical evidence.

1899 – Marr was the owner of the NW/4 of a certain Section 1 in Greenwood County, lying within Common School District No. 45 (CSD 45). A site for a new schoolhouse was needed, and Marr agreed to provide a portion of his land for that purpose. To facilitate the creation of the new school, Marr deeded an area described as "one acre and 9 square rods" to CSD 45, but the point of beginning was misidentified in this description, so it failed to properly outline the true intended location of the school site. Nevertheless, since this description error was unknown to all parties, including those who were involved in preparing the relevant area for school use, it did no harm at this time, as the school was built in the intended location, the boundaries of the site were fenced, and the schoolgrounds were then put into normal use.

1905 – The mistaken point of beginning in the 1899 deed was noticed and pointed out by some unknown party, and a correction deed was therefore created and recorded at this time. Unfortunately, in the process of rewriting the description to eliminate the original description error a new error was introduced, and as a result the corrected description identified the school property as being situated in another

quarter section. Nonetheless, this mistake was also overlooked by all parties, so it also did no apparent harm at this time, and the school site continued to function in the intended location over the ensuing years without complaint from anyone.

1934 – By this time Marr had died, and his widow conveyed a portion of the Marr tract to Marcy at this time. The parcel conveyed to Marcy consisted of the land surrounding the school site, and that area was described as 10-5/8 acres "less School House". What use Marcy made of his parcel is unknown, but he was evidently aware of the presence of the schoolyard within his parcel, and he understood that the fenced area which was being used for school purposes was not conveyed to him, so no boundary or title issues ever arose between Marcy and CSD 45.

1940 – Marcy conveyed his parcel to Jorgensen, employing the same legal description which had been used in his deed, and once again there was no concern about the location of the school site. What use Jorgensen made of her parcel is unknown, but she was also fully aware that the fenced schoolyard was not conveyed to her, so no boundary or title issues ever arose between Jorgensen and CSD 45.

1945 – Burr acquired the Jorgensen parcel, but the legal description which appeared in his deed made no reference to the school site whatsoever. Whether or not Burr ever saw the land he was buying before he acquired it, and whether or not he was told anything about the school site, are both unknown, but he believed that he had acquired the schoolgrounds along with the rest of the area described in his deed, and shortly after making his acquisition he informed CSD 45 that he owned the land which was being used for school purposes. What response CSD 45 offered to Burr's assertion of ownership, if any, is unknown, but nothing was done at this time and the school site continued to function just as it always had.

1946 to 1953 – At an unspecified time during this period, Burr decided to fence his entire parcel. After discussions with CSD 45, it was agreed between the parties that CSD 45 would provide the fence material, if Burr would rebuild the fence around the schoolyard, and pursuant to that agreement Burr proceeded to treat the school site as a separate parcel for fencing purposes, although he continued to maintain that he owned the school site and that the ongoing use of the school was by virtue of his permission. Near the end of this period CSD 45 was dissolved and became legally merged with CSD 87. Burr apparently sought to leverage this development to his advantage, and he attempted to convince CSD 87 to close the school and abandon the site, but the other residents of the area filed a petition requesting that the school be kept open, in which they also suggested that even if the school were to be closed, the site should be retained and preserved for other social activities. Since this controversy brought the ownership of the school site to the forefront as a matter of general public concern, CSD 45 decided to file an action seeking judicial verification that CSD 45 was the holder of the fee title to the school site prior to the 1953

merger, in order to clarify the land rights of all the parties who were concerned about the legal status and use of the established site.

CSD 45 argued that it had legitimately acquired the physically established school site in fee in 1899 and that the originally intended site was fully and properly defined by the existing fence, regardless of the fact that the site was not in either the location described in the 1899 deed or the location described in the 1905 deed, and regardless of the fact that Burr's deed did not acknowledge the existence of that site. CSD 45 further argued that the formal dissolution of the original district had no legal effect whatsoever upon the ownership of the land at issue, and that the fee title held by CSD 45 automatically passed into the ownership of CSD 87 when the 2 districts were merged, so Burr held no interest whatsoever in the fenced area, therefore he had no right to demand or insist that CSD 87 must cease using that area. Burr argued that the area occupied by the school site was legally part of his parcel, and that his land was not legally burdened in any respect, because the school site was not in the location where it was supposed to be, as a matter of public record, while also maintaining that his land had been conveyed to him entirely unencumbered, since his deed indicated that no school site existed within his parcel. Burr further argued that even if CSD 45 had once owned the fenced schoolyard, title to that area had reverted to him upon the dissolution of CSD 45, so it was not owned by CSD 87, therefore he had the right to order CSD 87 to vacate the premises. The trial court ruled in favor of CSD 45, finding that the 1899 deed constituted a conveyance in fee, and deeming the description errors that were made in both 1899 and 1905 to be inconsequential, while also rejecting Burr's assertion that the dissolution of CSD 45 had any impact at all upon the existing public land rights associated with the established school site.

At the outset, it should be well noted that this conflict obviously stands as an excellent example of the serious consequences of carelessness or inattentiveness when creating legal descriptions, which is often the case when descriptions are prepared in haste or without the involvement of any qualified professional land surveyor. The first issue was what the legal consequences of the 1905 description error really were, and whether or not CSD 45 bore any obligation to have that error rectified, once the matter was brought to the attention of the district personnel by Burr in 1945. Observant of the real conditions on the ground, as always, the Court was quite cognizant of the fact that the mistaken description never had any actual impact upon either the location or the use of the school site, the intended location was occupied by the school, and no problem developed until Burr endeavored to turn the description error to his own advantage. The absence of the school site exception from Burr's deed triggered this controversy, but no evidence was presented addressing why that exception had been removed from his chain of title. Jorgensen's attorney may have either accidentally omitted the relevant exception, when preparing Burr's deed, or it may have been deliberately extracted as part of an effort by Jorgensen to mislead and cheat Burr, in which case he may have been victimized. On the other hand, it was equally possible, the Court realized, that Burr or his attorney had instructed Jorgensen or her attorney to drop that exception, after discovering that the school site was described upon the public record as being located in another part of Section 1, making the site appear on paper to be irrelevant to Burr's acquisition. In any event, the Court recognized, the answer made no difference to the outcome of this case, since the school site could not be eradicated, or combined with the parcel which had been acquired by Burr,

under any of circumstances. The evidence clarified that the actual schoolgrounds, as fenced, consisted of one acre in the form of a square, thus no contention existed over the amount of land occupied by the schoolyard, and no description reformation was ever requested by anyone, so no judicial rectification of the 1905 error was deemed to be necessary by the trial judge, and the Court concurred on that point. Thus the Court ultimately dismissed the description errors presented here as minor technicalities, the significance of which Burr had unjustifiably sought to magnify, given the fact that the site was physically well defined at all times, making reference to the public record unnecessary to ascertain the school's real location. The reversionary interest asserted by Burr formed a separate issue however, requiring the Court to interpret the meaning and efficacy of the 1899 deed, and also to evaluate the legal effect of the 1953 legislation which had merged CSD 45 and CSD 87, in order to uphold the lower court decision confirming the public status of the existing school site:

“In 1899 ... the land conveyed was described by metes and bounds containing one acre and 9 square rods ... an error occurred in the description relative to the starting point ... in 1905 ... the starting point was corrected but ... reference was improperly made to a certain quarter section ... in 1945 ... that description embraced the school grounds and failed to exclude them ... plaintiff had been in uninterrupted possession ... since 1899, the school grounds had been fenced at all times ... when Burr fenced his farm he did not make the school grounds a part of his farm, he fenced them out ... in 1953 ... the plaintiff district had been attached to district 87 ... for neighborhood assemblies, educational, patriotic and other community activities ... no paper evidence of a transfer of possession of the grounds ... was necessary ... the school grounds were at all times fenced out of the farm ... no one except defendant ever claimed title to the school grounds ... the school grounds clearly had been excluded in the deed to Jorgensen ... Burr acquired no title from Jorgensen which she did not have to convey ... Burr's executed agreement with plaintiff to join in the erection of the fence ... constituted recognition of plaintiff's long claim of title ... the deeds to plaintiff constituted outright grants of the fee simple title, they did not contain ... a provision for reversion of title ... defendant failed to establish any title ... the plaintiff district was so attached and title to it's property was vested in district 87 ... this was a quiet title action and not a suit to reform deeds ... defendant's contention is unsound ... it is highly technical and has been overruled.”

Burr was simply mistaken in his belief that he was entitled to rely fully upon his deed, the Court thus informed him, regardless of whether or not he had been cheated by Jorgensen, he was not an innocent purchaser, because the presence of the fenced schoolyard provided him with clear physical notice that the parcel he was acquiring was burdened. There could be no justification for the removal of the school site exception from Burr's deed, the Court pointed out, since mere observation on his part, prior to making his acquisition, would have brought him the knowledge that a school impacted his parcel, and

his apparent failure to take notice of the existing conditions upon the subject property prior to buying it could not be rewarded. Eliminating a valid exception from a legal description has no impact upon existing land rights, just as tearing up or burning a deed has no legal effect, the relevant land rights remain intact, because destruction of mere documentation of those rights does not equate to the extinction of the rights themselves. A grantee who is on inquiry notice cannot ignore an existing enclosure within his legal description, the Court confirmed here, since equity allows no man to close his eyes to objects that are visible upon the ground, and even if the grantee never actually looked at the subject property those physical conditions offered him the opportunity to take proper notice. Here the Court also applied the principle that a description error can become irrelevant, if the subject property is enclosed and its boundaries are thus physically defined, while noting that boundary related activities conducted mutually, such as rebuilding a fence, can constitute binding mutual recognition of established boundaries. Land acquired in fee without a reversion clause is never lost to reversion, the Court also reiterated, it remains in the fee ownership of the acquiring party or his successors, and it can therefore be sold to anyone, even if used for differing purposes or left entirely unused. The well known and logical rule that a grantee acquires exactly what his grantor can deliver, no more and no less, was also relevant to the outcome here, highlighting the fact that legal descriptions serve a primarily informative role, and do not always represent the strongest evidence of the controlling intent of the original parties. The premise that a physical delivery of possession between a grantor and a grantee can control boundary locations, which is an enabling factor in the application of adverse possession to boundaries, was also relevant on this occasion, demonstrating that physically marked boundaries which have been openly recognized can control over described boundaries, thereby rendering description errors moot. As this scenario well illustrates, when researching land rights issues, merely reading the current deed is insufficient, essential information is often found only in earlier documents, so genuinely thorough research, including investigation of undocumented potential burdens, as well as objects representing potential boundary evidence, is vital, provided that reaching an accurate and reliable conclusion about the true status of title to the subject property is the objective.

Brewer v Schammerhorn (1958)

As discussed in the introduction to our previous featured case, legal descriptions have a fundamentally limited communicative purpose, each one simply represents an attempt to define land rights, which actually exist on the ground, in linguistic terms. Understanding the circumstances under which a legal description can control, and those under which it cannot, is perhaps one of the most essential aspects of any professional land surveyor's knowledge, since society views land surveyors as experts on all location issues, such as property boundary locations, and every surveyor has an acknowledged professional responsibility to safeguard all land rights objectively. In order to fulfill that role successfully, without producing misleading information, which could result in litigation, the surveyor must be able to interpret the meaning of the descriptive language

that he or she is charged with analyzing in the context of the existing conditions on the ground, which very often hold the key to the real meaning of the language that was selected and employed in conveying land. Adjudicating the respective land rights of grantors and grantees is the sole province of the judiciary of course, and the land surveyor can never act as a judge or jury, yet the surveyor can contribute to minimizing costly and often useless litigation, by insuring that all documentary evidence, such as descriptive language, is applied in a manner which properly accords with the historically established use of the land. In so doing, the surveyor must regard the land rights of all relevant parties, including those of the general public or public entities, with genuine objectivity, rather than focusing only upon securing the rights of the party who has employed the surveyor, as if those rights existed in isolation. The case we are about to review presents a highly typical and frequently encountered scenario, in which the title of each party is linguistically expressed in terms that do not directly correspond to those employed in describing the adjoining property, and not surprisingly so, since adjoining legal descriptions are quite often not composed by the same author. Here we will watch as the Court turns to perhaps the most reliable and most dominant of all boundary principles, the principle of monument control, to eliminate any boundary uncertainty introduced by varying legal descriptions, cognizant that doing so serves to support title security through boundary stability.

1902 – McKenna was the owner of the SE/4 of a certain Section 31 in Sedgwick County, along with other land located in some of the adjoining sections. How long he had owned this quarter and what use he had made of it are both unknown, but he presumably made typical agrarian use of all of his land. McKenna conveyed the north 80 acres of this quarter to the father of Schammerhorn at this time, but whether or not the Schammerhorn family moved onto this quarter or made any other use of their tract immediately after acquiring it is unknown.

1908 – It evidently became necessary to erect a division fence at this time, so McKenna decided to have the dividing line which had been created in 1902 marked on the ground. The county surveyor executed a survey for that purpose, marking the line defining the south edge of the north 80 acres of this quarter with stone monuments, and a fence was then built on that monumented line. Presumably the surveyor located all 4 corners of the SE/4 in the process of performing this survey, but whether or not he found any monuments in Section 31 or elsewhere is unknown, and the basis upon which he calculated the location of the dividing line is unknown as well. This survey was duly completed and recorded however, and it showed that the southern portion of this quarter contained 83.7 acres, but whether McKenna was ever informed about that or not is unknown.

1913 – McKenna conveyed the remainder of his land in the SE/4 of Section 31 to Rowan, describing it only as "the south half", without making any reference to the 1908 survey, thus giving no indication as to whether he knew that more than 80

acres were contained within this remainder tract or not. Rowan subsequently began using the land conveyed to him as typical cropland, and he regarded the fence as his north boundary, although what he may have been told about the history of that line, if he was told anything about it, is unknown.

1915 – The fence was removed, since none of the land was being used as pasture by this time, but the posts at the 2 ends of the line were intentionally left in place by Rowan and Schammerhorn's father, to serve as a guide in their use of the land. Henceforward both of these men cultivated all of the land on their respective sides of the line marked by the posts.

1935 – The Rowan tract was foreclosed upon and was thus acquired by Prudential Insurance.

1937 – Prudential conveyed the Rowan tract to Brewer, who was a married daughter of Rowan. The cultivation of both the Brewer tract and the Schammerhorn tract continued, the 1908 line of division was still marked by the fence posts, and that line continued to be treated by all of the parties as their mutual boundary, although whether or not the stone monuments set in 1908 were still in place is unknown.

1946 – McKenna died, and for unknown reasons one acre in Section 31 was listed among the properties comprising his estate. There was no evidence indicating that any of his heirs ever openly used or claimed any land in the SE/4 of Section 31.

1954 – A dispute arose over the use of the land along the 1908 dividing line, between Brewer's husband and a tenant farmer who was using the Schammerhorn tract, which by this time had passed into the ownership of Schammerhorn, presumably upon the death of his father at an unspecified date. Schammerhorn obtained a quitclaim deed from the heirs of McKenna at this time, purporting to convey "the south one acre in the north half of the SE/4" to him. A survey was also done for Schammerhorn, splitting the subject quarter in half, and thereby leaving Brewer with only 81.85 acres, resulting in a new dividing line that was about 30 feet south of the line formed by the fence posts, which were still in place, and Schammerhorn then built a fence on that new line. Brewer objected to this southward relocation of the north boundary line that her father had long relied upon, so she filed an action against Schammerhorn, seeking to have him judicially compelled to remove his new fence and honor the 1908 boundary.

Brewer argued that she had acquired not merely the south half of the SE/4, but the south 83.7 acres of the SE/4, because Schammerhorn had acquired only the north 80 acres of that quarter, maintaining that McKenna had conveyed the entire remainder of that quarter to her father, and he had always used the entire 83.7 acre area, in reliance upon the 1908 survey. She further argued that Schammerhorn's 1954 quitclaim deed was invalid and he had acquired no additional land by virtue of that deed, because the

McKennas had no land left to convey in the SE/4 of Section 31, so the disputed boundary was still controlled by the 1908 survey, and not by the 1954 survey. Schammerhorn argued that the 2 deeds executed by McKenna in 1902 and 1913, when viewed together, indicated that McKenna intended to split the quarter in question into 2 equal areas, so Schammerhorn and Brewer were each entitled to half of the 3.7 excess acres that were present in that quarter, and his 1954 survey was valid because it divided the quarter in that manner. Schammerhorn also asserted, as an alternative argument, that his 1954 quitclaim deed was valid, because it served as confirmation that McKenna really intended his father to have the entire north half of the contested quarter, rather than merely 80 acres, maintaining that the 80 acre figure had resulted only from McKenna's ignorance that the subject quarter contained excess land. The trial court accepted the 1954 quitclaim deed as valid and the 1954 survey as controlling, thereby approving the division of the SE/4 into 2 areas of equal acreage, while declining to allow adverse possession to support the 1908 boundary, and rejecting Brewer's request for the removal of the new fence.

As most experienced surveyors will recognize, the arguments set forth by the litigants were naturally focused primarily upon the descriptions that appeared in their deeds, yet those descriptions had created the state of uncertainty which plagued the parties, and therefore did not resolve the controversy over the location of the boundary in question. The crucial element within the evidence which would serve to conclusively resolve the matter at hand, the Court realized, was the fact that the boundary described in each of the deeds had been physically established on the ground, in a manner which had subsequently proven to be entirely satisfactory to all of the relevant parties, as witnessed by 4 full decades of productive land use, free of dispute from 1913 to 1953. Had the line created in 1902, and utilized again in the conveyance of 1913, never been marked on the ground, the result of this case could well have been different, and if the line had been placed in a different location in 1908 then that location would have controlled the outcome, because the operative principle was the right of reliance upon a survey made under the authority of a grantor for the purpose of land division. Whether the Court viewed the 1908 survey as an original survey or not is unknown, but that made no difference in this instance, because the evidence made it clear that the 3 original parties, McKenna as the grantor, along with Rowan and Schammerhorn's father as the grantees, all accepted the line that was provided for their use in 1908, and in fact none of them had been cheated in any respect. The alternative argument made by Schammerhorn, that McKenna had really intended to retain one acre in the middle of the SE/4, was genuinely nonsensical and was destined to gain no traction in the eyes of the Court. The evidence supported no such suggestion, the Court observed, because only one boundary was marked in 1908, and if McKenna had truly intended to retain ownership of a small sliver of land running across the SE/4, he would have instructed the county surveyor to mark 2 lines in 1908, in order to define the strip that he intended to retain. The idea of re-dividing the quarter in contention, 40 years after it had been divided in an appropriate and useful manner, was fundamentally antithetical to the concept of boundary stability, as well as the concept of title security, the Court well understood, and this realization made the Court highly inclined to regard the 1908 survey as an entirely legitimate and conclusive division of land. The trial court erred by failing to apply the principle of monument control, the Court explained, the line monumented in 1908 was the controlling line, regardless of whether the survey monuments set at that time still existed or not, because the fence posts had perpetuated that line, and they had thus

become the primary boundary evidence:

“Appellee contends ... Rowan received only 81.85 acres ... other facts in evidence ... clarify the existence of monuments and boundaries ... a fence was built dividing these two properties ... this fence ... coincided with the survey of 1908 ... when the fence was removed the large hedge posts on the corners at both the east and west ends of the fence were permitted to stand to mark the dividing line ... possession of the entire remaining tract, containing 83.7 acres, was delivered by the grantors to Rowan ... who farmed it without challenge until 1953 ... numerous witnesses testified concerning the boundary line recognized through the years ... a ridge had been built up along the boundary line, which was marked by the two corner posts, where the old fence had originally been established ... slight variation in farming up to the line ... is immaterial ... there is a presumption that the grantor intends to convey his entire interest ... where the description of the land in a deed is uncertain or ambiguous ... it is proper for courts to resort to parol evidence, not to contradict the instrument, but to explain the uncertainty or ambiguity ... the vendor cannot afterward avail himself of any ambiguity in the conveyance ... in 1954 certain McKenna heirs conveyed all their title and interest ... to Schammerhorn by quitclaim deed ... the admission of the foregoing evidence was erroneous since it was immaterial ... it had no bearing on ... the intention of the parties to the deed in 1913 ... Prudential ... acquired title to the entire 83.7 acres owned by Rowan ... it passed to the appellant ... appellant succeeded in chain of title to all the property owned by Rowan ... judgment for the appellant.”

In reversing the trial court decision, the Court also noted that there was no need for any consideration of adverse possession, because the relevant principles of law and equity pertaining to both title and boundary resolution all aligned with the position set forth by Brewer and militated against the premise upon which Schammerhorn's position rested. A fence can serve as conclusive boundary evidence, the Court thus specified on this occasion, if shown to have been built upon a surveyed line, or in fact upon any line that was adopted as a boundary and mutually regarded as a source of legitimate reliance, as demonstrated by the subsequent conduct of the adjoining land owners. Moreover, as this particular scenario well illustrates, even the mere remnants of a fence which has long been removed can operate as controlling boundary evidence, if sufficiently visible and prominent to provide notice and to define a perceptible line. A grantee of land described in aliquot terms, such as Rowan in this instance, is not necessarily limited to the area defined in his deed, if his grantor put him in physical possession of a larger area, while expressing no intention to retain any portion of his land, the Court also indicated here, pursuant to the principle that a boundary physically identified by a grantor for the use of his grantee represents a valid basis for reliance on the part of the grantee and his successors. As this decision also shows, with particular regard to title, conveying "the north 80 acres" and

"the south half" does not create any gap or overlap, regardless of the acreage contained within the relevant PLSS unit, because every grantor is presumed to convey all of his land, and the grantor retains no acreage that was not explicitly identified as a reservation or exception. Under this widely accepted principle, Brewer was fully entitled to McKenna's entire remainder of the SE/4, despite the fact that her legal description called for only the south half of the quarter at issue, since McKenna failed to specify in 1902 and again in 1913 what area, if any, he intended to retain, and the acts of his heirs in asserting title to one acre following his death were irrelevant and futile, since their opinion regarding his intent held no legal force or effect. The principle applied by the Court in rejecting the 1954 quitclaim deed, as can readily be seen, originates in the wise concept that no grantor can ever be allowed to benefit from any ambiguity found in a legal description that the grantor, or any agent functioning on his behalf, either created or chose to employ, which operates as a fundamental safeguard protecting all grantees who rely on descriptions provided by their grantors. In addition, the Court's decision here rested upon the principle that extrinsic evidence is always relevant to clarify boundary ambiguity of any form or source, thereby confirming that testimonial evidence resides along with physical boundary evidence, above numerical evidence of boundary locations, while highlighting the fact that a survey which was not referenced in any deed can nevertheless control.

The 1960s - Clarification of Descriptive Conveyance Language

The centennial of statehood arrived in Kansas during a time of general prosperity for the nation, and like the rest of the country Kansas was experiencing the benefits of a land development cycle at this time, as the economic expansion and recovery from the difficult years of the 1930s and 1940s, which had gained momentum during the 1950s, continued. Land development invariably results in the creation of new boundaries, and that of course is a process in which land surveyors have long been instrumental, but in a modern and technologically advanced society, the creation of accurate documentation relating to the formation and transfer of all land rights is also among the typical surveyor's primary duties. Land surveyors have always had the opportunity to establish original monumentation, whenever the need to subdivide land and create new boundaries has arisen in our country, and that remains the core function of the land surveyor, but the modern era has brought the land surveying profession many additional opportunities to make important contributions to our society, such as the creation of more definitive and reliable land records. Surveyors have always been key contributors to the public documentation of land rights, through the creation of legal descriptions and plats, but during this period it was becoming clear that better land records were needed, to document the ongoing densification of property ownership in our country, on a broader scale and in a more integrated and useful manner. During this period the title industry was also undergoing significant changes and developing into its modern form, as the need to protect all existing documented land rights by providing effective notice of their existence became clear, and as a result title and boundary issues became increasingly intermingled. Land surveyors came to be seen as logical partners by title attorneys at this time, and surveys naturally became more detailed, in response to the demand for increased clarity of

property rights associated with the multitude of improvements that were being placed upon the land. The land surveyor also came to be recognized as a key member of any land development team, being a provider of essential data, relied upon by professionals representing many other disciplines, pointing to the need for surveyors to obtain more advanced education, including more thorough knowledge of matters ranging from land rights law to project management. In many ways the expansive role of the modern land surveyor was crafted and took shape during this period, driven by the need for better organized land development, and in recognition of this enlarged role, at the end of this decade, land surveyor licensing came to Kansas, bringing with it enhanced professional credibility, but also elevated professional responsibility and liability.

The appearance of metes and bounds calls in a legal description is understood by all surveyors as a method of describing any given area by outlining it, but as *Carpenter v Fager* (1961) clearly shows, the legal efficacy of numerical calls is highly limited, and although they may adequately define boundaries, they carry no controlling force with regard to title. Fager was the owner of a 32 acre tract of unspecified shape, the boundaries of which were presumably well defined, but how this tract was described, and whether or not it had ever been surveyed, are both unknown. In 1951, the Sunflower Improvement District, within which Fager's tract was evidently located, designed a sewage processing facility on his land, and since Fager was unwilling to convey any of his land to Sunflower, 0.92 acres of the Fager tract were condemned. Sunflower then built the sewage facility within the condemned area, which had evidently been surveyed and described in the typical manner using metes and bounds. Fager died in 1952, and his heirs had his property surveyed, in anticipation of selling it off, but both the heirs and the surveyor who they hired apparently failed to realize that the condemned area was still part of the Fager property. The survey done at this time excluded the condemned area, because instead of following the original boundaries of the Fager tract, the survey followed the calls of the condemnation description, and thus depicted the condemned area as being outside the Fager property. The Fager heirs then used this survey, and a legal description based upon it, to sell the Fager property, which was eventually acquired by Carpenter at an unspecified date. When the Fagers were later alerted to this error, they notified Carpenter that they were still the owners of the condemned area, forcing him to file an action against them, seeking to quiet his title to the entire 32 acre Fager tract, including the condemned area, which was still being utilized by Sunflower. The trial court found Carpenter's title to the original Fager tract to be entirely legitimate, and quieted fee title to the sewage site in him, along with the rest of the land that he had acquired, over the protest of the Fagers that Carpenter's legal description very clearly did not cover the 0.92 acre area. The Court upheld that ruling, and went on to inform the Fagers that the survey upon which they had relied did not justify their position, reiterating that resurveys are powerless to control boundaries for purposes of title. Even though the survey of the condemned site was an original survey, it had not created an independent 0.92 acre parcel, the Court explained, since condemnation results only in the creation of an easement, to accommodate the specified land use, leaving the fee ownership of the underlying land undisturbed. Fager still owned the sewage site even after it was condemned, but the heirs had failed to recognize that, supposing instead that it had been acquired in fee by Sunflower, and they had failed to preserve their ownership of that area when they deeded away the Fager estate. The heirs mistakenly assumed that they had never conveyed the condemned area, because it was not

embraced within the metes and bounds calls in any of the deeds that were executed subsequent to the condemnation, but in fact they had neglected to explicitly retain that area, so it had passed from their ownership in 1952, right along with the rest of their property. It made no difference whether the contested area was inside or outside the boundary that was surveyed for the Fagers in 1952, the Court clarified, because no grantor can retain fee title to any land which is not explicitly identified by the grantor as a fee reservation or exception. Here the Court applied the principle that any portion of an estate being conveyed, which lies beneath an easement burdening that estate, passes to the grantee along with the rest of the grantor's land, regardless of how the property is described. Mere use of the metes and bounds description format is not equivalent to the creation of an exception or reservation, the Court thus stipulated, so the boundary shown on the 1952 survey and employed in Carpenter's legal description was incapable of limiting the title which he and his predecessors had acquired, leaving the Fagers with nothing.

The problematic nature of a legal description created without the assistance of a land surveyor was poignantly displayed in *Ford v Sewell* (1961) which well illustrates the Court's highly open posture toward description reformation. Ford was the owner of 4 presumably typical rectangular platted lots in Paola, which were bounded on the east by an unspecified public street. The dimensions of these lots, when they were created, and how or when Ford had acquired them, are all unknown, but they were all evidently vacant, except the north lot, upon which Ford had a trailer. Sewell wanted to acquire these lots from Ford, and he planned to build a gas station on the property. Ford agreed to sell the lots to Sewell, but he wanted to keep part of the north lot, and Sewell agreed to that, so the 2 men visited the site with the objective of establishing a new dividing line within that lot. They were unable to locate any lot corners, but they nonetheless made some measurements, and they agreed upon a certain line of division passing through the north lot, upon which Ford then erected an ornamental fence. The measurements were reported to an unspecified party, presumably an attorney, who prepared a deed for them, and in 1953 Ford conveyed the 3 southerly lots and the described portion of the north lot to Sewell. How this new dividing line was described, and whether or not Sewell carried out his plan to build the gas station, are both unknown, but a controversy subsequently arose over the validity of Sewell's title, so in 1957 he completed a quiet title action, by which his title was secured, although the boundaries of the subject property were not at issue in that action. At an unspecified date, presumably circa 1960, Sewell had his property surveyed, and the surveyor evidently informed him that the dimensions in his deed placed his north boundary an unspecified distance north of Ford's fence. When Ford learned about this, he filed an action against Sewell, seeking judicial clarification of the boundary in question, while maintaining that the described line north of the fence represented a correctable mutual mistake, and requesting that the 1953 legal description be reformed accordingly. The trial court agreed with Ford that the bungled measurements, upon which the 1953 description had been based, had produced a genuine description error, which constituted a mutual mistake, and proceeded to establish the boundary between the litigants at the fence, viewing it as a boundary monument, as well as evidence of an agreed line. The Court upheld that ruling, approving the reformation of Sewell's legal description to conform to the fenced line, upon recognizing that the inaccurate measurements had failed to capture the true intentions of the parties, while deeming the fence to be the strongest and best evidence of the boundary location which had been settled upon by the 2 men on the ground

in 1953. They had the authority to select a dividing line of their own preference at that time, the Court thus confirmed, and since that line had been physically marked on the ground, their failure to properly describe it was insufficient to overcome or supplant the intended location, leaving the bogus dimensions used in the 1953 description subject to rectification. Sewell protested that his title had been quieted in 1957, therefore his legal description bore judicial approval, making it uncorrectable, but the Court reminded him that title and boundaries are distinct matters, and the location of his boundaries was never addressed in 1957, so his boundaries did in fact remain subject to judicial alteration, even after his title had been quieted. Thus the Court reiterated on this occasion that a boundary physically established by a grantor and a grantee controls over descriptive language, which can be reformed to match that physically defined boundary location. Erroneous dimensions, the Court thus acknowledged, like all other items recited in conveyance documentation, are subject to correction, when it can be shown that any such numbers would defeat the true intentions of the parties, if allowed to stand and control as written, because misleading documentary evidence, unlike an inaccurately placed original monument, is not immune to correction.

By this point in time, the 1905 Abercrombie case, previously reviewed herein, had stood as the Court's most definitive and frequently referenced statement on the legal status of railroad right-of-way for over half a century, but *Harvest Queen Mill & Elevator (HQ) v Sanders* (1962) was destined to become its modern counterpart, reinforcing the principle that the creation of a right-of-way does not result in passage of fee title. Long was the owner of a Sedgwick County farm of unspecified size, through which the Chicago, Kansas & Nebraska Railway designed a railroad. In 1887, Long deeded the railroad "a strip of land ... for the purpose of building or constructing its roadbed and railroad". This strip varied in width, but its location was expressly called out as being defined by the track, and no dispute over the physical extent or boundaries of the strip ever arose. This track remained active henceforward, continuing to serve its intended purpose, but at unspecified times over the ensuing decades this rail line came to be owned and operated by Chicago, Rock Island & Pacific, and the Long property passed into the ownership of Sanders. In 1956, an oil well was constructed and put into service on the Sanders property, under his authority, but then in 1958 the railroad company authorized HQ to drill for oil within the railroad right-of-way. When HQ personnel arrived and attempted to commence drilling in the right-of-way within the boundaries of the Sanders property, he complained that neither the railroad company nor HQ had any right to extract oil in that location, and he either forced them out or threatened to do so. HQ was thus compelled to file an action against Sanders, seeking judicial verification that the railroad company owned the railroad right-of-way in fee, and therefore held the mineral rights associated with that strip as well. The trial court decided that the railroad right-of-way was only an easement however, and declared that the railroad company had no right to lease that strip for mineral exploration purposes, thus HQ had no right to make any use of the Sanders property at all. The Court upheld that ruling, observing that the trial court had correctly applied the rule that every railroad right-of-way in Kansas is an easement, regardless of how it was acquired, reiterating that railroads have no need to obtain fee title in order to provide rail service either within, or passing through, Kansas. HQ protested that the 1887 deed represented a fee conveyance, because it identified the area in contention as "a strip of land", while also noting that neither the phrase "right-of-way" nor the word "easement" appeared

anywhere in that deed, but the Court nonetheless refused to regard the deed in question as a fee conveyance. All railroad right-of-way in Kansas constitutes an easement subject to reversion, however it may have been acquired, and regardless of whether any reversion language appears in the documentation by which it was acquired or not, the Court stipulated. A railroad right-of-way comprises an exclusive easement, as long as it remains functional, but even an exclusive easement is limited to land use for the specified purpose and carries no mineral rights, which are vested in the fee owner of the servient estate, so Sanders had the right to drill for oil anywhere on his property, unimpeded by the right-of-way, and to prevent anyone else from doing so as well. A warranty deed does not always convey land in fee, the Court also clarified on this occasion, an easement can be created using terms of warranty, so the format in which a deed is composed is not conclusive as to the nature of the rights thereby conveyed. Of greatest significance to land surveyors, the Court's decision here also indicates that railroad right-of-way lines are not fee boundaries, and do not mark the limits of fee title or ownership in Kansas, unless of course such a right-of-way line is independently adopted as a boundary by an underlying land owner, in the process of subsequently dividing and conveying land.

As several of our previous cases have demonstrated, legal descriptions appearing in wills can be just as problematic as those appearing in deeds, and potentially more so, because family members frequently engage in land rights agreements of various kinds, which can generate controversy, as was the case in *Goff v Goff* (1963). Goff was the owner of a substantial amount of presumably typical farmland in Graham County, consisting of over 2000 acres, and he and his wife had 5 adult children. In 1950, one of Goff's sons was married to Brock, and they had 2 sons together, but they apparently had a troubled marriage which later ended in divorce. Goff's married son acquired an unspecified section from an unspecified party in 1957, evidently expanding the Goff family farm, but he and his wife began to prepare for their divorce shortly thereafter, and Brock insisted that she held a legal interest in the section acquired in 1957, which she planned to assert during the divorce proceedings. In an effort to mediate an amicable settlement between his son and his daughter-in-law, Goff called a family meeting, at which Brock agreed to deed her interest in the 1957 tract to her father-in-law, upon the condition that her husband would also deed his interest in that tract to his father, and upon the further condition that Goff would leave the tract in question to Brock's sons in his will. Goff agreed to hold the disputed tract until his death, so it was deeded to him by both his son and his daughter-in-law as agreed, and Goff verbally stated that he would leave that tract to Brock's sons in his will. When Goff died just one year later however, it was discovered that for unknown reasons he had failed to follow through on that promise, instead he left all of his land to his widow, so the disposal of all of his land, including the contested 1957 acquisition, was up to her discretion, as the executor of his estate. When Brock learned about this, she filed an action on behalf of her minor sons against the estate of Goff, seeking a judicial decree that the 1957 tract was not part of Goff's estate, and the trial court ruled in her favor, since the evidence made it clear that Goff had in fact verbally agreed to re-convey the tract that had been deeded to him in 1957, by means of his will, but had neglected to do so. A majority of the Court upheld that lower court decision, approving the extraction of the section in contention from Goff's will, and requiring the Goff estate to convey that tract to Goff's grandsons, in fulfillment of his unwritten promise, although 2 Justices dissented. The trial court correctly dismissed the argument set forth by Goff's widow, who maintained that her

late husband's undocumented agreement was a violation of the statute of frauds, and therefore could not be enforced by her daughter-in-law or anyone else, the Court concluded, because extrinsic evidence, in the form of testimony, verified that an oral agreement had been made. Since Goff was the only party to the 1957 settlement who had not carried out his part of that agreement, the Court observed, his estate was bound by his verbal commitment to relinquish the land at issue, and the fact that Goff's part of that agreement had been left unwritten was insufficient to prevent his promise from being enforced, because valid evidence had proven the existence of the alleged agreement, removing it from the statute of frauds. The statute of frauds operates only to void an undocumented agreement which remains voidable, because no action has been taken in reliance upon it, the Court reiterated here, it has no power to void an unwritten agreement that has been relied upon by any of the agreeing parties, as Brock had done in this instance, so she had a legitimate right to insist upon enforcement of Goff's re-conveyance promise. As the Court's decision here illustrates, an oral conveyance agreement can be enforced even after the death of the oral grantor, based upon extrinsic evidence of his intentions, which can effectively nullify his will, showing that a legal description in a will is subject to judicial reformation, either to add land or to remove any amount of the land described therein, no different from a legal description appearing in a deed.

One of the most frequently misunderstood aspects of the principle of reversion is the fact that it operates by virtue of the association of land to land, and not by the association of land to any specific party or parties, thus the right of reversion is an appurtenant right which automatically descends from party to party, along with each passage of fee title, preserving even ancient reversionary rights, as illustrated by *Thompson v Godfrey* (1963). Cherry was the owner of a tract of unspecified size situated near Parsons in Labette County, and in 1885 he conveyed a typical one acre schoolhouse site within his tract to School District No. 5. Evidently Cherry effectively communicated his intention not to permanently relinquish the acre to the district personnel, and they apparently acquiesced to his wishes in that regard, because this deed stated that this site would revert to Cherry "when it shall fail to be used for school purposes". The school site was evidently used for it's intended purpose long beyond Cherry's lifetime however, until it was finally retired in 1959. The original Cherry estate was apparently divided up over the decades, and at an unspecified date a portion of that tract was acquired by Thompson, thus he became the owner of the land surrounding the school site. Shortly after the school building fell into disuse, the district offered it for sale at an auction, and Godfrey was the successful bidder, so he came to be the owner of the old schoolhouse in 1959, but the land upon which it stood was never deeded to him. Rather than relocating the building to his own property however, as the district had intended, Godfrey left it in place and began using it as a storehouse. In 1960, Thompson apparently grew weary of Godfrey's intrusions upon his property, so he began to fence off the old site, but Godfrey saw Thompson doing this and he decided to prevent it, so using a tractor he mowed down the fence posts that Thompson had just installed. Thompson responded by filing an action, asserting that Godfrey had no right to use the school site, because Thompson owned it in fee, by virtue of reversion. The trial court rejected Thompson's position, holding that he had no right to prevent Godfrey from using the building at issue in it's historic location, because the school site had never been conveyed to Thompson, so he had no authority to prevent Godfrey from entering the school site to use the building. The Court reversed that decision however, clarifying that

Thompson was in fact the fee owner of the school site, which he had obtained by means of reversion, at the moment when the district sold the school building, because that event represented a formal abandonment of the school site, triggering the reversion clause in the 1885 deed. Godfrey protested that the reversion clause applied only to Cherry, who died without ever using it, but the Court informed him that the reversionary rights associated with any given lot, parcel or tract pass automatically from each grantor to each grantee, and do not die with any individual, so the 1885 reversion clause remained in effect, even after 74 years, despite the fact that the 1885 deed made reference only to Cherry, and said nothing about heirs or successors. A reversion clause, once created, remains effective forever, the Court indicated on this occasion, so it can be invoked by any successor of the grantor who created it, whenever an appropriate time to do so arrives. Any property to which a reversion clause is applicable, the Court also reiterated here, is not owned in fee simple absolute by any grantee, all such grantees acquire only a limited fee interest or an easement in such property, because the base fee always remains part of the estate from which it was carved. Selling the schoolhouse legally operated as a conclusive abandonment of all the land rights held by the district that were associated with that building, the Court stipulated, enabling reversion to reunite the former site with the Thompson tract, so Godfrey owned the building, but he had no right to maintain it upon the land comprising the extinct site, he had only the right to move it to his own land.

The case of *Klepper v Stover* (1964) introduces us to a relatively modern judicial premise known as the discovery rule, in the context of description reformation, while also once again illustrating the power of the equitable principle of estoppel. All statutes of limitation contain 2 common elements, they require the passage of a designated time period and they require the existence of conditions generating adequate notice. As can readily be seen, the time period can commence only once the element of notice is in place, and this key factor resulted in the creation of the discovery rule, which can be applied to any set of circumstances that do not provide open and obvious notice. The Stover family owned an unspecified amount of property, apparently consisting of a substantial number of lots in Randolph. How or when the Stovers had acquired these lots, and how this land had been used prior to the 1950s, are both also unknown, but 2 lots were leased to Murray in 1954, who then began using part of the Stover property. Unknown to both the Stovers and Murray however, the legal description which appeared in Murray's lease was erroneous, it made reference to Lots 2 & 3, when in fact the area occupied by Murray was comprised of Lot 2 & part of Lot 1. This description error evidently went undiscovered by anyone for 7 years, until the leased premises were surveyed in 1961, by which time Klepper was residing upon the leased land, as the assignee of Murray. The elder Stover, who created the lease in 1954, had evidently died by 1961, and when his heirs learned of this mistake, they refused to take any steps to correct it, forcing Klepper to file an action against the Stover estate in 1963, seeking reformation of the legal description to conform to the area that was actually being utilized by Klepper. None of the parties denied that a mistake had been made in describing the subject area in 1954, but the Stover heirs argued that they were under no obligation to correct the description error made by their ancestor, because the 5 year statute of limitations pertaining to description reformation had expired before the error was recognized by anyone. The trial court declined to impose the 5 year bar however, and held that Klepper was entitled to the description reformation which he had requested, thereby placing the unwanted corrective responsibility upon the Stovers. The Court upheld

that decision, concurring that the statutory 5 year period was irrelevant, and the amount of time that had passed before the description issue was noticed was immaterial, because the 5 year period could not commence until the existence of the error in question had been discovered by the relevant parties. In fact only 2 years had passed, the Court realized, from the time when Klepper first learned of the mistake until he took action to force the Stovers to rectify the error, so he had acted well within the 5 year window allowed to him under the law, which had begun in 1961, rather than in 1954. In so ruling, the Court adopted the important position that the discovery rule is applicable to erroneous legal descriptions, because mistakes appearing in descriptive language are typically invisible to those holding land rights documentation, so their legal right to seek correction of mistaken descriptions extends 5 years from the moment when they actually become aware that a description error exists. The right to obtain judicial reformation of a legal description remains intact, the Court thus stipulated, as long as the erroneous nature of the description goes unrecognized, so the opportunity to rectify such mistakes does not automatically expire 5 years from the date when the description was created or first used, although a survey can provide notice sufficient to set the 5 year period in motion, which occurred in this instance. In addition, the Court concluded, estoppel can support description reformation at any point in time, upon purely equitable grounds, rendering the statutory period moot, if land use constituting substantial and justifiable reliance upon an inaccurate legal description has taken place.

The case of *Kollhoff v Board of County Commissioners of Reno County (1964)* provides an excellent demonstration of judicial preservation of ancient but vital public land rights, while emphasizing the importance of judicial interpretation of the meaning of a single key word. In 1872 all section lines in Reno County, along with those in several other counties, were legislatively deemed to constitute public right-of-way, and Reno County formally accepted that concept, under which a 66 foot wide right-of-way, centered upon each section line, was created. Numerous public roads were constructed along section lines in Kansas over the ensuing years under the authority of this law, but of course most section lines simply remained undeveloped land, unused for purposes of travel by anyone. In 1879 an automatic vacation statute was enacted, previously outlined herein, which provided for the extinction of any public right-of-way that went unopened and unused for 7 years, and as also previously discussed herein, that statute existed until 1911, when it was repealed. Kollhoff was the owner of a tract that was bounded on the north by an unspecified section line, and his land was situated in a section which was patented in 1884. The land lying along the north line of this section was evidently vacant or sparsely used until 1900, at which time trees were planted and fences were built along the north section line by the predecessor of Kollhoff, and by neighboring land owners as well, which effectively prevented any use of this section line for travel, and that scenario remained in effect henceforward, as no one ever sought or attempted to make use of this portion of the 1872 section line right-of-way. In 1963 however, Reno County asserted that this section line right-of-way still legally existed and proposed to build a road within it, requiring the removal of all obstructions from that area. Kollhoff declined to comply with that directive, electing instead to file an action against the county, seeking a decree that the relevant portion of the section line right-of-way had clearly been legally extinguished, because it had gone entirely unused for purposes of travel for 90 years, maintaining that it had been legally eliminated by the 1879 statute long before 1911. The trial court ruled against

Kollhoff however, declaring that the 66 foot wide public right-of-way created in 1872 still existed, burdening the north 33 feet of the Kollhoff tract, despite never having been used for travel, and the Court upheld that decision, deeming the 1879 statute to be inapplicable. The vacation statute could not apply to the period from 1872 to 1879, the Court explained, because it did not yet exist, nor could it apply prior to 1884, because the relevant land remained part of the public domain until that time. The vacation statute was also inoperative in this particular location between 1884 and 1900, the Court pointed out, because the section line right-of-way stood open and ready for use by anyone during that period, and was never blocked in any way, so it remained legally intact. The subject area was blocked from 1900 to 1911, the Court acknowledged, but this was also of no benefit to Kollhoff's position, because the statutory 7 year period was long passed by that time, so any opportunity to extinguish this right-of-way by means of physical blockage was already gone by 1900, and of course the fact that the contested strip remained useless after 1911 was of no significance, because the vacation statute was then no longer in effect. Thus the Court served notice that the 1879 statute had become virtually useless, since it requires proof that the right-of-way being challenged was physically blocked and thereby made unusable for the first 7 years of its existence upon patented land between 1879 and 1911, which in this instance was the period from 1884 to 1891. All public right-of-way is legally "open", the Court reiterated here, if it is physically unobstructed, even if the relevant area simply stands vacant and entirely unused by anyone for any purpose, and this principle applies to all section line right-of-way in Kansas. Thus the Court clarified here that even a section line right-of-way which has been completely blocked for several decades remains available for public use at any time, regardless of the fact that it was never previously used at all, or improved for purposes of travel, thereby revealing just how staunchly the Court is prepared to protect valuable public access rights.

As we have learned from some of our previous adverse possession cases, any evidence indicating the real intent of an adverse possessor is of great significance to the Court, so an offer made by the adverse holder to buy the land he is using can in some instances completely destroy an otherwise legitimate adverse possession. This sword can potentially cut both ways however, in the eyes of the Court, since the same principle can under some circumstances operate against the owner of record, and thereby support a claim of adverse possession, as the case of *Unruh v Whorton* (1964) well illustrates. At an unspecified date, Unruh acquired a tract of unspecified size, shape and location in Barton County which was bounded on the north by the Arkansas River. How and when Unruh acquired his land, and what use he made of it, if any, is unknown, but he had apparently already owned it for several years by the 1920s, during which time period the river evidently narrowed and receded, exposing previously submerged land along the north side of the Unruh property. In 1927, another tract of unspecified size and shape, which was also bounded on the north by the river, and which adjoined the Unruh tract, was patented to O'Shay and Cook, and in 1928 they evidently leased their land to Whorton, who was a tenant farmer. How the boundaries of the tract patented in 1927 were marked on the ground, if they were marked at all, is unknown, but Unruh had built a fence across the north side of his tract, apparently running more or less parallel to the river, so as the river retreated a substantial amount of potentially useful land formed between the fence and the river, which Unruh had evidently never used. Upon arriving, Whorton saw the land lying between Unruh's fence and the river, and he either assumed that it was part of the O'Shay

& Cook tract, or else he simply decided to make use of it regardless of which tract it was part of, so he proceeded to cultivate and harvest the whole area between the fence and the river, along with the land that he had leased, and this continued for the next 35 years, without comment or disturbance from anyone. In 1963 Unruh evidently realized, or was informed, that some of the land being used by Whorton was actually accretion or reliction which had legally attached to the Unruh tract, so he filed a quiet title action against Whorton, O'Shay and Cook, seeking to have Whorton's land use restricted to the O'Shay and Cook tract. The trial court rejected the position set forth by Unruh however, and ruled that the entire area used by Whorton had become legally attached to the O'Shay & Cook tract, through adverse possession, so the fence controlled the location of Unruh's northerly boundary, thereby disconnecting his tract from the river. Noting that Unruh had, at an unspecified date, made an offer to buy the contested area from the defendants, the Court upheld the lower court decision against him, indicating that his offer to buy the disputed land constituted an open acknowledgement on his part that he had already lost the land in question at that point in time, and that it had been adversely acquired by the defendants. Unruh thus paid the price for his negligence with respect to the open use by another party of the portion of his land which he had fenced out, and also for his ignorance of the operation of riparian boundary principles, since he evidently failed to recognize for many years that the land he had fenced out had become part of his property upon emerging from the riverbed, and had thereby become subject to adverse possession. Thus the Court confirmed once again that accreted or relicted land is subject to adverse possession, just like all other privately held land, while also reiterating that the acts of a tenant represent the acts of the landlord under whose authority the land use is made by the tenant, therefore the encroaching acts of a tenant, such as Whorton in this instance, legally operate to vest title in his landlord, by means of adverse possession.

The principle of description reformation, and its capacity to alter and control described boundaries, was again on display in the case of *Pickering v Hollabaugh* (1965). Pickering was the owner of a tract of rural land in Pottawatomie County, abutting upon the Tuttle Creek Reservoir, while Hollabaugh was the owner of urban property in Wichita, bearing an apartment building, and in 1961 these 2 land owners reached an agreement to exchange their properties. In their written conveyance contract, which was duly signed by both parties, the Hollabaugh property was adequately described, but the Pickering property was described as "... approximately 221 acres located in Section 1 ...", with no reference to any land lying outside the boundaries of that section. After reviewing some unspecified county records however, Hollabaugh arrived at the conclusion that Pickering owned only about 173 acres, so he asked a surveyor to investigate how much land Pickering really owned, and the surveyor estimated that Pickering owned about 199 acres, but no survey was performed. Hollabaugh and Pickering viewed and walked the Pickering property together, and Pickering pointed out the boundaries of his land on the ground to Hollabaugh, but since he was convinced that Pickering did not have 221 acres to convey, Hollabaugh informed Pickering that their deal was off. Pickering responded to this development by filing an action against Hollabaugh, seeking judicial reformation of the legal description of his tract in the conveyance contract, as well as a decree requiring Hollabaugh to complete their intended transaction on the agreed terms, regardless of what the acreage contained within the Pickering tract might prove to be. During the research done in preparation for the trial, it was evidently discovered, presumably by Pickering's

legal team, quite possibly working in coordination with an unspecified land surveyor, that the Pickering tract was not contained entirely within Section 1, it actually extended into Section 2, and it included about 27 acres lying in that section. The trial court ruled in favor of Pickering, ordering Hollabaugh to complete the documented transaction, on the basis that the entire Pickering tract was intended by both parties to be the subject of the contract in contention, while proceeding to reform the Pickering property description in that contract, to include the land owned by Pickering in Section 2, along with his land in Section 1. Hollabaugh protested on appeal that the actual acreage of the Pickering tract was still uncertain, and he was not assured of getting a full 221 acres, so the contract at issue was ambiguous and therefore could not be enforced. The Court upheld the decision against him however, declaring that the legal description of the Pickering tract had been properly reformed, with the addition of Pickering's land in Section 2, so Hollabaugh was legally bound to complete the agreed transaction by deeding his Wichita property to Pickering, as he had agreed to do. Thus the Court informed Hollabaugh that a legal description can be reformed to add land lying in an another section, which was intended to be conveyed, even though that section was mistakenly never mentioned in that description, thereby confirming that neither inaccurate acreage nor a missing section number can render a legal description void, since such numerical errors are subject to rectification by means of description reformation. An ambiguous legal description is not fatal to a conveyance if the description can be made certain through the application of extrinsic evidence, the Court once again observed, while also reminding the litigants that acreage expressed only in approximate terms is not a controlling factor in a legal description. A grantee is entitled to all the land that was pointed out to him by his grantor, regardless of how it may have been described, and even if it is left partially undescribed, the Court thus reiterated on this occasion, while pointing out in addition that legal descriptions are not private information, so they can always be freely shared and distributed without liability.

The perspective of the Court relating to some of the consequences of the platting of land under modern land development standards was revealed in the case of Colorado Oil & Gas (COG) v City of Topeka (1966). A tract of land situated in Topeka, lying directly south of 29th Street, which was bounded on the east by Randolph Avenue and on the west by Oakley Avenue, was partially subdivided in 1959. Shunganunga Creek passed through this tract, and about 900 to 1000 feet of this tract was to the west of that stream, while only about 100 to 200 feet was east of the creek. The area platted in 1959 was identified as Phase 1 of a subdivision known as Sunnymede, and this area included all of the land west of the creek, but a strip comprised of the land lying within about 50 feet of the creek was left undeveloped, and was labeled "city park" on this subdivision plat, thereby dedicating that portion of the platted property. In 1960, Phase 2 of Sunnymede was platted, and this second plat covered the remaining land east of the creek, as well as some land on the east side of Randolph Avenue. On this 1960 plat, several lots were created in the area lying east of Randolph Avenue, but no lots were created west of Randolph Avenue, and the area lying between Randolph Avenue and the creek was identified only as "dedicated park" on this plat, corresponding to the way the land on the opposite side of the creek had been handled on the prior plat. In 1964, Topeka decided to pave Randolph Avenue, so a paving assessment was levied upon all of the lots which fronted upon that roadway, and 2 of those lots bore the office of COG, so COG was required to pay a share of the project cost. COG complained that the assessment upon the COG lots had been wrongly calculated and was

too high, because the lots in the block lying west of Randolph Avenue had been charged nothing, but the city officials refused to reduce the assessment, so COG filed an action against Topeka, alleging that the city had improperly handled the assessment and had overcharged COG. By disregarding the existence of the platted lots in the block lying directly west of Randolph Avenue, COG maintained, Topeka had illegally forced the lots east of Randolph Avenue to bear the full project cost, pointing out that the relevant assessment laws stipulated that lots in both blocks adjoining any given street were legally required to share in the cost of such projects. The trial court rejected the position taken by COG however, and the Court upheld that decision, finding the assessment to be valid and requiring COG to pay the full amount of the assessment upon the COG lots. In so ruling, the Court observed that the core question at issue was the legal definition of the word "block", and the Court held that the land lying between Randolph Avenue and Oakley Avenue could not be legally characterized as constituting one block, as COG insisted. Because the land between those 2 public streets had been subdivided separately, it could not be regarded as a single block, the Court concluded, moreover, the land fronting upon the west side of Randolph Avenue was not platted land at all, the Court determined, since it was not subject to development, and for those reasons, the position set forth by COG could not prevail. Lands which were platted separately cannot legally be deemed to represent one block, the Court indicated on this occasion, even if such properties are physically contiguous and are not separated by any public road, street or alley. A public park can never be subdivided, unless formally vacated, so a platted and dedicated park is legally not platted land, the Court explained here, because the phrase "platted land" denotes land which has been divided into developable units, and land which cannot be developed does not conform to that legal definition. In addition, the Court reminded COG that a non-navigable stream can represent a natural boundary monument forming an ambulatory boundary of a city block, as Shunganunga Creek did in this instance, marking the boundary between the 2 relevant platted subdivisions, thereby confirming that Topeka had correctly treated the lots west of the creek as being irrelevant to the Randolph Avenue project.

As a large number of the cases previously reviewed herein have illustrated, conveyances of land and land rights can be made in a wide variety of ways, and in many instances title to land passes from the hands of one party into those of others by unusual means, as the case of *Hinchliffe v Fischer* (1967) demonstrates. Ewing was a widowed mother with an adult son, named Ferdinand, and 2 married daughters, Hinchliffe and Fischer. Ewing lived in Larned, and Fischer lived nearby, but Ewing's other 2 children had moved away and lived in separate locations in Texas. Ewing was the owner of a substantial amount of land in Hamilton County, including one particular section, that was evidently comprised entirely of cropland, which she rented out to tenant farmers for several years. In 1963, Ewing apparently grew tired of the inconsistent results that had been produced by those who were farming this particular section, so she proposed to create an annuity contract, in an effort to use this portion of her land as a device from which to reap a steady annual income, and 2 of her children, Ferdinand and Fischer, agreed to participate in that plan with her. She then had an annuity contract prepared, which provided for the transfer of all of her rights to the section in question to Ferdinand and Fischer, in exchange for their promise to make equal annual payments to her, regardless of the subsequent productivity of the land within that section. This contract was duly signed by the 3 parties, and the 2

grantees took control over the farming activities upon the relevant section, but no deed was ever prepared, so Ewing was still identified as the owner of that section upon the public record, even after the annuity contract was recorded. Later in 1963 Ewing died however, and Fischer became the executrix of her estate, but Fischer did not include the land covered by the annuity contract when she listed the real property owned by her late mother, because Fischer considered herself and her brother to be the owners of that particular section, under the terms of the annuity contract. When Hinchliffe obtained a copy of the list of properties comprising her late mother's estate, she noticed the missing section and she asked why that tract had been excluded, but her siblings informed her that they had acquired that section, so Hinchliffe was not entitled to any portion of that land, or to any share of the profits generated by the use of that land. Upon getting this news, Hinchliffe filed an action against her brother and sister, asserting that they had never acquired the section at issue, so it was still part of her late mother's estate. The trial court found the contract in question, which was entitled "Private Annuity Contract", to be a valid conveyance of land, and thus rejected Hinchliffe's assertion that she held any interest in the land described therein, while quieting title in Fischer and her brother to the entire relevant section as requested by them. Observing that the disputed contract stated that Ewing "... hereby bargains, sells and transfers ..." the contested section, which was properly described in the contract, the Court upheld the lower court ruling, deeming the contract to be the legal equivalent of a deed, so the tract at issue had indeed been fully conveyed in fee to Fischer and her brother. Here the Court thus applied the principle that any document can operate as a deed, regardless of how the parties choose to identify that document, if it includes legitimate conveyance language and a valid legal description, thereby adequately expressing the vital intention of the grantor to forsake and relinquish all control over the described land. As the outcome of this controversy also indicates, the title or heading of a document does not control its legal operation, and in fact land can even be conveyed by equitable means with no documentation whatsoever, because in the eyes of the Court substance controls over form, therefore any evidence of an agreement revealing an intention to transfer title to land can serve to vest equitable title in a new land owner.

Although it is often said that the main purpose of adverse possession is simply to support all productive use of land, the case of *Walton v Unified School District No. 383* (USD 383) (1969) demonstrates that from a judicial perspective adverse possession serves primarily to validate land rights which originated legitimately, when documentation supporting those rights is found to be either deficient or absent. Chandler was presumably a typical farmer, who owned about 15 acres in Riley County, and in 1903 the Rocky Ford School District notified him that a school site was needed and that his land was suitable for that purpose. Chandler then agreed to allow an acre of his land to be devoted to school purposes, so a schoolhouse was placed upon that acre and it was fenced off from the remainder of Chandler's land, but whether or not this agreement was documented in writing is unknown, and no deed creating the school site was ever found. The schoolyard thus created was used in the normal manner for the next 34 years, until the school was closed in 1937. Even after the old schoolhouse ceased to serve as a classroom however, it was used for various public events and gatherings, and Chandler never maintained that he still owned the fenced acre, in fact he told his children that he had sold that acre to the district. Chandler died in 1945 however, and his knowledge of the exact nature of the 1903

land use agreement died with him, then in 1946 his heirs conveyed the 15 acre tract to Walton, and no reference was made in that deed to the school site, but one of Chandler's daughters told Walton that Chandler did not own the school site, and that it was not meant to be included in his deed. Walton respected the old school site and allowed public meetings and other activities to take place there for many years, during which time he made no use of that area himself. For unknown reasons however, in 1965 he filed an action against USD 383, the successor of Rocky Ford, alleging that he was the fee owner of the fenced acre, and seeking a decree ordering the building to be removed and the public use of that area to cease. Since Walton had failed to challenge the public use of that acre for about 20 years, the trial court ruled that if he had ever owned the contested acre he had lost it to adverse possession, quieting title to the disputed site in USD 383 and thereby converting the fence into a previously undocumented fee boundary. Noting that the terms of the 1903 agreement between Chandler and Rocky Ford, establishing the school site, were unknown due to the absence of any documentation, the Court surmised that the school site was presumably the product of an oral conveyance agreement, which may have amounted to a license, an easement, a dedication, or a full fee conveyance. It made no difference what the specific terms of the 1903 land use agreement were however, the Court determined, because the use of the land for school purposes had ended in 1937, so all use of the acre at issue by the public beyond that point in time was adverse in nature, upholding the lower court ruling on that basis. Although the initial use of the land in contention was permissive for 34 years, that did not prevent adverse possession from subsequently becoming applicable, the Court explained, because by using the site for purposes which were not foreseen in 1903 the public had openly asserted that the site was publicly owned, and doing so was genuinely adverse to both Chandler and Walton as his successor. Thus here the Court confirmed that adverse possession can be completed by a school district through expanded use of land which was intended to be used solely for school purposes. Use of land which commences under permission becomes adverse when that permission is repudiated by putting the land to any unintended use, and any such unauthorized land use can support adverse possession, the Court informed Walton. In addition, here the Court reiterated that a grantee of any fenced or otherwise visibly burdened land, such as Walton, is thereby placed upon notice of the potential existence of land rights held by others within his described boundaries, so Walton had lost his opportunity to challenge the unwritten title to the fenced acre held by Rocky Ford and USD 383, just like all other victims of adverse possession, by failing to do so with appropriate promptness.

Green v Ector (1960)

Aside from the issues relating to the presence or absence of navigability, the most frequent source of controversy over title to riparian land and the location of riparian property boundaries is the question of how the distinction is to be drawn between accretive river movement and avulsive river movement. These 2 types of river activity both represent the ongoing impact of nature upon land, and they are highly similar in that respect, but under the law the consequences of each of these types of movement differ dramatically,

often leading to friction when different parties each interpret past events involving river movement in the manner which best suits their own interests. The concept of avulsion originates from the fundamental principle that it is inequitable to deprive any property owner of some portion of their land upon the basis of an unusual, unexpected or extreme event, which that party could not have reasonably anticipated or foreseen. For this reason, avulsive river movement has legal consequences, relating to titles and boundaries, which stand in direct opposition to the results produced by normal accretive river movement, and this dichotomy sets the stage for legal battles such as the one we are about to review. One frequently misunderstood aspect of avulsion is the notion that it is to be measured primarily in terms of time, and specifically that it can only take place with great rapidity, but numerous examples, such as our present case, demonstrate the contrary, proving that avulsion can also manifest itself in a gradual manner. Aside from the length of time over which river movement occurs, another potentially important factor in the determination of the real nature of any river movement for legal purposes is human intervention, which can often have a significant impact upon the landscape, as our present case, which features a scenario including both accretion and avulsion, also illustrates. As we have observed in reviewing previous riparian cases, and as is shown here once again, the physical extent of all riparian title, and the location of all riparian boundaries, are subject to the forces of nature, and the outcome of conflicts such as the one which plays out here, is controlled by the best evidence of the historical formation and development of the land at issue.

Prior to 1906 – At an unspecified date, presumably circa 1860, the Kansas townships bounded on the east by the Missouri River were subdivided and platted by the GLO. In the township forming the northeastern corner of Kansas, the river evidently ran southward through the eastern part of Section 5 and the western part of Section 4, so riparian government lots were created by the GLO in Section 5, representing the northeasternmost land units in Kansas. The original platted size of these lots, when they were patented, how many different parties owned them over the decades, and how this land was used during the nineteenth century, are all unknown, but eventually these lots came into the ownership of Green or her ancestors. North of the Green property, the river flowed eastward between Nebraska and Missouri, before taking a distinct turn to the south, known as Squaw Bend, and the west side of the river's broad flood plain in the Squaw Bend area was marked by a bluff, which extended southward from Nebraska into Kansas. At an unspecified date, a railroad was built at or near the foot of this bluff, upon the strip of land between the bluff and the river, leaving a narrow segment of the Green lots between the railroad and the river. During this time period, the river's flow was apparently strong and consistent, and there is no indication that either the location or the width of the river changed materially, so during the first several decades of statehood it presumably occupied its platted location.

1906 to 1917 – During this period the river migrated steadily eastward, as the outer bank of the river, forming the Missouri side, was severely eroded by a series of flood events, and the western edge of the river moved correspondingly eastward, thereby very substantially expanding the Green property. What use was made of the newly formed land on the Kansas side of the river is unknown, but trees and brush took root and began to grow in the former riverbed.

1918 to 1927 – The river's location stabilized at the beginning of this period, roughly a mile to the east of its platted location, and farming activity soon commenced upon the land lying west of the river. Green's predecessors cultivated and harvested corn within a large portion of the exposed riverbed, while the area closest to the river was occupied by willow and cottonwood trees, which grew rapidly in the rich and fertile soil, supported by the abundant moisture provided by the river.

1928 to 1935 – Some flooding occurred during this period and the western portion of the former riverbed was inundated an unknown number of times. As a result of this river activity, a strip of land running through a low portion of the cultivated area occupying the former bedland began to function as a new minor river channel, which carried water only at times when the river was running high. The head of this new channel was actually located in Nebraska, about a mile north of the state line, but from that point it ran in a southeasterly direction, eventually rejoining with the main river channel at a point near the south boundary of the Green tract, which was presumably about a mile south of the state line. All of the former bedland west of the river remained dry most of the time however, and virtually all of it was farmed by Green's predecessors, as one continuous area stretching eastward from the foot of the bluff.

1936 to 1939 – The United States Army Corps of Engineers conducted river stabilization activities on the Missouri side of the river, constructing dikes and levees, to prevent further loss of Missouri land, in an effort to contain the river within the portion of the flood plain which it occupied at this time. The structures which were put in place along the northeast side of Squaw Bend had the effect of forcing the flow of the water back toward Nebraska and Kansas, and this evidently resulted in a gradual increase in the amount of water flowing down the minor westerly channel which had recently formed.

1940 to 1956 – The minor westerly channel came to be known as "the slough", but it continued to be dry most of the time, flowing only in times of high water, and Green or her predecessor continued to utilize nearly all of the land between the bluff and the river as cropland, with the exception of those areas that were occupied by trees. By the end of this period the railroad track had evidently been removed and Kansas Highway 7 occupied the strip near the foot of the bluff which had once comprised the railroad right-of-way, about a mile west of the river. Whether or not Green ever

resided in this location is unknown, but it appears that she lived elsewhere, since there is no indication that any buildings were ever erected in the area between the bluff and the river.

1957 to 1959 – The slough may have widened and become more prominent at this time, leading employees of Kansas to examine that portion of the land lying between the slough and the river which extended south from the Nebraska line, consisting of about 75 acres in the form of a triangle, most of which was under cultivation by Green. State officials, and possibly others including Ector, who was presumably a neighbor of Green, apparently contacted her, and suggested that the land east of the slough was actually an island, thereby questioning her title to that area. Green responded to this challenge to her land ownership by filing a quiet title action against all of the relevant parties, seeking judicial verification that all of the land between Highway 7 and the main river channel, in the position which it occupied at this time, belonged to her.

Green argued that she held title to all of the land south of the state line extending eastward from Highway 7 to the west bank of the main river channel, stretching all the way across Section 4, because all of it had attached itself to her riparian lots in Section 5 through accretion and reliction. She further argued that the land east of the slough was not an island, it was accreted or relicted land, no different than the land between the slough and the highway, and those 2 areas had merely become physically separated by the development of the slough channel, subsequent to the exposure of the former riverbed. She also asserted that the appearance and development of the slough represented an avulsive event, so the area cut off by the slough was still part of her expanded lots and therefore still belonged to her. The neighboring land owners and other individuals who Green had listed as defendants, such as Ector, raised no challenge to her title and dropped out of this litigation, but Kansas chose to engage in battle with Green, and set forth an argument maintaining that the area between the slough and the river was a genuine island, which constituted property of the state, by virtue of having arisen from the bed of a navigable river after statehood. Kansas further argued that the land in question was indisputably part of the originally platted riverbed, so Green could not successfully claim to own that area, because she could not prove exactly how or when that land had become unsubmerged. Kansas also alleged that the contested area had really first emerged from the river as a sandbar, comprising a body of land which was separate from the land that accreted or relicted to the Green lots west of the slough, and that sandbar had grown into an island, disconnecting Green's tract from the main river channel, so the slough channel, and not the main channel, marked the eastern boundary of the Green tract. The trial court ruled in favor of Green, finding that she had adequately proven that all of the land which her family had been using had in fact originally formed as one continuous body of land, which was only later avulsively penetrated by the slough channel, so for purposes of title no island ever existed, quieting her title to the entire area in contention.

Green had both a substantial burden of proof and a formidable opponent, but she and her legal team carried their burden to gather valuable historical evidence quite admirably, and that was a relatively complex task in this case, because she had to present

proof of both accretion and avulsion in order to prevail. She first had to present evidence that all of the land west of the river and east of the platted location of her lots in Section 5 had formed through accretion or reliction that attached to her lots, vastly expanding the size of her property, far beyond the acreage that comprised her lots when they were platted by the GLO. In addition, in order to eviscerate the island theory, she had to show the sequence in which the key events occurred, because it was necessary for her to prove that the formation of the slough was the most recent event, and that it represented an act of avulsion, which was incapable of cutting her tract off from the river by relocating her east boundary. The fact that the land appeared to be an island when it was viewed at high water by state personnel triggered this controversy, but they were about to learn that not all land which has the appearance of an island is legally an island, because avulsion has the capacity to create islands which are not independent land forms for purposes of title, and the principle of avulsion stands in legal recognition of this fact, thereby protecting valid riparian titles. The state personnel insisted that the land east of the slough was clearly an island, but they were destined to experience defeat, because they simply relied upon the present conditions, and they neglected to research the history of the subject area well enough to ascertain that all of the land west of the river had become unsubmerged long before the slough first formed. The former riverbed was not precisely flat, the Court realized, the original riverbed presumably contained depth variations, leaving ruts in the exposed bed, so it was entirely logical that one of those low areas might later become a minor channel in times of high water, eventually creating a chute, passing through the accretion area held by Green and her forbearers, and the evidence produced by Green indicated that was how the slough originated. The alteration of the eastern bank of the river by human hands, forcing more water to the west, also played a role in the development of the slough channel, the Court understood, and this factor made the Court inclined to agree that the formation of the slough was avulsive in nature, even though it only very gradually became distinct enough to be readily observable, over a period spanning about 3 decades. Given these important factors supporting her position, the Court upheld Green's victory, on the basis that the main river channel had remained her easterly boundary as it moved eastward accretively, expanding her lots in so doing, and the subsequent formation of the slough was an avulsive act, so it could not operate to relocate her eastern boundary or to otherwise reduce her greatly enlarged title:

“... the issue in question is whether or not the real estate involved in this action was formed as part of an island ... the fact that a slough subsequently cut a channel through ... the accretion, isolating it from the rest of plaintiff's land, would not change her title to the property ... under the doctrine of avulsion ... a new channel, in this case a slough, does not change the ownership of the land thereby cut off ... appellant argues ... the tract was formed as an island ... making it the property of the state ... prior to 1900 the river ran along the Kansas side of it's flood plain ... at the base of the Kansas bluffs ... about 1906 land started filling in along the railroad right-of-way ... and rapidly continued to fill in ... the river has maintained it's present location since about 1917 and all of the plaintiff's land had filled in solid ... no slough was there ... willows and grass began to grow by the early 1920s ...

horses and wagons were driven out three-quarters of a mile to the river ... no slough appeared until the late 1920s ... the slough developed after dikes were built on the Missouri side of the river, causing the river to start to swirl on the Nebraska side, and commence cutting through the land ... one witness ... until 1936 ... drove his car across the slough ... one witness ... in 1956 rode out to the area in an automobile ... they crossed a depression about a foot deep ... water did not run through the slough in normal times, but only during periods of high water ... accretion ... operated to produce an expansion of the shore line outward ... appellant contends ... that when the slough cut through an island was formed, vesting title in the state ... the contention is not well taken ... the slough did not form until after the land in question had formed ... the land was formed by accretion and was not formed as an island.”

Green prevailed simply because she produced the superior historical evidence, no one alive knew exactly what had happened as the river relocated itself to the east, half a century before the trial, so no one could definitively state the details of how the disputed area had formed, but the testimony of Green's witnesses was sufficient to conclusively disprove the island theory set forth by Kansas. As the Court's decision here shows, avulsion can be defined as any event, natural or otherwise, which results in the formation of an additional river channel, even a very minimal secondary channel, and such a channel, chute or slough does not represent a boundary or carry publicly held title along with it as it progresses, to the detriment of any party through whose land it may pass. Avulsion does not require the complete abandonment of any previously existing channels, it can result in the existence of multiple channels, and it can occur in a gradual manner, as seen in this scenario, although sudden and violent displacement and inundation of previously unsubmerged land is the typical signature of avulsive action. Quite ironically, the avulsive development of the slough actually took far longer than the relatively short 11 year period during which the river moved about a mile to the east, driven by dramatic erosion, which the Court nonetheless accepted as a legitimate foundation for accretion, despite the rapidity of the river's progression. Avulsion can obviously result directly from human interference with natural stream flow, by which any stream serving as a boundary is deliberately relocated, but it can also take place as an indirect or unintentional consequence of human activity that was not meant to change the course of a stream, as exemplified by the river stabilization work which contributed to this controversy. Avulsive movement, unlike accretive movement, effectively prevents the relocated path of the water from controlling boundaries, and leaves any boundary associated with the subject watercourse in the location which that boundary last occupied immediately prior to the avulsive event. From the standpoint of the land surveyor, when the objective is to assemble evidence pertinent to a determination of accretion or avulsion, trees can represent valuable evidence of avulsion, because trees are typically uprooted and destroyed by erosive action, which supports accretion, so their presence can assist in making the key point that the water was avulsively redirected around the subject area, rather than erosively passing over the surface of that area. As the state employees who observed the Squaw Bend area during the 1950s learned, a physical island may not be a legal island, because an accreted or relicted area does not become an island merely by being cut off from it's estate by avulsive

action, and only by tracing the history of the relevant area can a legally supportable conclusion regarding its possible status as an island be reached. Thus the Court once again shielded a long established land use pattern from attack, through wise application of essential riparian title and boundary principles in this instance, rather than turning to adverse possession, which was unavailable to protect the productive land use that had so long been made by Green and her ancestors from public assault.

Beams v Werth (1968)

Relatively few cases focused upon boundary or title issues have been hotly debated internally by the members of the Court or resulted in serious friction between the Justices, causing them to produce a split decision, but our present case is one of that kind, upon which the 7 distinguished jurists comprising the Court at this time were unable to reach a state of agreement. The thorough historical review of earlier Kansas cases involving issues that concern surveys and surveyors, which we have made in reaching this point, allows us to understand why this case was so judicially controversial. As we have seen, since first adopting the concept of boundary agreement as a source of potentially binding boundary evidence, in the 1887 Sheldon case, the Court steadily became increasingly comfortable with that concept during the subsequent decades. Over a period of about a third of a century, in a line of decisions ranging from the McBeth and Simon cases of the late 1920s to the 1958 Brewer case and the 1961 Ford case, all previously reviewed herein, the Court incrementally lowered the once steadfast partition between title and boundary issues, thereby allowing equitable factors pertaining to title to play an increasingly prominent role in judicial boundary resolution. From a point of beginning in the late nineteenth century, marked by judicial acceptance of express boundary agreements as potentially controlling boundary evidence, the Court had by the 1960s gradually moved toward a much more open and flexible stance on what kind of evidence could nullify surveyed or described boundary locations. This was a natural judicial progression, comparable to that which took place in other western states during the early twentieth century, as with the passing decades courts grew cognizant that it was becoming ever more difficult to link long physically established boundaries to direct or absolute evidence of original monumentation. Thus the protection of such established boundaries, including those which were undocumented or poorly documented, became a judicial priority, causing courts to take a more expansive view of what can constitute valid boundary evidence, and leading some Justices to embrace equitable factors such as boundary acquiescence, thereby enabling such evidence to negate resurveyed boundary locations. The once bright partition between title and boundary issues had thus been substantially eradicated by this point in time, but as the case we are about to review points out, some Justices even during the modern era have declined to accept the proposition that equitable factors have a role to play, along with

legal descriptions and resurveys, in the realm of boundary determination.

1915 – Winters was the owner of the NW/4 of a certain Section 34 in Ellis County, consisting of typical cropland, and there were typical public roads running along both the north and west lines of this section. The north line bore a public right-of-way that was 66 feet in width, while the west section line bore a public right-of-way that was 80 feet in width, and both of these right-of-way lines were fenced, so the north 33 feet and the west 40 feet of the NW/4 were in public use and were uncultivated. How and when Winters had acquired the NW/4 is unknown, and what use he made of it prior to this time is unknown as well, but at this point Struble, who was a nephew of Winters, began farming the NW/4 as a tenant.

1916 to 1926 – Struble raised wheat on the NW/4 throughout this period, and in so doing he used all of the land lying south and east of the right-of-way fences. At the end of this period however, Ellis County proposed to create a curve in the road intersection at the northwest corner of this section, and Winters agreed to convey some of his land adjacent to that intersection to the county for that purpose, but no deed was executed at this time. Nevertheless, the county engineer designed a curve for the proposed modification of this intersection, having a radius and a tangent of 426 feet, and he then staked a curving line on the ground, outside of the existing right-of-way boundaries, to mark the intended location of the proposed right-of-way line cutting through the northwesterly portion of the NW/4. Anticipating that the area which had been staked off was going to be deeded to the county, so it would no longer be available for cultivation, Struble built a fence upon the curved line marked by the stakes, and he then ceased his use of the land lying northwest of the new curving fence.

1927 to 1932 – Winters died, without having deeded any land to the county, but at the end of this period the area required for the proposed road work was deeded to the county by his heirs. The legal description that had been created by the county engineer was used in this transaction, which defined the proposed right-of-way curve in the usual manner, and this deed made no reference to either the stakes set in 1926 or the fence which had already stood upon the staked line for 6 years by the time of this conveyance.

1933 to 1937 – Ellis County dropped the plan to improve the intersection, and therefore soon sold off the small tract that it had obtained in 1932, which was acquired at the end of this period by Werth, after being briefly owned by some other private parties who apparently made no use of it. Werth wanted to verify that the curving fence accurately marked his southeast boundary, so he summoned the county engineer, who met him at the property and after making some measurements told Werth that his tract did indeed extend to the fence.

1938 to 1948 – Werth proceeded to build a gas station and a restaurant on his tract, and he also built a driveway serving both of those buildings, which ran within a few feet of the curving fence for its entire length, providing direct access to his buildings and facilities from both of the adjoining roads. At the end of this period, he closed the north entrance to his parking area, but the driveway running along the fence continued to provide access to both of his businesses from the west road.

1949 to 1955 – The Werth property was used in the typical manner throughout this period, while Struble continued to farm all of the land southeast of the curved fence, but Struble retired at the end of this period and his son took over the farming operations conducted upon the Winters estate.

1956 to 1959 – The son of Struble continued to farm the Winters tract, up to the curved fence, until that tract was conveyed to Schwaller at the end of this period, while Werth and his customers continued to use the driveway on the northwest side of the fence. Schwaller's deed called out the Werth tract as an exception, and it defined the excepted area with reference to the originally intended 426 foot curve dimensions, but the existing fence was not mentioned in Schwaller's deed.

1960 to 1962 – Schwaller developed a plan to subdivide the former Winters tract during this period, but prior to completing his subdivision plan, he conveyed a tract lying in the northwestern part of the NW/4, which included the portion of his land adjoining the Werth property, to the First Southern Baptist Church of Hays. The legal description employed by Schwaller in making this conveyance once again made reference to the southeast boundary of the Werth tract by defining it in terms of the 426 foot radius and tangent, in accord with the prior descriptions of that line, but again no reference was made to the existing curved fence. What use was made of the land acquired for church purposes by the church personnel is unknown, but no use was made by them of any of the land on Werth's side of the curving fence.

1963 to 1967 – During this period Schwaller finished the design work on his subdivision, but while completing the survey work on that subdivision Schwaller's surveyor discovered that the curved fence was actually located about 30 feet too far southeast, in relation to the described location of the boundary which that fence had long been thought to stand upon. Schwaller's surveyor came to the conclusion that the county engineer had either incorrectly staked the curve in 1926, by mistakenly applying the centerline radius to the right-of-way line, or the curve's intended location had been wrongly described, if the 426 foot radius was actually meant to apply to the right-of-way line rather than the section lines, which formed the centerline of each of the abutting public roads. Upon learning about this discrepancy, Beams, who was one of the church trustees, filed an action against Werth and Schwaller and the heirs of Winters, seeking to quiet the title of the church to all of the property described in the deed to the church, which included the

30 foot strip on Werth's side of the fence.

Beams argued that the church was entitled to all that part of the NW/4 lying southeast of the 426 foot curve in question, regardless of the presence of the curving fence, and regardless of the prior use of the land on each side of that fence, which had been made by Werth and by the Winters family. Beams further argued that the various legal descriptions which had been used to describe the curved boundary over the years were inconsistent and had been misunderstood by all parties, thus the boundary at issue had remained ambiguous and unclear at all times, and no agreement that the curved fence represented that boundary had ever been made, so the existing fence could not control over the numerically defined boundary location. Beams also maintained that adverse possession was inapplicable to the circumstances of this case, because the original placement of the fence itself was a mistake, and the subsequent treatment of the fence as a boundary was simply a product of ignorance on the part of all of the parties who had made use of the land, so under the mistake doctrine none of the land use made by Werth qualified as adverse. Werth argued, on behalf of himself and his fellow defendants, that the county engineer had personally verified to him that the curved fence represented the originally intended location of the disputed boundary, so the fenced line controlled over the mistakenly described boundary location. Werth alternatively argued that even if the fence had not been accurately placed, and was not in its originally intended location, it represented a legitimate agreed boundary, which had been implicitly accepted and adopted as a mutual boundary by all of the parties, who had allowed it to function as a boundary at all times for decades, so it controlled over the described location on that basis. The trial court found that the fence in question simply represented a plain mistake, wrongly relied upon by all parties as a boundary, so the fence could not control the contested boundary by virtue of either adverse possession or boundary agreement, and therefore ruled in favor of Beams and the church, quieting their title up to the numerically defined boundary, thereby allowing the church to relocate the fence to that line and take control over Werth's driveway.

The variety of arguments presented by the litigants in framing this case required extensive treatment of this conflict by the Court, resulting in one of the longest opinions generated by the Court up to this time for the purpose of addressing a boundary location issue. Adverse possession was not a serious factor in this case, because all of the parties agreed that mistakes had been made, either in describing the 1932 conveyance or in staking the land conveyed at that time, and perhaps mistakes had been made in both of those respects, so in the view of this scenario taken by the Court, the mistake doctrine made adverse possession inapplicable. The litigants actually reached a formal stipulation specifying that adverse possession was the real basis for Werth's position, but the Court chose to simply bypass that matter, since it was unnecessary, in the view of the Court, to introduce adverse possession into the legal and equitable equation, in order to resolve the boundary and title issues which this situation presented. The issue relating to the allegedly erroneous manner in which the Werth tract had been described over the years was discussed at length by the Court, but was also deemed to be irrelevant, because none of the parties had proposed an alternate means of describing the curving line, or expressly requested judicial reformation of any legal descriptions. How the curved line in contention was described after 1932 was inconsequential, the Court decided, because the boundaries of

the Werth tract, and all of the rights associated with it, were created at that time, and were not subject to modification by means of any other descriptions which appeared thereafter. There was no indication of any mislocation of the relevant section lines, which served as control for the survey work done in both the 1920s and the 1960s, so the true crux of this controversy related to whether or not the boundary staked on the ground by the county engineer in 1926 was to be regarded as an original boundary. None of the parties expressly set forth the proposition that the fence amounted to a perpetuation of an original boundary line however, so the Court chose to resolve this dispute on a different basis, which brought about the same result that declaring the fence to be original boundary evidence would have produced. As noted in the introduction above, this case poignantly shows just how deeply divided the Court was at this time on the proper handling of evidence that indicates the presence of both boundary and title issues, which brings the various principles that are applicable to each of those sectors of the law into play. By only a 4 to 3 vote, the Court deemed it necessary to reverse the lower court decision, in order to protect the land rights of Werth up to the physically established boundary, by invoking the equitable doctrine of boundary acquiescence, to support the agreed boundary premise set forth by Werth:

“The property here in controversy is ... located between the curved fence line ... and a radius of 426 feet ... the church claims the tract conveyed to it extends beyond the fence line ... there never was a road dedicated or vacated at the place in question along the fence line ... to the south and east side of the fence the land had been continually farmed ... engineering witnesses assumed ... the curve in the description was erroneous ... the conclusion drawn from such testimony was that the Werths ... did not have legal title to the disputed tract ... the fallacy of the plaintiffs position lies in the assumptions made by their expert engineering witnesses ... mistakes were made in the deeds describing the land conveyed to the Werths and their predecessors ... the mistaken description was prepared by the county engineer ... this action cannot be converted into an action to reform a deed ... plaintiffs are bound to stand upon the description of the property conveying the Werth tract ... Struble ... farmed the land continuously for a period of approximately 40 years ... Struble built the fence around the curve going by the stakes, placing posts wherever there was a stake ... and maintaining the curved fence at the same location ... until 1959 ... no one ever questioned the fence ... Werth ... in 1937 called the county engineer ... the county engineer told Werth his property was over to the fence line ... the testimony of Struble suggests an agreement between Winters and Ellis County to fix the boundary ... along the fence line laid out by the county engineer ... more than 30 years the property owners ... acquiesced in the line so agreed upon ... it must be considered as the true boundary ... surveys merely establish boundary lines and do not determine title ... the trial court erred ... in entering judgment quieting the plaintiffs title ... the property owners immediately adjacent to the fence line acquiesced in the line as the boundary, the fence line constituted the true

boundary line between the adjoining tracts.”

The majority elected to turn to boundary acquiescence as the controlling element emerging from the evidence, and the most suitable basis upon which to dispose of this conflict, clarifying that acquiescence alone can control boundaries in Kansas, independent of adverse possession. A fence that was built on a line staked by a county engineer supports acquiescence in the boundary context, the majority decreed, declining to penalize Werth for any errors that may have been made the county engineer, either in staking or in describing the Werth tract. As this outcome demonstrates, mutual boundary acquiescence can operate to support the right of reliance of all grantees upon any boundary which was physically marked for the use of the grantee, such as Werth and his predecessors in this instance, by any party possessing the authority to execute that task. Mutual recognition of a fence or other linear object as a boundary can represent a de facto agreement to fix or settle an uncertain boundary location, the majority informed the litigants on this occasion, resulting in an implicitly agreed and binding physical boundary, even in the absence of definitive evidence of any specific verbal boundary agreement. Here the majority followed the principle that acquiescence does not require any passage of time to become binding, while also indicating that mistaken beliefs, opinions or impressions regarding boundary locations are irrelevant to acquiescence, because all grantees have the right to accept physically established boundaries just as they find them, without examining or questioning the precision or accuracy with which those boundaries may have been marked or described. Agreed boundaries are not negated by the statute of frauds, the majority also reiterated, since a binding state of boundary agreement can be supported either by the mutual actions of adjoining land owners, or by their mutual inaction, which can function as evidence of their mutual satisfaction with the boundaries that visibly divide their respective lands, effectively rendering their legal descriptions moot. In addition, the majority adhered to the judicial position that even entirely accurate resurveys can have no altering impact upon physically established boundaries, because surveys cannot reduce or enlarge title or ownership, which is controlled solely by those acts and communications in which the land owners themselves engage, making the survey that revealed the fence location discrepancy, 4 decades after the fence was built, legally useless to Beams and his fellow trustees. As this case well illustrates, and as we will observe again in reviewing subsequent cases, physical boundary evidence typically controls over documentary evidence pertaining to boundaries in the eyes of the Court, so when adverse possession is unavailable or inappropriate for any reason, the equitable alternative presented by the doctrine of boundary recognition and acquiescence can accomplish the same judicial objective, which is to enforce repose.

The 1970s - Judicial Perspective on Adverse Possession Redefined

The 1970s marked the first full decade of land surveyor licensing in Kansas, which had commenced in 1969, but while this milestone for the land surveying profession undoubtedly enhanced the status of land surveyors in the eyes of the Court, by providing assurance that the long established Kansas survey standards were being enforced, it had no direct impact on the application or operation of judicial principles pertaining to title and boundary resolution. The overall integrity and reliability of land survey work presumably

improved at this time, since the arrival of licensure meant that unqualified individuals could no longer legally function as land surveyors, and it meant that the proficiency of those approved to conduct survey work was being monitored to some extent and presumably wisely guided as well. During this same time period however, the use of adverse possession for boundary resolution purposes was dramatically expanding, facilitated by a subtle but very powerful change in the statutory language defining the parameters of adverse possession in Kansas. As documented earlier herein, adverse possession was tightly restricted to the realm of title law during the first several decades of statehood, and was not allowed to alter or impact boundaries in any respect, so the early adverse possession cases are all battles over the ownership of entire properties, which involve no boundary issues. By this point in time however, most adverse possession cases were generated by boundary disputes, rather than title conflicts, and as we have observed, this transition had come to pass because the Court had approved numerous exceptions to the mistake doctrine, which was the judicial device that had long been exercised by the Court for the purpose of preventing adverse possession from controlling boundaries. Recognizing that the partition between title law and boundary law had dissolved, allowing adverse possession to be applied to fragmentary areas as well as entire properties, the Kansas Legislature took action in the early 1960s, effectively enabling adverse possession to legitimately control boundaries, by creating a second legal channel through which adverse possession could be utilized. The legislative elimination of the hostility requirement for adverse possession validated the Court's increasingly dismissive position on the mistake doctrine and created a supportive legal structure for adverse possession completed in good faith, thereby authorizing the creation of original boundaries by means of adverse possession, which negates boundary locations of record and amounts to de facto boundary relocation. Under this statutory mandate, adverse possession can be completed in Kansas either through genuinely adverse intent or in the absence of any such intent, and as we shall see, each of these separate forms of adverse possession follows a distinct track during litigation. This development set the stage for much broader use of adverse possession in the boundary context in Kansas, ultimately producing a very substantial increase in the number of cases leveraging adverse possession as a tool for boundary adjustment, to which we will bear witness, as we proceed through the subsequent decades. In addition, this decade marks the return of the Kansas Court of Appeals, which in 1977 was authorized by the Court to serve as the principal handler of land rights in Kansas, a task which it has carried out since that point in time.

The case of *Stark v Stanhope* (1971) confronted the Court with a unique scenario, which required it to consider and determine for the first time whether or not the presence of a public access route passing through an adversely held area had the legal effect of negating the otherwise adverse use of the land traversed by the road. In 1883, a rectangular 7 acre tract was carved out of the SE/4 of a certain Section 8 in Chautauqua County for school purposes and was acquired by the local school district. This tract was presumably used as intended over the following decades, but it eventually became unnecessary for school purposes, so the school buildings which occupied it were removed and it was left vacant and abandoned by the school district. By 1940, the western portion of this tract, containing about 2.5 acres, was being used by the public as a cemetery, and a road running west across the eastern part of this tract, from the east line of Section 8, was being used to access the cemetery. In 1944, a cemetery district was created by the county,

and county employees began maintaining the cemetery and the entrance road, but they made no use of the rest of the 4.5 acre area east of the cemetery, although cemetery visitors often parked along that road and walked west into the cemetery grounds. In 1950, the 2 acre area lying north of the road and east of the cemetery was acquired by Stark, but rather than using only the 2 acres that he had acquired, he used the entire 4.5 acre area east of the cemetery. He built a house north of the road, cleared the overgrowth from the area south of the road, and made a hay field out of that 2.5 acre area, while also planting numerous trees south of the road. He evidently soon became annoyed by people parking along the road, so he fenced off the road, forcing the cemetery visitors to drive further west and park within the cemetery parcel. County personnel and other users of the entrance road, presumably including Stanhope, questioned Stark's right to fence off the road, but the road remained fenced. In 1968, having made sole use of the east 4.5 acres of the tract at issue, with the exception of the strip comprising the roadway, for well over 15 years, Stark filed a quiet title action, seeking to have his title to that whole area judicially confirmed. The trial court rejected Stark's position, and refused to quiet title in him to either the road or the 2.5 acres lying south it, but noting for the first time that since 1964 adverse possession could be completed in Kansas either with or without hostile intent, under statute 60-503, the Court reversed that decision and ruled that Stark had adversely acquired all of the land within the contested tract lying east of the cemetery parcel. By controlling all use of the 4.5 acre area in question, Stark had demonstrated his complete dominion over all of the land in contention, including the road itself, the Court held, so he had become the fee owner of the entire 4.5 acre remainder of the 1883 tract, and the public was left only with an access easement, to facilitate the ongoing use of the road through Stark's land by cemetery workers and visitors. The presence of public land rights, even those which are in active use, within an adversely held area, does not necessarily negate an adverse acquisition, the Court thus concluded, if the adverse party effectively limited or regulated the public land use, conducting himself as a typical land owner in so doing, and thereby exercising the degree of control over the land necessary to meet the requirements of adverse possession. Clearing brush, harvesting hay, planting trees and preventing parking are all acts constituting adverse land use, the Court specified here, reiterating that no buildings or other permanent structures need be erected to successfully complete adverse possession. In addition, an adverse holder of land need not possess any color of title, or pay any property taxes, in order to validate his land use, the Court reminded the vanquished defendants, thus producing the inaugural adverse possession ruling of the modern era, under statute 60-503, which heralded increasingly extensive judicial reliance upon adverse possession in Kansas.

While flooding is typically associated with avulsion rather than accretion, and flooding is in fact the principal form of genuinely avulsive activity, not every flood amounts to an avulsive event, and in reality most floods leave all prior conditions intact, once the flood waters subside. In the wake of each flood event, the principal boundary question is whether or not the river's location changed, and if it did change materially, then the second important question is whether the river's resulting location represents an entirely new channel, forming a branch departing from the prior channel, or merely a marginal shifting of the location of the previously existing channel, produced by erosion. The factual evidence provided by the Court in documenting the case of *Rieke v Olander* (1971) is highly minimal, yet this case is worthy of note, because it illustrates an important lesson

regarding the relationship between boundaries of different types that were created by the GLO in the riparian context. The Kansas River evidently passed through the north half of a certain Section 27 in Leavenworth County, and Rieke was the owner of the land lying north of the river in the NW/4 of that section, while Olander was the owner of the SE/4 of the adjoining Section 22, but who owned the NE/4 of Section 27 is unknown. How and when each of these parties acquired their respective quarters is unknown, but it appears that both families had already been farming their lands for decades by 1951, at which time a major flood took place, apparently relocating the river an unspecified but substantial distance to the south. After the river thus relocated itself, both parties extended their land use southward to the river, separated by a fence which evidently stood upon the east line of the NW/4. Olander had never acquired any land in the NE/4 of Section 27, but he evidently nonetheless used all of the land in that quarter, so he gained the use of a very substantial amount of acreage as the river moved southward away from Section 22. Eventually however, Rieke apparently realized that the land in the NE/4, having been exposed by the river's southward movement, could potentially be regarded as accretion to his quarter, so he filed a quiet title action claiming the NE/4 on that basis, but the trial court declined to accept his assertion, and quieted title to the NE/4 in Olander instead, based on adverse possession. The Court upheld that decision against Rieke, informing him in so doing that it really made no difference whether the land in the NE/4 of his section had formed as accretion or avulsion, because both accretion and avulsion are subject to adverse possession, so Olander had adversely acquired that quarter, through his family's sole use of it for well over 15 years. Rieke apparently believed that he held a clearly superior claim to the land that had formed in the NE/4, because his land was situated within that same section, while Olander's land was situated in an entirely different section, therefore the claim set forth by Olander crossed a section line, while the claim made by Rieke did not. Rieke learned the fallacy of his notion that section lines represent impenetrable boundaries however, as the Court's decision here served to once again highlight the fact that neither accretion nor adverse possession can be stopped by a section line. Platted PLSS boundaries are incapable of halting the progress of accretion, the Court understood, because once a river is documented on a GLO plat as a boundary it represents a natural monument, and it retains that status wherever it moves, unless it can be shown to have moved avulsively. The artificial monuments set by the GLO at section corners are thus distinctly secondary in importance to the river itself in the context of boundary control, the Court recognized, because an ambulatory natural boundary simply absorbs and eradicates all such artificial boundaries as it erosively devours and submerges them, in accord with the well known principle that natural monuments have primacy over artificial monuments.

Only rarely has the Court expressly negated the controlling value of survey work which was done under the statutory process for the resolution of boundary disputes in Kansas by means of a resurvey. One example is *Childers v Hoffer* (1954) in which the Court struck down a survey of a presumably typical platted lot, which had been approved by a lower court, because the point of beginning adopted by the surveyor was a point of questionable origin located in a different subdivision, an unspecified distance away from the lot being surveyed. Aside from nullifying such patently flawed survey work however, the Court typically refrains from scrutinizing the technical aspects of such work, and allows all surveys to stand, unless the results of the survey bring it into conflict with principles of law or equity, and *Frey v Master Feeders (MF)* (1971) is a prime example of

the Court's inclination to approve all surveys which meet the very basic requirements of the Kansas statutory resurvey process. A certain Section 26 in Haskell County, situated in a township which had been platted by the GLO during the 1880s, was resurveyed during the 1920s and the section corners were evidently all either found and re-monumented or reset by unknown means at that time. Additional survey work was evidently done in the subject area during the 1930s and the veracity of the section corner monuments thus reset was reinforced by repeated acceptance and use of those positions by subsequent surveyors. In 1969, MF proposed to acquire the west half of that section, and in June a survey was done at the request of MF by the county surveyor, during which he reset the relevant quarter corners and found that a certain fence of unknown origin was about 50 feet west of the east line of the west half, although exactly how he reset those quarter corners is unknown. Upon learning of this situation, Frey and Cook, who owned the east half of the section, stated that they wanted a statutory resurvey done, and MF agreed to that proposal, so a specific time and date in July was set, and the parties agreed to meet for that purpose at the appointed time, but no one other than the county surveyor showed up at the agreed meeting location. The county surveyor then simply proceeded to flag up all the same corners that he had already set in June, and when the parties eventually showed up later in the day he showed them those corners. Frey and Cook were evidently disgruntled, since they apparently expected an entirely new and different resurvey to be performed in July, rather than a mere reiteration of the June survey, with which they were unsatisfied, so they filed an action challenging the validity of the resurvey. The trial court upheld the resurvey however, and the Court upheld it as well, over the protests of Frey and Cook, who attacked the survey on the grounds that it was not done on the appointed day, as had been agreed, and it was done by an unlicensed surveyor. The Court informed the plaintiffs that the law required the county surveyor only to be a "practical and competent surveyor", while also pointing out that they had failed to uphold their agreement to show up and participate in the July resurvey, so they had no basis upon which to attack the surveyor for failing to complete his work in their presence on that date. Frey and Cook made the fundamental mistake of failing to specify exactly how the surveyor allegedly erred in conducting the June survey, the Court recognized, so their appeal was utterly baseless, making it unnecessary for the Court to look into any of the technical aspects of the survey work that had been done. Whether the surveyor had overlooked any potentially original boundary evidence, whether he had rightly or wrongly relied on monuments set during prior resurveys, and whether his measurements were correctly made or not, were all issues which could have been argued by the plaintiffs, but since they raised no such issues, the Court declared that the survey conclusively controlled the line in question. Thus on this occasion the Court poignantly highlighted the fact all resurveys done by a duly authorized party carry a presumption of correctness, so in order to prevail, any party challenging a resurvey bears the burden of proving that the survey work was erroneous in some specific respect, rather than merely stating that they find the results of the survey to be repugnant.

The case of *Gnadt v Durr* (1972) marks a very rare occasion, upon which payment for a survey was the central issue before the Court, and much like our last case, this one also shows that a land owner cannot turn his disagreement with the results of a survey to his own advantage, unless he can prove that the surveyed boundary location is meaningless, because his title extends to a different location. *Gnadt* was evidently the owner of a tract of unspecified size, shape and location in Wabaunsee County, which was

bounded by an unspecified number of other tracts. One of Gnadts neighbors evidently requested a statutory survey in 1969, and one of the boundaries of the Gnadts tract was therefore resurveyed by Durr, who was the county engineer and who apparently also functioned as the county surveyor. The report filed by Durr pertaining to this resurvey evidently indicated that he found all of the controlling corners intact, and no corners were set during the resurvey, although whether the monuments he located were original GLO monuments or subsequent perpetuations is unknown. Gnadts was unsatisfied with the results of this resurvey, since he believed that some land had been taken from him by Durr and awarded to his neighbor, but Gnadts chose not to file any appeal, so the resurvey became legally conclusive once the appeal period expired. Several months later, in 1970, Gnadts got a bill for his share of the cost of making the resurvey, but rather than paying the bill Gnadts filed an action against Durr, alleging that Gnadts bore no obligation to pay for any portion of the resurvey, on the grounds it had proven to be harmful rather than beneficial to him. The trial court rejected all of Gnadts assertions however, ordering him to pay the amount for which he had been billed, and the Court upheld that decision, finding that the bill in question was fully authorized under statute 19-1427, which required the county surveyor to assess and distribute the costs of each statutory survey among all of the parties who were deemed to benefit from it. Gnadts protested that he had never wanted the survey to be done, and no new corners were set during the survey, and he had lost land as a result of the survey, so he could not legally be regarded as a beneficiary of the survey. The Court informed Gnadts however, that the fact that he was displeased with the amount of land with which he was left as a consequence of the resurvey was immaterial, he did in fact benefit from the resurvey, just like every other land owner whose boundaries were thereby clarified, through the discovery of the controlling boundary monuments that were uncovered during the resurvey. The value of a resurvey is not to be measured, the Court stipulated, by how many people requested it or wanted it to be done, or by whether or not all of the parties are pleased with the results, or by how many corners are set during the resurvey, recognizing that setting corners would be senseless when original corners are present, and verifying that finding and identifying existing monumentation is just as important and valuable as setting new points. Each relevant land owner must pay his assessed share of the cost of any statutory survey, the Court thus confirmed, even if he did not request or want the survey, and he disagrees with the results of the survey, and he believes that the survey accomplished nothing, because the boundary certainty provided by such surveys is fundamentally beneficial to all members of our society. In conclusion, the Court reminded Gnadts that he had not in fact lost any land as a result of the resurvey in question, because resurveys are incapable of either adding or removing any land, to or from any existing properties, since surveys do not operate upon title. Any boundary locations "established" or "determined" during a resurvey can be negated and rendered irrelevant through a quiet title action, the Court reiterated here, when evidence that other boundaries have been honored for purposes of title is produced.

As we have repeatedly observed in traversing the prior decades of land rights adjudication in Kansas, the outcome of any dispute or conflict over property rights between neighboring parties is often dependent upon whether or not a grantor and grantee relationship exists between either the present parties or their predecessors, and the importance of this crucial factor is particularly well illustrated in *Fritzler v Dumler* (1972). In 1955, Fritzler acquired 2 adjoining vacant platted lots, situated just south of Russell,

which were bounded on the east by Highway 281. These 2 lots both had 150 feet of frontage upon the highway, but whether the side lines of these lots were perpendicular to the highway or not is unknown. Whether or not any of the corners of Fritzler's lots were marked on the ground is unknown, but by some unknown means, apparently without the assistance of any surveyor, he ascertained the approximate location of his boundaries, and in 1956 he built a house on the south lot, while leaving the north lot vacant. He also planted a row of trees north of his house, which he intended to place on the line between the 2 lots, and he then sold the vacant north lot to Anschutz. Fritzler told Anschutz that the tree line was the lot line, but Anschutz apparently did not care, since he had no intention of building anything on the north lot, and he evidently never had his lot surveyed. In 1958, Anschutz sold the still vacant north lot to Dumler, and he told Dumler that the tree line was the lot line, so Dumler acquired that lot on the assumption that the trees marked his south boundary, and just like both of his predecessors he ordered no survey of his lot. Dumler proceeded to build a house on his lot and occupy it in the normal manner, but in 1969 he had his lot surveyed, and he then learned that his south lot line was actually about 7 feet south of the tree line, so he informed Fritzler that he wanted the trees removed from his lot. Fritzler took no action however, so Dumler plowed out all of the trees with a tractor, which prompted Fritzler to file an action seeking to quiet his title extending northward beyond the lot line to the former tree line. Fritzler maintained that the tree line was an agreed boundary, which made the platted lot line location unimportant, since he had never intended to sell any land south of the trees, stating that he had told Anschutz that only the land north of the trees was being conveyed to him, but the trial court declined to accept the tree line as an agreed boundary and refused to quiet Fritzler's title to any portion of the north lot. Observing that the deeds held by Anschutz and Dumler made no reference to the tree line, and described the north lot only by lot number, the Court upheld the decision against Fritzler, rejecting his assertion that boundary acquiescence was applicable to the tree line. Fritzler pointed out that many prior rulings of the Court indicated that grantees have the right to rely upon boundaries physically marked by their grantors, suggesting that under that principle Dumler was bound by the tree line, rather than the lot line defined in his deed. The Court informed Fritzler however, that he was in no position to set forth such a suggestion, since his own negligence, in failing to properly ascertain the location of the lot line at issue when he planted the trees, was the real source of the whole controversy, so the matter was controlled instead by the principle that a grantor cannot leverage his own negligence. The trial court had correctly disregarded the tree line, the Court concluded, and Dumler, as the successor of Fritzler's grantee, was entitled to the full platted lot referenced in his deed, even though Dumler had neglected to verify the location of the lot line in question before acquiring that lot, because as a grantor Fritzler could not equitably be allowed to benefit from his own boundary mistake. Thus the Court clarified that although a physically marked boundary pointed out by a grantor can be relied upon by a grantee, the grantor cannot take advantage of his own mistaken boundary representations, against his own grantee or his grantees successors, the grantor is bound by the described location which he unwisely employed, contrary to his own real intentions, when deeding away part of his land, without adequate verification of his boundaries.

The Court was once again required to assess the legitimacy of the concept of adverse land use made in good faith at this juncture, this time in the easement context, in the case of *Armstrong v Cities Service Gas (CSG)* (1972). This relatively simplistic

prescriptive easement case was destined to become a frequently cited judicial landmark in Kansas, because it marks the moment when the Court permanently abandoned the line of judicial thought under which all adverse land rights were fundamentally linked to the concept of hostility. From this point forward, the Court has embraced the modern form of adverse possession, outlined in statute 60-503, which focuses upon objective analysis of land use, and honors the value of all land uses made in good faith, thereby enabling established land use patterns to control both titles and boundaries. Armstrong was the owner of an unspecified half section near Lawrence, and when he died in 1916 he left his land to the unborn children of his 12 year old grandson Leland, but he also provided in his will that Leland would hold a life estate in the Armstrong property. In 1929, Leland granted an easement to CSG, and a gas pipeline was installed across the Armstrong tract, which was then put into operation and remained in operation henceforward. In 1968 however, the children of Leland learned that they were the real owners of the Armstrong tract, and not their father, so they filed an action challenging the validity of the 1929 easement granted by their father to CSG. The Armstrong heirs insisted that CSG had not legitimately acquired the gas line easement, because their father was never the legal owner of the Armstrong tract, so he was legally incapable of granting any such easement. The trial court silenced their assertion however, by declaring that CSG had acquired the easement in question through prescription, under statute 60-503, since CSG believed that Leland was the legal owner of the Armstrong property when the easement was documented, thus CSG qualified as an adverse party who had acted in good faith. The Armstrong heirs protested on appeal that the trial court had wrongly applied statute 60-503 to this scenario, because that statute was enacted in 1964, so it could not control anything that happened prior to that date. By a majority of just 4 to 3, the Court upheld the lower court decision, confirming that statute 60-503 was retroactive in nature, so it was in fact available to support the existence of the CSG easement, thereby eliminating any need to determine whether the 1929 easement deed was really legally valid or not. In ruling here that an easement acquired from a mere life tenant, who is not a fee property owner, can be validated by statute 60-503, under the same parameters that are applicable to adverse possession, the majority established that as of 1964 hostile intent is no longer required to prove and prevail upon adverse possession of land in fee, or upon the formation of a prescriptive easement, in Kansas. The Court's adoption of this position has subsequently served as an important reference point, since it represents judicial acknowledgement of the intent of the Kansas Legislature to relegate the mistake doctrine to the past, by codifying the concept that adverse possession is controlled purely by land use, regardless of whether that use is based upon genuinely hostile intentions or simply upon some form of mistake made by parties innocently acting in good faith. Emphasizing the value to our society of placing all long established land rights in repose, while once again utilizing adverse possession to render a questionable acquisition of land rights effective, the majority thus defined the perspective which would govern the use of adverse possession in Kansas going forward:

“In the language of the statute, belief of ownership has been substituted for the common law element of hostile holding ... hostile holding involves intent ... beneficial and productive use of land ... will be accomplished more often under ... belief of ownership ... statutory authorization of adverse possession ... gives protection to those who in good faith enter and hold possession of

land ... these enactments rest upon a wise public policy which regards litigation with disfavor and aims at the repose of conditions which the parties have suffered to remain unquestioned long enough to indicate their acquiescence therein ... the purpose of these enactments is to quiet title to land, and neither the power of the Legislature to do so, nor the wisdom of doing so, is open to question ... a defect in title is not sufficient to impeach the good faith of a claimant ... adverse possession presupposes a defective title ... it is a ripening of certain types of possession into title by the lapse of time ... the Kansas Legislature has authorized that possession to be under a belief of ownership, which concept may not be judicially nullified.”

The movement of a river once again became a source of controversy in the case of *Schaake v McGrew* (1973) which provides a superb example of the persuasive force and value of solid historical documentation as evidence, whenever the legal effect of substantial changes in riparian boundary locations becomes an issue. The Schaake family acquired a tract consisting of about 300 acres of typical cropland in 1889, which was bounded on the north and on the west by a portion of the Kansas River that passes near Lawrence. Both the use of the land and the behavior of the river in this area during the late nineteenth century and the early twentieth century were matters of no concern to the Schaakes for several decades, although they presumably realized that the size of their property was being reduced to an unknown extent by the river's action at all times. In 1951 however, the portion of the river adjoining the Schaake property moved dramatically to the southeast, by about 600 feet, during a flood, and the river evidently continued to migrate in a southeasterly direction over the ensuing years, eventually reducing their property remaining southeast of the river to only about 10 acres. In 1967, Lawrence condemned an area that was comprised of about 200 acres, which was situated directly across the river from the area farmed by the Schaakes, for the creation of a flood control facility. The condemnation award was bestowed upon the McGrews however, rather than the Schaakes, since the McGrews had been farming all of the land on the northwest side of the river since acquiring their property in the 1940s. The Schaakes decided to protest that decision, so they filed an action alleging that they were the real owners of the condemned land, on the basis that it was all clearly within the described sectional boundaries of their property. The trial court rejected the Schaakes assertion however, holding that they had lost the 200 acre area lying northwest of the river, which they had once owned, to adverse possession by the McGrews. Observing that the McGrews had come to this battle very well armed, with an extensive array of aerial photography spanning the decades, the Court upheld the lower court ruling that by 1967 the Schaake property had been reduced from 300 acres to only the 10 acres still lying southeast of the river. The Schaakes protested that the river's movement had been primarily avulsive, resulting from the 1951 flood, rather than being accretive in nature, so after 1951 the river was no longer their northwest boundary. The photographic evidence presented by the McGrews indicated the contrary however, the Court noted, pointing out that the photos showed that the river had moved continually southeast over a long time period, and just as importantly, the photos all showed that the Schaakes had never used any land northwest of the river, revealing that they had always regarded the river as their northwest boundary, which conclusively supported adverse

possession of the whole contested area by the McGrews. Thus the Court reiterated here that any land representing either accretion, reliction or avulsion can be lost to adverse possession, if left unused and available to others by the land owner of record for any reason, including ignorance of riparian law on the part of the record owner. Whether the land at issue in this instance was truly accreted land, or avulsed land, or a combination of both, which was most likely the case, was of no consequence, the Court informed the Schaakes, because having abandoned it, they were not entitled to any of it under statute 60-503, regardless of the fact that it was within their originally deeded boundaries. Thus the Court verified that typical agrarian land use supports adverse possession of riparian land, regardless of whether that land was formed by accretive and erosive forces, or disconnected from the other property of its record owner through an act of avulsion, thereby confirming that adverse land use can control riparian boundaries, just as it does boundaries of all other varieties.

Less than a year after our last previous case was addressed by the Court, another controversy involving adverse possession in the riparian context came to the Court for review, in *Morehead v Parks* (1974) which yet again demonstrates how adverse possession serves the Court as a versatile and flexible tool covering land rights conflicts of many kinds, such as one resulting from a description error in this instance. The Parks family owned a typical riparian tract comprised of cropland situated in the SE/4 of a certain Section 23 in Riley County, which was bounded on the east by the Kansas River. How and when they acquired this tract, and whether they resided upon it or not, are both unknown, but during the early part of the twentieth century the river evidently migrated eastward an unspecified distance, so by the 1930s the west bank of the river was east of the platted line between Sections 23 & 24. As the river moved, the Parks family apparently continued using all of the land west of the river, lying between the northerly and southerly boundaries of their tract, so while their frontage upon the riverbank remained the same, both their north and south boundary lines were eventually extended about 1000 feet past the originally platted location of the east line of Section 23. In 1945, the accreted area was acquired by Parks from his aunt and uncle, by means of a quitclaim deed, but the legal description they used mistakenly described the deeded land as being in the NW/4 of Section 24, when in fact it was south of that quarter. Henceforward, Parks used the same land that his ancestors had always used, apparently unaware that it was incorrectly described in his deed. In 1971 however, the Johnson estate, which evidently held title to an unspecified amount of land in the SW/4 of Section 24, conveyed the property of the Johnson family to Morehead, who apparently discovered the error made in describing the land that was being used by Parks, and decided to challenge the right of Parks to that area, which consisted of about 6 acres. The trial court held that Parks had acquired the contested area by means of adverse possession however, making any issues relating to the validity of the deed held by Parks, or relating to the legal consequences of the river's movement, irrelevant. The Court upheld that lower court ruling, over Morehead's protest that Parks could not have held or used any land in the SW/4 of Section 24 in good faith, because he never paid any taxes on any such land, since he paid taxes only on a tract which was supposedly located in the NW/4 of that section, according to his flawed legal description. Statute 60-503 was nonetheless applicable to this scenario, and was available to protect the land use made by Parks, the Court informed Morehead, because under that statute adverse possession can negate description errors of any kind, such as the one that had been made in 1945, thereby

functioning as an alternative to description reformation. As the position taken by the Court here demonstrates, the principle of good faith applies to adverse possession in the context of both title and boundaries, therefore it can impact both property dimensions and boundary locations by eliminating the consequences of description errors, as well as by bringing the controlling force of land use into play, as a factor resulting in the contraction or expansion of titles. Thus the Court again approved the use of adverse possession to validate an inaccurate legal description, since the land use of Parks made the actual area that was deeded to him in 1945 perfectly clear, even though it was actually part of Section 23, and not part of Section 24 at all, despite being east of the original west line of Section 24, because in reality the accretive movement of the river, which comprised the east boundary of Section 23, had simply expanded that section to the east.

Along with the burgeoning use of adverse possession that was underway at this time in Kansas, the Court also continued to develop and clarify the conditions under which an undocumented boundary agreement can become legally binding, in the PLSS context in *Moore v Bayless* (1974). In 1904, Moore acquired the south half of the SW/4 of a certain presumably typical Section 8 in Shawnee County, while his mother obtained the NW/4 of the adjoining Section 17, upon the death of Moore's father. A hedgerow of unknown origin existed upon or near the section line, which had long been regarded as marking that line, and when Moore's mother died in 1932, the hedgerow was also accepted as the boundary by Hercules, who acquired the NW/4 of Section 17 at that time. Moore and Hercules decided to try to verify the location of the hedgerow, so they made some unspecified measurements, leading them to conclude that it was indeed upon the section line, although there is no indication that they looked for any survey evidence anywhere along the section line, or that they had the assistance of any surveyor in reaching this conclusion. In addition to agreeing to honor the hedgerow as their mutual boundary, these 2 men jointly erected a fence, extending the line formed by the hedgerow the full length of their half mile boundary. Over the ensuing years, Hercules sold off unspecified portions of his land to various parties, one of which was acquired by Bayless in 1946, so Moore eventually came to have multiple neighbors on the south, but all parties continued to treat the fence and hedgerow as their mutual boundary, until a survey was done in 1969, which placed the section line an unspecified distance north of the fence and hedge. No details are known regarding the manner in which this survey was conducted, and there is no indication that any monumentation was ever found on the section line in question, or anywhere else in the subject area, but no one ever challenged this survey. Bayless insisted that his tract extended north of the fence to the surveyed line however, so Moore was compelled to file an action seeking a decree that the line which had stood for 37 years was a legally binding agreed boundary. The trial court found Moore's position to be convincing and ruled in his favor, confirming that his title extended south to the fence and hedge line, without requiring him to provide any legal description of the area to which his title had thereby been secured. Declaring that "we can think of no circumstances that would have more probative value" for the purpose of establishing a legally binding agreed boundary, the Court upheld that decision, concurring with the lower court that there was no need for a legal description to outline the area which was being quieted in Moore, since it was adequately defined on the ground. Several core principles pertaining to boundary resolution were reinforced by the Court on this occasion, including the concept that boundaries can be conclusively settled by adjoining land owners, and such boundaries are legally binding, even without the passage

of any amount of time, by virtue of agreement alone, despite the absence of any documentation of their agreement. Mutual action taken by adjoiners, in placing any objects which visibly mark a boundary on the ground, constitutes legitimate evidence of a boundary agreement reached by them, and such a boundary is legally binding upon their successors, being supported by physical notice, the Court also reiterated here. No dispute is necessary to justify the formation of a boundary agreement, the Court also clarified, any uncertainty in the minds of the adjoining parties regarding the boundary location in question legally suffices for that purpose, so the fact that any section line could have been located by means of a survey does not prevent the relevant parties from opting to settle upon a line of division themselves, without any surveyor input. The reliance of Bayless upon both his legal description and the 1969 resurvey proved to be unwise, because a visible established boundary was already in place at the time of his acquisition, thus he learned the hard way that surveys are incapable of displacing agreed boundaries, which have been established by unwritten means.

The Kansas Court of Appeals (COA) began to function on a permanent basis at this juncture, and the first COA case of the modern era which we will review highlights the importance of understanding how principles applicable to title law interact with boundary law. The case of *J & S Building (JSB) v Columbian Title & Trust (CTT)* (1977) brought the COA its first opportunity to provide clarification of the true legal effect of conveyance language, in the context of dedication, vacation and reversion. McMurray owned a group of several typical contiguous platted lots in Overland Park, and in 1964 he conveyed all of his lots to Johnston. McMurray anticipated however, that the 2 public streets abutting his lots were soon going to be vacated, so he expressly reserved those streets unto himself in this 1964 deed. In 1965, Johnston conveyed the same property to JSB, using the identical conveyance language that appeared in the 1964 deed, and CTT issued a title policy confirming that JSB had acquired all of the lots and all of the land rights associated with them. In 1967, Overland Park vacated the 2 streets abutting the JSB lots, and in 1972 JSB sold all of the lots, along with the adjoining half of each of the vacated streets, but JSB was then told that McMurray owned the land lying within the vacated streets abutting the JSB lots. Upon hearing this news, JSB reacted by first paying McMurray for the land which he claimed to own within the vacated streets, and then asking CTT to compensate JSB for the cost of that acquisition. CTT refused to reimburse JSB however, and informed JSB that McMurray never owned any land lying within the streets in question, so JSB had foolishly paid McMurray for land which JSB already owned. JSB refused to accept the premise set forth by CTT however, and instead filed an action against CTT, demanding that CTT be ordered to pay JSB, on the grounds that the 1965 title policy had proven to be inaccurate and legally defective. The trial court found no merit in the assertion made by JSB and decreed that no title defect existed, so JSB was entitled to no funds from CTT. The COA upheld that decision, despite the fact that the trial court had wrongly concluded that McMurray had successfully reserved the 2 streets unto himself, and proceeded to clarify the matter for the benefit of both JSB and the trial judge, verifying in so doing that the position taken by CTT was correct. All statutorily dedicated streets in Kansas, such as those at issue here, the COA observed, are held in fee by the public, and a lot owner, such as McMurray, holds no retainable interest in such streets, therefore lot owners are incapable of reserving any rights relating to such streets when conveying their land, so the 1964 deed reservation was meaningless and void. No right of reversion ever existed in the

vacated streets, because they were not merely public easements, they were dedicated in fee, and only easements are subject to reversion, so no reversion ever occurred, and only when the streets in question were vacated in 1967 did the land within them become legally merged with the abutting lots, thereby expanding the boundaries of the JSB lots at that moment. By operation of law, the JSB property boundaries extended to the street centerlines upon vacation, and McMurray was powerless to prevent that occurrence, so CTT was right that JSB had needlessly paid McMurray for the contested area, due to ignorance of the law on the part of JSB. A grantor can never retain any reversion rights, the COA pointed out in so ruling, because such rights are appurtenant and are legally fused to land, therefore they pass automatically to the grantee whenever the relevant land is conveyed. While the principle of reversion operates only upon easements, the COA indicated, the centerline boundary principle is applicable regardless of whether the vacated right-of-way constituted a strip of land held in fee by the public or only a public easement. Thus the COA demonstrated that in Kansas grantors are legally incapable of ever depriving their grantees of any portion of any unvacated street, even when the grantor expresses his intention to do so in the clearest possible terms in a deed, because the centerline boundary rule protects all grantees, by automatically uniting title to any adjoining vacated area with the title to the abutting land.

The case of *Roberts v Osburn* (1979) also holds a valuable lesson for surveyors, regarding the importance of completeness in platting, by illustrating the consequences of misleading information appearing on plats. Fundis owned a tract of unspecified size near Baldwin City, and in 1964 he conveyed a portion of his land to a developer, who planned to create a residential subdivision. The driveway leading to the Fundis home ran through the area conveyed by Fundis to the developer however, so Fundis reserved the right to go on using his driveway in the 1964 deed. The access easement thus created by Fundis was not permanent however, since this deed specified that the easement would terminate when he sold the remainder of his tract. The land sold by Fundis, but still bearing his driveway, was then platted by the developer in 1965, and the driveway easement was shown on the plat, passing through one of the platted lots, but the plat gave no indication that the easement was not permanent. In 1973, Roberts acquired the platted lot which was crossed by the Fundis driveway, and Roberts evidently read the 1964 deed, so he was aware that the easement was only temporary in nature. In 1974, Osburn entered a contract for deed, under which he agreed to buy the remainder of the Fundis tract, and Osburn noticed that the driveway ran through the platted area, but upon viewing the plat he saw that the driveway was protected by an easement, so he felt confident that he would be able to use the driveway. When Fundis moved out of his house, and Osburn moved in and began using the driveway, Roberts filed an action seeking to have Osburn ordered to stop driving across his lot, alleging that the platted easement no longer existed, but the trial court ruled against him, declaring that the easement still existed, because Fundis still held legal title to the land bearing the house, even though it was now occupied by Osburn. The COA reversed that decision however, holding that Roberts was right that Fundis was no longer the owner of the land which he had contractually agreed to convey to Osburn, so the driveway easement had in fact been legally terminated. Under the principle of equitable conversion, the COA noted, a legally binding conveyance of land, along with all of the associated land rights, occurs at the moment when a contract for deed is signed and takes effect, so from that moment forward the grantor has no control whatsoever over the land

being conveyed. Beyond that moment of agreement, the COA explained, the grantee is the true owner of the subject property, and has full control over all land rights associated with it, while the grantor retains only the legal title, which merely serves to verify that he is entitled to payment, so the grantor is no longer the holder of any land rights, he holds only the right to be paid for the land. Osburn protested that the easement in dispute had been platted, so he had the right to rely on the easement, since it was shown on the plat, but the COA reminded him that the plat did not include or cover the tract which he had acquired, so in fact he had no right to rely upon that plat. A plat is not equivalent to a deed, the COA informed Osburn, a plat is useless unless it is referenced in a deed, and Osburn's deed naturally made no reference to the plat, because the land that he had acquired was unplatted, so the plat was completely irrelevant to his acquisition. The concept of plat reliance is a very strong and important one, which applies to unrecorded plats, plans, maps or any other graphic depictions that are legally incorporated into any deed by means of reference, the COA recognized, as well as recorded plats, but that concept is not unlimited. The principle supporting plat reliance is founded upon the right of every grantee to rely upon any graphic document employed by his grantor in describing his land, and the rights associated with it, for purposes of conveyance, so grantees of platted land are the true intended beneficiaries of the plat. Thus Osburn learned the hard way that the plat was of no use to him, as an owner of land adjoining the platted area, because the appearance of the contested easement on the plat was incapable of converting the temporary easement into a permanent one, leaving him to seek out an alternate access route to his new home.

As we have noted in reaching this point, the Court grew steadily more inclined to support physically established boundaries during the twentieth century, repeatedly approving the use of both adverse possession and the concept of boundary acquiescence for that purpose. As the 1970s drew to a close however, the COA demonstrated its reluctance to follow the course thus charted by the Court, regarding the value of boundary acquiescence, in the case of *Martin v Hinnen* (1979 & 1981) signaling that the use of acquiescence as a factor in boundary disputes would be limited going forward, leaving adverse possession as the primary option for litigants seeking to preserve physically established boundaries in Kansas. In 1944, the Hinnen family acquired Sections 7 & 8 in a presumably typical township, and their land was apparently comprised entirely of typical pasture land. Whether or not anyone ever occupied either of these sections is unknown, since there is no indication that any structures were ever built in this area, but they ran cattle on their land, and they regarded a fence of unknown origin, which ran near the section line, as a line of division between the 2 sections. In 1970, Martin acquired Section 8 from the Hinnens and he evidently assumed that the fence stood upon the west line of his section, although no one ever told him anything about the origin or purpose of the fence. A prairie fire destroyed the old fence in 1972, but Martin and Hinnen collaborated in rebuilding it in the same location, and the new fence continued to serve as their functional boundary, although neither of them had any authentic knowledge of the original section line location. Martin subsequently decided to have his section surveyed however, and the survey showed the section line to be about 150 feet west of the fence, but Hinnen refused to allow Martin to move the fence to the surveyed line, so Martin filed an action seeking to have Hinnen judicially compelled to allow Martin to relocate the fence. How the section line was located during the survey is unknown, and there is no indication that any survey evidence was found anywhere in either of these sections or in any nearby sections, yet

Hinnen never challenged the survey, asserting instead that the fence represented an agreed boundary. The trial court accepted that premise, holding that the fence had become the west boundary of Martin's tract by virtue of his acquiescence, but the COA disagreed in 1979 and sent the case back to the lower court for further adjudication. The trial judge then proceeded to quiet title extending eastward to the fence in Hinnen, on the basis that their mutual rebuilding of the fence showed that the litigants had both acquiesced in the fenced line as their boundary, but the COA again disagreed and in 1981 reversed the lower court decision, mandating that the resurveyed section line must control. Minimal use of unimproved land of low value, up to a fence of unknown origin, is insufficient to support an agreed boundary, the COA concluded, so Martin was not bound by the fenced line, even though he had once maintained that it was the section line, since he had treated it as his west boundary only because he thought it was on the section line, thus deeming Martin's acceptance of the fence to have been merely conditional. On this occasion, the COA took the view that "simple acquiescence" alone is incapable of displacing or otherwise overcoming boundaries of record, since it does not constitute definitive evidence of a boundary agreement, thereby substantially curtailing the value of acquiescence as a factor in boundary resolution in Kansas. In so deciding, the COA revealed that it was more inclined than the Court to adopt resurveys as controlling boundary evidence, as here the COA took the position that any resurvey which goes unchallenged will be presumed to be entirely correct and accurate, showing a high degree of confidence in Kansas land surveyors, presumably mindful of their recently achieved status as licensed professionals. As we will see, this judicial position would eventually be modified by the COA, but this would nonetheless prove to be a highly influential decision, causing most future litigants to abandon the concept of boundary agreement and focus primarily upon adverse possession, as a means of securing title conforming to existing physical boundaries.

Landrum v Taylor (1975)

At this juncture we reach our final featured case focused upon the subject of boundary agreement in the PLSS context. On this occasion, nearly 9 decades after first acknowledging the potential significance of informal boundary agreements made by adjoining land owners, as documented in the first case featured herein, the Court's support for the concept of boundary agreement reached it's zenith. During the early decades of statehood, the Court was disinclined to treat any verbal or unwritten agreements relating to boundary locations as controlling boundary evidence, primarily for 2 reasons, first because the judicial partition between title and boundary issues was more prominent at that time, and second because the statute of frauds was more rigidly applied during the nineteenth century. Due to the presence of these factors, for several decades the Court adhered to the view that either an orally agreed boundary or an unspoken and implicitly agreed boundary represents adverse land use, leading the Court to regard agreed boundaries as fundamentally hostile in nature, under which view agreed lines can control only through adverse possession. As we have witnessed in completing our journey through

the decades however, this position was quite naturally relaxed by the Court during the first half of the twentieth century, as the Court observed decisions that were made in other states and became enlightened, whereby the Court came to see the value in boundary agreements, eventually recognizing them as fundamentally positive and worthy of judicial support. By the middle of the twentieth century, the need to judicially honor and validate agreed boundaries in order to provide repose had become obvious, since original boundary evidence was by then fading into ancient history, leading the Court to adopt the position that agreed boundaries can control over resurveyed boundaries of record independently of adverse possession. It was this modern perspective upon the issue presented by allegations that undocumented boundaries have been formed and must be respected, that the Court brought to the case we are about to review, in which the Court demonstrated that it had become highly receptive to the agreed boundary concept. The Court was about to hand off most title and boundary adjudication to the Kansas Court of Appeals however at this point in time, and as we will observe, the result of that development was destined to be a renewed emphasis on the utilization of adverse possession for purposes of judicial boundary resolution, leaving our present case to stand as the pinnacle of agreed boundary litigation in Kansas in the twentieth century.

Prior to 1963 – Nuzum acquired the SW/4 of a certain Section 14 in Doniphan County, which was a riparian tract, bounded on the northeast by the Missouri river, but how long the Nuzum family owned this tract and how they used their land are both unknown. Whether or not the south and west boundaries of this section were ever visible or otherwise known to the Nuzums is also unknown, but Kansas Highway 7 evidently passed over or near the southwest corner of this section, and a dirt road of unknown origin ran northeasterly on an unspecified bearing from an unspecified point along the highway down to the river, which roadway the Nuzums treated as their west boundary. Who used this road, and the frequency with which it was used, are both unknown, presumably it was used primarily as a means of river access, but there was no indication that it was ever used by the public or regarded by anyone as being public in character, nor was it ever mentioned in any conveyance documents. Some survey work involving Section 14 was done in 1956, but who ordered that survey and why it was done are both unknown, and there was no indication that the Nuzums were ever informed that the dirt road was found during that survey to be west of their section, so they used all of the land southeast of that road at all times, presumably as typical cropland. Dunn acquired the east 50 acres of the SE/4 of Section 15, also at an unspecified date during this period, and he was also evidently unaware of the section line location marking his east boundary, nor was he apparently ever informed about the 1956 survey, so like the Nuzums he treated the dirt road as a property boundary at all times.

1963 – Landrum acquired the SW/4 of Section 14 from Nuzum, and shortly

thereafter Landrum and Dunn met and discussed the location of their mutual boundary line. These 2 men evidently both felt that the dirt road to the river had long functioned well as a practical boundary between their tracts, so they agreed that it would remain their mutual boundary henceforward, and they both simply continued using all of the land on their respective sides of that road.

1964 to 1968 – Landrum continued to regard the dirt road as his west boundary until his death in 1968, at which time the Landrum property passed into the ownership of his widow and their 2 daughters, who perpetuated the use of all the land east of the road.

1969 to 1971 – The use of the land west of the dirt road continued until the death of Dunn in 1971, at which time Taylor acquired the Dunn tract. Whether or not anyone ever told Taylor anything about the 1963 boundary agreement or pointed out the agreed line to him is unknown, and Taylor may well have acquired the land of Dunn without ever actually seeing it.

1972 – Taylor had his property surveyed and his surveyor adopted the section line location that had been documented in 1956, which was about 200 feet east of the dirt road, although the distance from the highway to the river is unknown. Nothing is known regarding the manner in which this resurvey was conducted, so whether or not any monumentation was found or used during this resurvey is unknown as well. Upon learning that the section line was east of the dirt road, Taylor plowed the road up and took control of all of the land west of the surveyed section line. Landrum's widow had remarried by this time, so she was now named McLain, and she responded to Taylor's activity by filing an action against him, seeking a decree that the old dirt road was a legally binding agreed boundary.

McLain argued that the location of the section line in question was never known to any of the relevant parties, and specifically that it was unknown to both Dunn and her late husband at the time of their boundary agreement in 1963, so their agreement was entirely legitimate and legally binding upon their successors, in accord with their intent at that time, which was also evidenced by their subsequent conduct. McLain stated that she personally witnessed the verbal agreement being made and remembered all of the details of the conversation very well, maintaining that she had personal knowledge that the 1963 agreement was intended to be permanent in character. McLain made no adverse possession argument, because less than 15 years had elapsed since her family had first occupied the subject property, and her legal team evidently concluded that there was no need to attempt to prove that the Nuzums had adversely acquired the area in contention prior to the arrival of the Landrums. Taylor argued that the alleged boundary agreement was invalid and was not binding upon him, because the mere existence of the dirt road at the time when he acquired his land was insufficient to put him on notice of the existence of any such undocumented agreement. Taylor further argued that the disputed section line location was knowable at all times, because it was a surveyable line, and in fact it had been surveyed, so all parties were bound to honor the line of record, and they had no legitimate

option to agree upon any other line. Taylor also maintained that the allegedly agreed line had become lost, due to the destruction of the road, so it was no longer possible for the location of that line to be definitively ascertained, thus it could not be enforced, leaving the resurveyed section line as the only existing boundary. The trial court found the evidence supporting the 1963 boundary agreement to be both acceptable and convincing, and therefore ruled in favor of McLain, confirming that the agreed line had effectively negated the section line, thus the alignment formerly traversed by the obliterated road controlled the location of the contested boundary.

The evidence that a boundary agreement had actually taken place in 1963 was relatively strong in this case, the Court recognized, and Taylor had no way of overcoming the testimony of McLain concerning the verbal agreement made by her late husband and their neighbor, because Taylor was not present at that time, so Taylor was at a serious disadvantage from the outset. The Court's approval of the use of McLain's testimony as a controlling factor in this dispute serves to illustrate that unwritten oral or verbal evidence pertaining to boundaries, also known as parol evidence, can be genuinely valuable boundary evidence and cannot simply be dismissed as hearsay. Courts generally acknowledge that all forms of boundary evidence can be useful, and in fact testimony can often be the only means by which the crucial knowledge and intentions of deceased parties relating to their property boundaries can be preserved, so such testimony is typically taken quite seriously and can be decisive. The testimony outlining the express agreement that was put in place in 1963 made it unnecessary for the Court to consider whether or not the evidence relating to the land use made by the parties formed a sufficient basis upon which to conclude that a boundary agreement implicitly existed. From the evidence it appears likely however, that such a conclusion could have been reached if necessary, since a state of implicit agreement apparently centered upon the old road existed for many years, and perhaps even decades, before Landrum ever arrived on the scene, and this factor may well have influenced the Court's decision. Another factor which may have been concerning to the Court was the lack of detailed evidence regarding the 1956 survey, along with the fact that the 1972 resurvey may have been a mere paper duplication of the 1956 survey, leaving the Court potentially unconvinced of the validity of the survey work that was done on either of those occasions. In addition, the fact that the parties had either been unaware of the 1956 survey or had deliberately ignored it also suggested that the agreed boundary location had been long relied upon, making the Court quite disinclined to strike it down, despite the fact that the old dirt road clearly bore no direct relation to the section line. Ultimately, in the view of this scenario taken by the Court, all of Taylor's arguments were unavailing, because open evidence of a potential physical boundary existed upon the ground at all times, for Taylor or any other interested party to see, upon even a very rudimentary inspection of the relevant area, and some physical evidence of the agreed line existed even after Taylor's destruction of the old road, from which the Court was clearly determined not to allow him to benefit. Citing several of the prior boundary agreement cases which we have reviewed, ranging from the Steinhilber case of 1904 to the 1974 Moore case, the Court explained why Taylor could not prevail, regardless of the fact that his position was supported by 2 unassailed and therefore presumably accurate resurveys:

“Landrum and Dunn ... entered into an oral agreement which ratified and confirmed the boundary between the respective tracts as a roadway ... to a

large Cottonwood tree on the bank of the Missouri River ... the roadway was identified by testimony and photographs ... and a culvert or tube ... about midway between the highway and the river ... the roadway had been recognized as the boundary by Nuzum and Dunn ... there was no dispute concerning the boundary until shortly after defendants purchased ... when they caused ... the roadway to be plowed ... the trial court intended to and did establish the mutual boundary running along the roadway ... defendants assail ... boundary by agreement ... testimony established that a mutual agreement fixed the boundary at the old road ... there was ample evidence to support ... an agreed boundary line ... boundary lines ... are to be determined by reference to the deeds ... however there are exceptions ... the owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, will be binding upon the parties and their grantees. Such an agreement, followed by possession, is not obnoxious to the statute of frauds ... a subsequent survey ... does not determine title to land ... it is however essential ... that the boundary line fixed by the agreement be definite, certain and clearly marked ... the Cottonwood tree ... and tube were described by several witnesses ... the line was sufficiently established by monuments.”

Any visible object can be evidence of an agreed boundary and can thereby become a controlling boundary monument, the Court thus stipulated, noting that predecessors had adopted the tree, the culvert and the dirt road itself as monuments, so all of those objects had presented Taylor with an adequate opportunity to inquire about the location of the boundary at issue prior to making his land acquisition. Even an object as common as a dirt road, no different than a fence, a hedge, a wall, or a ditch, can be evidence of a boundary, about which any grantee is legally required to inquire, in order to preserve his status as a party operating in good faith, and in this instance Taylor's failure to do so proved to be fatal to his position. Mutual land use made in reliance upon an agreed boundary can make the agreed location fully binding, the Court indicated in upholding the lower court decision here, even without the passage of any particular length of time, since judicial support for such settlement agreements is based upon the agreement itself, rather than land use of an adverse nature. Adjoiners are free to agree upon a permanent boundary, effectively replacing even a sectional boundary, if they are in a state of genuine uncertainty as to the record line location, and their agreement, once openly implemented on the ground, is binding upon all of their successors, the Court also clarified here. Every boundary line of record, no matter how obscure, is susceptible of being surveyed in some manner, the Court understood, so the mere fact that any given line can be surveyed does not preclude the right of all adjoining land owners to reach a binding though undocumented boundary settlement agreement in the absence of a resurvey. It is the land owners themselves, the Court well realized, who hold full authority over their own lands, and no law prevents them from taking mutually conclusive action with respect to their own boundaries, to bring their mutual boundary uncertainty to an end, either with or without

the assistance of any other parties, such as attorneys or surveyors. Resurveys which neglect to depict or honor evidence of an agreed boundary cannot be leveraged to assert title based on a resurveyed line of record, the Court thus reiterated on this occasion, because any resurveys which are in conflict with principles applicable to title law are inoperative and cannot control land ownership, regardless of their technical accuracy or precision. Photographs can comprise legitimate boundary evidence, the Court also specified here, when they are supported by adequate testimony, for the purpose of proving the existence of monuments, such as the tree and culvert in this instance. Thus here, for the last time during the twentieth century, the Court verified that even entirely unwritten boundary agreements, entered and carried out in good faith, can control over resurveyed PLSS lines of record, thereby setting forth a proposition which the Kansas Court of Appeals has yet to extend.

Murray v State (1979)

As all experienced surveyors understand, the concept that natural monuments represent the highest and strongest form of evidence, for purposes of boundary control, originates from the fact that the natural features of any landscape typically manifest both the highest degree of visibility and the highest degree of permanence, when compared to objects put in place by mere human hands to serve as artificial boundary monuments. Historically, natural monuments were often used to describe the boundaries of vast land areas, such as counties, states, provinces and nations, for which purpose prominent features such as mountains and rivers served reasonably well, because they were genuine landmarks recognizable to all, and in outlining such large areas there was little need or concern for precision. This principle was utilized in partitioning much of North America, when creating colonies, land grants and acquisitions such as the Louisiana Purchase, from which Kansas was destined to emerge, along with many other states. As time passed and the land became densely settled however, many of the rivers which had been selected to serve as natural boundaries proved to be problematic, most notably the wild and wandering Missouri, which has been the source of numerous legal battles, and which devoured countless tracts that were positioned along its banks, before finally coming under human control during the twentieth century. Thus we have learned, after 2 centuries of human settlement and land development in the west, that while rivers form wonderfully visible boundaries, they present serious issues in the locational context, because they often fail to provide genuine permanence of location. Nonetheless, land rights all across the west remain legally controlled primarily by the PLSS structure, which was put in place by the GLO at a time when the employment of rivers as boundaries appeared to be perfectly logical, so judicial boundary determination necessarily involves analysis of river movement and the legal impact thereof. The case we are about to review presents a classic riparian scenario, in which the Court wisely enumerates and applies the fundamental principles that

control riparian boundaries, mindful as always that all riparian property owners have the right to rely upon rivers which were adopted by the GLO as boundaries, because they all remain ambulatory natural boundary monuments in perpetuity, until such time as the contrary is definitively proven.

1857 – A certain township in Riley County, which was traversed by the Kansas River, was platted by the GLO. The river ran diagonally through Section 33 of this township at this time, coursing primarily through the NE/4 and the SW/4 while passing directly over the center quarter corner, so the river was meandered and several riparian government lots were platted in that section.

1858 to 1902 – Government Lot 2, which occupied the portion of the SE/4NW/4 of Section 33 lying northwest of the river, containing 31 acres, was patented to an ancestor of Murray in 1860, and all the rest of the land in this section was presumably also patented to various other parties early in this period. How the land in this section was used during this period is unknown, but it was presumably cropland and was used in the typical manner, since there is no indication that any structures were ever built in this section. To what extent the location of the river within this section may have changed during this period is also unknown, but there is no indication that that it moved any material distance.

1903 to 1950 – A flood occurred on the Kansas River at the outset of this period, which was followed by several years of frequent high water and strong river activity. During the early portion of this period the Murray tract was steadily reduced in size as a result of the river's activity, until only about 9 of the original 31 acres were left on the northwest side of the river. In 1944, the Wood family acquired the portion of the SW/4 of Section 33 lying northwest of the river, thus the Woods became the owners of the land lying directly south of the Murray property. Whether or not there was ever any interaction or communication between the Wood and Murray families is unknown, but no issues regarding the location of the quarter section line forming their mutual boundary ever arose.

1951 – Another flood occurred on the Kansas River at this time, which resulted in the creation of an entirely new river channel, about a mile to the southeast of the river's former course through Section 33.

1952 to 1957 – Although the river no longer flowed through Section 33 by this time, the Woods and the Murrays continued to use only the same land areas which they had always used, they did not make any use of the abandoned river channel, they continued to treat the northwest edge of the dry channel as the southeast boundary of their properties. At the end of this period, Miller acquired all of the land in Section 33 lying directly southeast of the extinct channel, and he began making use of the full width of the dry riverbed, presumably as cropland, with no objection

from the Woods or the Murrays.

1958 to 1966 – The land use pattern established by the Millers continued throughout this period, and Kansas never objected to the use of the land comprising the abandoned river channel by the Millers either.

1967 to 1978 – At the beginning of this period Miller obtained a patent from Kansas, conveying the southeast half of the entire length of the vacated channel in Section 33 to him, and on the same day, Wood obtained a patent from Kansas conveying the northwest half of that same portion of the old channel to him. Whether or not the centerline of the former channel was ever surveyed or marked in any way is unknown, but no dispute ever arose between the Woods and the Millers over their mutual boundary which was formed by that line. No members of the Murray family were ever contacted by anyone, so the Murrays were never invited to acquire any of the land within the defunct channel, and they may not have learned about these riverbed acquisitions made by the Woods and the Millers until several years later. When Murray discovered that the land lying southeast of his remaining 9 acres, which once comprised part of the Murray tract, had been deeded to Wood, he reacted by filing an action against Kansas, alleging that the sale of the abandoned riverbed to Wood and to Miller was an unconstitutional act, and seeking a decree that the 1967 deeds covering that area were null and void.

Murray argued he was the owner of all of Government Lot 2, as a successor of the patentee of that lot, so Kansas had no right to sell any of the land which was originally part of his lot. Murray further argued that title to abandoned navigable riverbeds is a matter of federal law, as opposed to state law, so Kansas had no right to make any laws or engage in any transactions involving title to any land lying within any abandoned navigable riverbeds. Murray also asserted that since the river had completely removed itself from the NW/4 of Section 33, the federal patent granted to his ancestor in 1860 entitled him to ownership of the entire SE/4NW/4 of that section, including the portion which was submerged when it was platted in 1857, on the grounds that his quarter quarter was freed of any legal burdens associated with the river when the river vacated the subject area in 1951. Kansas, on behalf of Wood and Miller, argued that the Kansas River is a navigable river, so the bed is owned by the state at all times, wherever the river may come to be located at any given time through normal river movement, and under Kansas law, title to such a riverbed remains in the state even after the river channel is left completely dry through an act of avulsion. Kansas further argued that all historical river movement of unknown origin is presumed to be accretive, rather than avulsive, and all such movement carries the title of the state along with it, and all of the river movement at issue prior to 1951 was accretive in nature, so Murray's lot had been legally reduced to just 9 acres by the river. Kansas also maintained that the flood of 1951 was a well documented and clearly avulsive event, so the state title to the original riverbed, as it stood immediately prior to the 1951 flood, was unaltered by the relocation of the river to the southeast, and Kansas was duly authorized to sell the abandoned riverbed to anyone, without notice to anyone else, just as it had done. The trial court was unconvinced by any of Murray's arguments, and

upheld the validity of both of the 1967 deeds, which bestowed the contested bedlands upon Wood and Miller, leaving Murray with only the 9 acre area which had never been submerged.

While it might well appear at first glance that the Murray family was cheated, in reality Murray's position was completely untenable, and it was his own ignorance of riparian law that doomed him to defeat. Presumably at some point in time after 1967 he saw a copy of the 1857 GLO plat, showing that his Lot 2 originally contained 31 acres, but no one explained to him that acreage is not a reliable or controlling element in the riparian context, so he could not comprehend that his family's missing acreage had been taken by the fickle river itself, rather than being unjustly taken by the state, as he evidently supposed. Murray's primary mistake was his apparent assumption that the bedland title of Kansas was limited by the GLO plat to the river's platted location, and he was also mistaken in his other apparent assumption that the departure of the river from Section 33 had the effect of erasing the river from the GLO plat, so in fact he was wrong on the legal operation of both accretion and avulsion, which were the essential controlling principles. Murray was right that he was the owner of all of Lot 2, but he failed to understand that the area comprising Lot 2 had been severely diminished by erosion over the decades, nor did he comprehend that the 1951 river movement had not restored any of the eroded land to his family, in reality his tract had lost its riparian character, and thereby lost its ability to ever return to its original size. This scenario provided the Court with an ideal opportunity to differentiate between accretion and avulsion, and the Court very effectively did so, by pointing out that avulsion requires the creation of a new additional channel, as opposed to the mere migration of an existing channel, which is generated by the combined forces of erosion and accretion. The river's location had changed substantially prior to 1951, the Court recognized, but no second channel had formed until 1951, so the river continued to serve as a boundary of all of the platted riparian tracts in Section 33 until the platted channel ceased to carry the river, thereby converting the 1951 location of the old channel from an ambulatory boundary into a permanent boundary. The Kansas title to the migrating original channel had erosively consumed most of the Murray title to Lot 2, before the river vacated the subject area, the Court realized, and the physical evidence of the original channel's last location made the GLO meander lines irrelevant, thus the meanders were incapable of defining the relocated title held by the state. Extensive expert witness testimony was presented by surveyors, geologists and foresters, the Court noted, but it served only to verify that the 1951 flood was a genuine avulsive event, it was no help to Murray, because it concerned only the condition of the land in the east half of Section 33, which the river had bypassed in 1951. After reciting the factual findings, the Court reiterated the relevant legal principles that had been properly invoked by the trial judge, before addressing the critical burden of proof and the vital constitutionality issue as well:

“Where the boundaries of a navigable stream change by a process that involves erosion ... or accretion ... ownership of the channel underneath the body of water between the banks at high water remains in the State of Kansas ... where a new channel is cut and the old one is abandoned the State of Kansas retains ownership of the abandoned riverbed ... Kansas had power and authority to convey its ownership in the abandoned riverbed ... without

notice ... Wood and Miller ... are entitled to have their title quieted ... the process of erosion and accretion ... occurs naturally ... avulsion on the other hand ... is characterized by ... a new channel ... and there is visible evidence thereafter of an abandoned river channel ... our earlier cases have not discussed the matter of burden of proof ... in other jurisdictions ... the presumption is that the changes resulted from accretion, and one who claims that the change was by avulsion has the burden of showing the avulsion ... authority, both state and federal, appears to recognize a strong presumption, founded on long experience and observation, that the movement occurs by ... accretion rather than avulsion ... this general rule is sound and we adopt it ... plaintiffs contend that ... the State owned only the 1857 riverbed ... the movement of the river between 1903 and the 1951 flood was ... accretion and not avulsion ... between 1857 and 1903 ... it is presumed that the river moved by accretion and erosion ... the party claiming avulsion has the burden of proof ... the patent to Lot 2 predates the state patents ... however ... the federal patent did not purport to cover the riverbed ... plaintiffs claim ... they were entitled to notice ... plaintiffs land ... was no longer riparian to the Kansas River ... they had no property interest in the riverbed ... there was no taking ... or cutting off of any rights of plaintiffs by the 1967 sale ... notice ... was not required by either Kansas statute or the federal Constitution.”

In the course of upholding the lower court decision against Murray, validating the bedland acquisitions made by Wood and Miller, the Court thus clarified that all river movement is presumed to represent accretion, reliction, erosion, or a combination thereof, enabling all riparian tracts to flex in size, as the ambulatory stream forming their boundary migrates, and of course this applies to non-navigable as well as navigable watercourses. Any party alleging that avulsion has taken place always bears the burden of proof, and the recognition and adoption of this pivotal point of law by the Court holds great potential significance, since solid and reliable historical evidence of undocumented avulsive events often becomes obscure and very hard to come by, with the passage of time. The basis for this widely respected legal presumption lies in the concept that any river, once made a boundary monument, remains a controlling monument, until clear proof to the contrary is brought forth, in order to protect the fundamental right held by all riparian land owners to rely upon the river as a plainly visible bounding object. Under this guiding principle, avulsion cannot be proven without evidence that at least 2 distinct channels exist, but once avulsion is proven, it can have the legal effect of converting riparian property into non-riparian property, which is what happened to the Murrays, leaving them with both less land and no river access. In addition, the position taken here by the Court well illustrates that meander lines can no longer be regarded as boundaries once any non-avulsive river movement has occurred, unless those meander lines have been converted into upland boundaries by prior statutory surveys, as outlined in several of the cases reviewed previously herein. Thus on this occasion the Court emphasized the importance of knowing that Kansas owns all navigable riverbeds within her boundaries, as those streams are presently located through any form of normal river migration, in the absence of

positive proof that the river moved through an act of avulsion. Kansas must acquire any avulsed riverbeds, such as the new channel situated a mile to the southeast in this instance, if the state needs or desires to obtain fee title thereto, and the state holds no title to any originally meandered locations which have been vacated by typical river migration, but here the Court upheld the right of Kansas to legally sell any avulsively abandoned navigable channel to anyone, without liability to any abutting property owners. Fate was certainly unkind to the Murrays, leaving them with only a fraction of the land that had been acquired by their ancestor, but nothing that happened to them was outside the parameters of the law, and the Court had no sympathy for their plight, cognizant that they could have recovered some of their lost acreage by purchasing it, if they had taken timely steps to do so, rather than waiting until after that land had been deeded to others to awaken from their slumber.

The 1980s & 1990s - The Court of Appeals Takes on Land Rights

By the 1980s, all aspects of land rights adjudication in Kansas had been dealt with by the Court, and genuinely new issues rarely arose, because all major land rights issues had already been judicially addressed in prior cases, and well documented standards had thereby been established by the Court, so the Kansas Court of Appeals (COA) was allowed to begin handling typical land rights cases. The Court continued to accept certain land rights cases, but the judicial workload came to be shouldered primarily by the COA, and this trend only accelerated as the COA developed and the confidence of the Court in the COA increased. The objective of the COA is always to produce the same result that the Court itself would have reached, given the same relevant information, and in the vast majority of cases this is accomplished, but the Court always retains the option to review and potentially rectify any matters which the COA might mishandle. The vast body of Kansas case law on land rights topics provided the COA with a solid foundation from which to set out, and the COA typically makes reference to many of the earlier cases which we have reviewed, as established precedent, when announcing opinions on all of the boundary and title issues that we have examined herein. Just like the Court itself, the COA understands that boundary and title issues are fundamentally distinct, yet also realizes that under the modern rules governing civil actions such issues very often overlap, and therefore allows the parties to frame the issues in a manner that enables full resolution of both boundary disputes and title conflicts in the same litigation. As we will observe, the text documenting the decisions issued by the COA is typically less extensive than that issued by the Court, and many cases resolved by the COA are classified and filed as unpublished opinions, because they add nothing new to the existing body of Kansas case law, and therefore do not constitute precedent setting material. Nonetheless, several unpublished cases contain valuable information on matters of high relevance to land surveyors, and they serve to reveal how the COA has dealt with specific circumstances which surveyors are likely to encounter, including controversies that involve land surveyors as witnesses, and sometimes even as litigants. During the 1980s and 1990s, as we will see, the Court took on only a limited number of land rights cases, particularly those featuring obscure topics, such as certain railroad issues, description reformation and riparian rights, and this lightened

workload enabled the Court to focus primarily on more politically charged issues, but the COA was well prepared to step up and address the majority of land rights topics.

While the party wall concept is not employed as often in modern times as it once was, party walls erected decades ago can still produce controversy, since they stand upon or near property lines, placing them at the intersection of boundary issues and title issues. Even when no boundary issues are raised, the concept of mutual or shared land use, presented by all such walls, often becomes a source of conflict, when one of the parties feels that some action taken by the other party violated their rights. The case of *Lambert v City of Emporia* (1980) brought the Court of Appeals (COA) its first opportunity to address a party wall dispute, and in so doing the COA demonstrated that it was inclined to view all such land use in the easement context, even when no easement documentation relating to such a wall exists. Lambert was the owner of a parcel of unspecified size and shape, which was presumably a typical platted lot in Emporia, and Lambert's lot was bounded on one side by property that was owned by the city. Both of these adjoining properties bore buildings, although when those buildings were erected and which one was built first are both unknown. These 2 buildings shared a common wall and roof, but whether the wall was located directly upon the property line or not is unknown. Both buildings were evidently used in the normal manner for several years, and no boundary or title issues ever arose. In 1977 however, Emporia developed a plan to erect a new building upon the city property, which involved demolishing the existing city building. A contractor employed by the city cut through the roof and walls of the city building, near its point of connection with the Lambert building, without ever informing Lambert that such demolition activity was about to take place. The city building was then razed, thereby converting the former interior wall of the Lambert building into a fully exposed exterior wall, while taking no steps to protect it from the elements, and as a result the Lambert building sustained water damage. Upon learning what had happened, Lambert filed an action, charging the city and the contractor with negligence, but the trial court found no merit in his assertion and summarily dismissed his argument without conducting any trial. The COA upheld that decision, finding that no direct or deliberate damage had been done to the Lambert building during the demolition operation, and the subsequent damage to it, having been caused by wet weather conditions, was merely incidental damage, from which no liability could result. In so ruling, the COA indicated that every party wall represents an easement, allowing mutual use of the land required to support the wall, and no party can disturb such land in any manner, regardless of where the wall may be in relation to the relevant property line. In addition, the COA specified, no documentation is required to support a party wall, a party wall agreement implicitly exists wherever any wall has been utilized as part of 2 buildings, even if no agreement regarding the wall was ever documented, so mutual rights exist in the land supporting any such wall, even if it was not built directly upon a property line. Therefore, the COA informed the litigants, each party is legally obligated to respect the right of the other party to maintain and preserve the wall, regardless of whose land it may stand upon, but neither party is obligated to continue to make use of the wall, so it can be legally converted into an exterior wall by the removal of one of the 2 buildings. In this instance, since the city had left both the wall itself and the ground supporting it intact, no violation had occurred, the COA concluded, placing the responsibility to take any steps necessary to protect the wall from the weather entirely upon Lambert. As this outcome well illustrates, professional negligence carries a very high

burden of proof, and is especially difficult to prevail upon.

Historically, as noted in several of our prior cases involving railroad right-of-way, the removal of railroad tracks was long regarded as conclusive evidence of the abandonment of any such right-of-way, effectively eliminating the right-of-way by triggering the reversion rights associated with it. In modern times however, due to the frequency of such abandonments and the many issues that can arise from such events, a more organized and formal abandonment process has been instituted, which requires documentation confirming the intent of the railroad to forsake the land rights embodied in any given railroad right-of-way. The case of *Martell v Stewart* (1981) represents the first occasion upon which this development appeared as a factor in land rights litigation in Kansas, leading the COA to announce a modification of the historically established judicial position regarding railroad right-of-way abandonment in Kansas at this juncture. The Atchison, Topeka & Santa Fe Railway (ATSF) acquired a right-of-way of unspecified width running between Emporia and Moline at an unspecified date, and railroad tracks were maintained in that right-of-way for an unspecified number of years. Among the properties traversed by this rail line was a tract of unspecified size and shape which was owned by Stewart. How and when Stewart acquired his land, and what use he made of it, are both unknown, but he was aware that his property was legally burdened with a railroad right-of-way and no issues related to that right-of-way arose while it was in use. In 1975 however, ATSF decided to cease railroad operations in this corridor, so ATSF hired a contractor to remove all materials and equipment belonging to ATSF from the right-of-way, including the tracks. Whether or not Stewart was ever informed by anyone that the right-of-way passing through his land was scheduled for abandonment is unknown, but he evidently either observed or was told that the tracks had been removed sometime in late 1976 or early 1977. Upon discovering that all of the railroad equipment was gone, Stewart apparently assumed that the right-of-way no longer legally existed, so he was expecting no further intrusions upon his property. Later in 1977 however, Martell, who was an ATSF contractor, entered the Stewart property and began excavating the ballast from the defunct right-of-way and trucking it away, but Stewart objected and demanded that Martell vacate the premises, leading Martell to file an action, seeking a decree compelling Stewart to allow Martell to take all of the ballast. The trial court granted the decree requested by Martell, and the Court of Appeals (COA) upheld that decision, informing Stewart that he had no right to prevent Martell from completing his work in 1977, because the railroad right-of-way still existed at that time, even in the absence of any tracks. Because ATSF had entered a contract for the removal of all railroad property from the right-of-way at issue, the COA pointed out, it was clear that ATSF did not intend the removal of the tracks to mark the moment of termination of the easement comprising the railroad right-of-way. ATSF clearly intended to preserve the easement long enough to recover all of the ATSF material from the right-of-way in question, the COA concluded, and that included the ballast, so Martell was entitled to all of the ballast and Stewart was unable to legally prevent him from taking it. ATSF had filed a formal "declaration of abandonment" in 1978, and only then was the right-of-way easement finally extinguished, the COA determined, so Stewart had illegally prevented Martell from executing his appointed task in 1977, thus Stewart was required to allow Martell to enter the Stewart property for that purpose, even though the easement in contention no longer existed by the time this controversy was fully adjudicated. In *Bitner v Watco* (2010) the COA clarified

that a land owner whose property is burdened by an obsolete railroad right-of-way need not wait for the railroad to formally abandon it, land owners are entitled to apply to the Surface Transportation Board for a federal railroad abandonment order, thereby legally terminating any unused railroad right-of-way through reversion, provided of course that it was created as an easement.

Another controversy involving the subject of reversion, this time in the context of school land, was addressed by the Court, in *Roberts v Rhodes* (1982). During the first decade of the twentieth century, a certain school district in Montgomery County made 2 acquisitions from separate land owners, to facilitate the construction of a school. The acquired area, consisting of about 3 acres in total, was fenced and a schoolhouse was erected, which was then utilized in the typical manner for over 60 years, evidently without objection from anyone. In 1971 however, use of the school site ceased, and the school district sold the entire fenced area to an unspecified party. How the former school site was used over the ensuing years is unknown, it may well have remained vacant and idle for several years, until finally being acquired by Rhodes at an unspecified date, presumably circa 1980. How many parties owned the old site during the 1970s, and who owned the surrounding land, are both unknown, but the site presumably remained fenced, and the adjoining land owners apparently never took any interest in the 3 acre area. At an unspecified date, presumably shortly after the completion of the Rhodes acquisition, Roberts took an interest in the site, so he obtained deeds from the heirs of the original grantors of the site, conveying the full fenced area to him. Roberts then filed an action against Rhodes, alleging that Rhodes had acquired nothing and Roberts was the real owner of the land that had been deeded to Rhodes. The trial court agreed with Roberts and quieted title in him, on the grounds that the deeds by which the site was created specified that it was to be used "for school and cemetery purposes only", so the school district never owned the site in fee, and the unused site had reverted to the heirs when the school district ceased to use it in 1971. Rhodes then pursued the case to the Court of Appeals, where the trial court decision was reversed, leading Roberts to appeal that reversal, thereby bringing the case before the Court. Noting that the deeds which were used to create the school site contained no specific reversionary language, the Court held that the Court of Appeals had correctly decided the matter, by striking down the ruling in favor of Roberts and validating the acquisition made by Rhodes. In the absence of any language indicative of an intention to create reversion rights, the language limiting the land use was incapable of depriving the school district, and Rhodes as the district's successor, of fee title to the contested site, the Court concluded, so Roberts had acquired nothing, because the heirs had no title to convey to him. Thus the Court clarified that a school district can legally sell any real property that is owned in fee by the district to anyone, even though the acquiring party presumably intends to put the former school site to another use, for which the land was not originally intended, illustrating that failure to utilize a reversion clause in a deed can be fatal to the fee title of the negligent grantor and his successors. Just 3 months later, in *Board of Education v Vic Regnier Builders* (1982) the Court once again steadfastly protected land rights held by a school district. The circumstances of that case were virtually identical to those of the case just reviewed, here the school district had acquired the site in question in 1956 and abandoned it in 1978, leading the Board to file a quiet title action, in order to facilitate a proposed sale of that site. The only material difference presented here was the fact that the 1956 acquisition had been made by means of condemnation, under a statute

for that purpose which had been revised in 1951. Regnier asserted that the Board had not acquired fee title to the disputed site, because the revised statutory condemnation language did not specify that a school district or board can acquire land in fee for school purposes, so the abandoned site was subject to reversion. The Court disagreed however, and quieted title to the site at issue in the Board, reversing a decision to the contrary made by the Court of Appeals in so doing. Thus the Court emphatically declared that acquisitions made for school purposes represent an exception to the general rule that all condemnations result only in the creation of an easement.

As our journey through the decades has frequently shown, intent is always a serious and potentially controlling factor in the resolution of boundary and title issues, but that merely raises additional questions, such as whose intent controls, and which intention controls when conflicting intentions appear. One important question for land surveyors is whether the controlling intent is the intent of the surveyor or the intent of the land owner, and the case of *Mahlandt v Jabes* (1983) illustrates the Court's perspective on that question. Mahlandt and Jabes both owned portions of a certain presumably typical Section 20 apparently consisting of cropland in Butler County, although how and when they acquired their respective tracts is unknown. Along with other lands in the vicinity, Mahlandt owned the west half of the SE/4, while Jabes owned the whole west half of the section and the west half of the NE/4, so the center quarter corner was a controlling point upon their mutual boundary. A stone monument of unknown origin stood at or near the center quarter corner for several decades, and a fence of unknown origin ran southward to the south line of the section from that monument for several decades as well, over which no controversy ever arose, either between these men or their predecessors. During the 1960s, Mahlandt began using an artesian well which was evidently located just a few feet southeast of the old center stone, and Jabes gave Mahlandt permission to build a dike north of that stone, to create a canal and pond in the northwest corner of the Mahlandt tract. In 1977 however, the old fence became dilapidated and Mahlandt rebuilt it, but for unknown reasons he rebuilt it about 10 feet west of its prior location, which caused Jabes to order a statutory resurvey of Section 20. The surveyor found concrete monuments of unknown origin at the north and south quarter corners of this section and he accepted them as controlling corners. The south quarter corner monument was 14 feet east of the new fence and the line between these 2 monuments passed 4.63 feet east of the old center stone. When Jabes saw the survey showing these results, he wanted the fence relocated to the quarter section line depicted on the survey, and Mahlandt agreed to relocate the south end of the fence to the south quarter corner monument. Mahlandt insisted however, that the old center stone should also be regarded as a controlling monument, so the fence should run from the south quarter corner to that point, and he filed an action seeking a judicial determination of that boundary location. The trial court agreed with Mahlandt, and ruled that the old center stone marked the northwest corner of his tract, thereby preserving his right to the artesian well. Jabes pointed out however, that the surveyor had rejected the old center stone, maintaining that the surveyor clearly intended the line between the quarter corner monuments to represent the boundary between the litigants, and Mahlandt had not filed any appeal of the resurvey, so that line conclusively controlled the location of the boundary line in question. The Court agreed with Jabes that under Kansas law statutory resurveys which go unchallenged are absolutely conclusive and are legally binding for boundary location purposes, but the Court nonetheless upheld the lower court decision

against Jabes on this particular issue. Even though statutory resurveys, when properly completed, control boundary locations of record, and are often said to "establish" or "determine" property boundaries, resurveys are legally incapable of controlling title, the Court reminded Jabes, so such resurveyed corners or lines can have no impact upon the physical extent of titles, which are governed first and foremost by the acts of the land owners. The trial court had properly recognized the old center stone as an agreed boundary monument, the Court found, equivalent in terms of controlling force upon the titles held by both litigants to the quarter corner monuments, and the adoption of that monument by the trial judge did not represent an illegitimate deviation from an accepted statutory survey, as Jabes asserted. The opinion of the surveyor regarding the legitimacy or controlling nature of the old center stone was inconsequential, the Court thus observed, because even a properly executed resurvey does not constitute an adjudication of title, which is ultimately controlled by the acts and the intentions of the property owners. Thus the Court acknowledged that long established land use patterns can stand as the best evidence of an intended boundary location, particularly when that land use was based upon long accepted survey monumentation, regardless of its origin.

Easements are not comprised of land, they represent land rights that are limited to a specific use, or set of related uses, and any legal description defining land which is subject to an easement merely outlines the area within which that use can be made, while the fee title and ownership associated with the described area remain unchanged. The importance of understanding the key difference between ownership of land and ownership of an easement was vividly displayed in the case of *Atchison, Topeka & Santa Fe Railway (ATSF) v Humberg* (1984). In 1886, the Chicago, Kansas & Western Railroad, the predecessor of ATSF, acquired a right-of-way, passing through the NE/4 of a certain Section 35 in Ness County, by means of condemnation. In 1887, it was evidently determined that additional property was needed for railroad use in that location, so 3 tracts of unspecified size and shape adjoining that right-of-way were acquired for railroad purposes, directly related to the use of the right-of-way, from the Challacombe Town Company, which was the owner of the NE/4 at that time. The additional tracts were put to use at an unspecified date, and eventually came to be occupied by grain elevators, warehouses and scales, but how much of the area acquired in 1887 was actually used by ATSF or its predecessor is unknown, and whether the boundaries of that area were ever fenced or otherwise visibly marked is unknown as well. By 1950, Humberg had acquired the NE/4 of Section 35, and he evidently cultivated all of the open and available land in that quarter, which was not occupied by the track or the other existing structures, apparently without any interference or comment from ATSF. Humberg's use of the land surrounding the railroad structures was eventually noticed by ATSF however, and in 1981 ATSF offered to lease some of the acreage lying within the area acquired in 1887 to Humberg, but he declined that offer, insisting that he had acquired fee title to all of the railroad property that he had been consistently using for over 30 years, by means of adverse possession. ATSF was therefore compelled to file an action against Humberg, seeking to quiet its title to the area described in the 1887 deeds, in order to bring Humberg's use of that area to an end. The trial court held however, that Humberg had adversely acquired the parts of the 3 tracts at issue which he had been using, so ATSF was forced to pursue the matter further, taking it to the Court of Appeals (COA). The COA reversed that lower court decision, after examining the acquisitions made in 1887 and concluding that the predecessor of ATSF had

never acquired any land in the NE/4 of Section 35 in fee. All of the acquisitions made in both 1886 and 1887, the COA informed the litigants, represented easements, adhering in so ruling to the long standing Kansas judicial position that fee title is never acquired by any railroad for any right-of-way, or any purpose relating directly to an existing right-of-way, because fee ownership is simply not needed for such operational purposes. Noting that the 3 tracts in question were evidently intended to provide space for a station or depot, which for unknown reasons was never built, leading to the subsequent use of that area for other legitimate purposes clearly associated with the rail line, the COA advised Humberg that his adverse possession claim was useless, because he already held fee title to every bit of the NE/4, and no fee boundaries existed anywhere within that quarter. Since ATSF was the holder of valid easement rights however, which were applicable to the entire contested area, ATSF had the right to exclude Humberg from any portions of that area which ATSF needed for any railroad purposes, the COA clarified, so the fee title held by Humberg was useless to him, to the extent that it was encumbered by the easement rights of ATSF. Thus the COA demonstrated that all land which has been described as being devoted to railroad use is protected from adverse possession by the fact that it constitutes only an easement, since the presence of the easement makes any use of the land within such areas by the owner of the servient land merely tolerable servient land use, which therefore cannot be characterized as being adverse in character.

The concept of description reformation typically operates in favor of grantees, since they often have no experience dealing with conveyances and can be easily victimized, either intentionally through chicanery, or unintentionally through bungling or negligence, on the part of their grantors. Sometimes however, the grantee proves to be the more artful or astute party and takes control over the documentation of a conveyance, in which event the grantor can become the victim, and as the case of *Andres v Claassen* (1986) illustrates, the Court is prepared to utilize description reformation to rectify all such scenarios, thereby insuring that all conveyances embody the actual intentions of the parties. Claassen was the owner of a lumber yard of unspecified size and shape, situated on the north side of Highway 50, in the NW/4 of a certain Section 28 in Harvey County. The Andres family owned a tract of unspecified size and shape lying west of the lumber yard, but they also held a legal interest in a 44 acre parcel lying south of the highway, which had been condemned by KDOT at an unspecified date. Andres put his land north of the highway up for sale and in 1979 Claassen responded with an offer. Extensive negotiations over the value of the Andres tract took place, and Claassen eventually made an attractive offer, so the realtor who was acting on behalf of Andres sent Claassen a conveyance contract for his review, which included a legal description of the Andres property lying north of the highway. Claassen's attorney edited the descriptive language used in the contract however, to indicate that the conveyance included all land lying within the NW/4 held by Andres, and Claassen told the realtor that this was necessary to clarify the legal description of the Andres property, so no objection to this change was raised. Andres then deeded his property to Claassen, and the legal description of the Andres tract contained a clause stating "together with any and all right, title or interest, present or contingent, in the NW/4 of Section 28", which was supplied by Claassen's attorney. Then in 1980, Andres conveyed his interest in the parcel south of the highway to another party, and KDOT quitclaimed that 44 acre area to the same party in 1981, but when Claassen discovered this, he stepped forward asserting that he was the owner of that parcel, by virtue of his 1979 acquisition

from Andres. In order to protect his second grantee, Andres was thus forced to file an action against Claassen, seeking to have Claassen's deed reformed, to remove the clause added by Claassen's attorney, on the grounds that it operated to convey the 44 acre parcel to Claassen, contrary to the intent of the parties in 1979. The trial court ordered the requested correction, and the Court approved that decision, leaving Claassen with no land south of the highway, leading him to protest that the disputed deed language was clear, complete and accurate, so Andres was legally bound by the existing legal description and he could not deny that the relevant area was included in the 1979 transaction. The Court pointed out however, that Claassen and his attorney had taken control over the contents of the deed, and in so doing they had put words in the mouth of Andres, which he had not chosen and did not understand, so the contested language was not legally binding, because it did not conform to the intention of Andres to sell only his land north of the highway, thus the problematic clause had been properly eradicated. Claassen's clever scheme to turn the ignorance of Andres about descriptive terminology to his own advantage was thus judicially derailed, by means of description reformation. Any contents of a legal description which were not fully understood by either party are subject to rectification through description reformation, the Court thus confirmed, holding that an innocent party cannot be penalized for failing to comprehend descriptive language. No description which fails to accurately capture the intentions of all parties is legally binding, the Court thus acknowledged, while indicating that descriptions can be reformed regardless of the specific cause or source of the mistake. In addition, the outcome here exemplifies the widely accepted principle that the meaning, efficacy or veracity of any text employed in a legal description will be construed against the party who either personally authored that text or was responsible for it's presence.

The true nature or status of land rights of various kinds that are acquired by utility companies is sometimes unclear and has often become a source of conflict and litigation, much like the nature and status of railroad right-of-way. While the phrase "exclusive easement" may seem quite simplistic at first glance, the land rights associated with exclusive easements have frequently been misunderstood, requiring judicial clarification or determination, and the case of *Kansas Power & Light (KPL) v Ritchie* (1986) provides a good example of such a scenario. Boren was the owner of a tract of unspecified size, shape and location in Greenwood County, which was evidently comprised of vacant rural land. In 1980, KPL completed a successful condemnation of an unspecified portion of the Boren property, for the purpose of constructing a substation, and the condemnation documentation expressly specified that the "right of exclusive use" pertaining to the condemned area would be required by KPL to accommodate the substation. How the substation site was described, and whether or not it's boundaries were ever surveyed or monumented, are both unknown, but no controversy ever arose over either the size or the location of that site within the Boren tract. The construction of the substation was completed in 1984, but in 1982 Boren had executed a mineral exploration lease, covering a 5 acre portion of his land, which included the condemned area. The buildings and the equipment situated upon the substation site were fenced in by KPL, but the fence did not extend to the described boundaries of the condemned parcel, so a substantial amount of the condemned land remained vacant and unused, outside the KPL fence. Shortly after the completion of the substation construction, Ritchie, who was the holder of the 1982 mineral lease, arrived and began drilling oil wells an unspecified

distance from the KPL fence, within the leased area, but also within the condemned area. KPL objected to this development, but Ritchie evidently insisted that he was entitled to use the entire area which had been leased to him, so KPL was compelled to file an action, seeking to have Ritchie judicially ordered to cease his use of the condemned area and to honor the described boundaries that were enumerated in the condemnation documentation. The trial court upheld the right of KPL to control all use of the full condemned area, limiting Ritchie to the portion of the leased area which did not overlap the condemned area. Ritchie protested that KPL had acquired only an easement, and therefore had no right to fence any of Boren's land, and he also maintained that if the KPL fence was legal, then KPL had forfeited the portion of the condemned area which KPL had fenced out, but the Court of Appeals (COA) disagreed, and informed Ritchie that he was wrong on both of these points. The COA reiterated that condemnation results only in the creation of an easement, when invoked for utility purposes, but pointed out that the easement acquired by KPL in this instance was clearly exclusive in nature, allowing KPL to fence as much of the condemned parcel as necessary, and to exert complete control over the entire condemned area, tantamount to fee ownership of that area. In addition, the COA held that KPL had not relinquished any rights to the portion of the substation site that had been fenced out, and the exclusive easement obtained by KPL covered the whole condemned area, regardless of how much of that site had been put to actual use. Utility easements acquired by means of condemnation can be used as sites for permanent construction, the COA thus confirmed, even though condemnation does not confer fee title upon the party who thereby obtains the right to use the condemned area, verifying that no fee boundaries are created by means of such a condemnation. Substation sites are typically exclusive easements, the COA also observed, while acknowledging that an exclusive easement holder can legally fence out the fee owner and all others, but failing to fence the entire easement area does not represent abandonment of any portion thereof or reduce the size of the easement to only the fenced area.

Given the fact that the Court has long demonstrated that it is generally inclined toward acceptance of physical objects as boundary evidence, particularly in those situations where some visible linear object is treated or regarded as a basis for a claim of title, its not surprising that many clearly bogus boundary assertions have been made, and the case of *Perry v Mendelsohn* (1987) exemplifies how such situations develop. In addition, the importance of understanding the relationship between fee title and easement rights is on display here, as the Court of Appeals (COA) is confronted with a suggested alternative to adverse possession in the boundary context. The Browns were the owners of a presumably typical residential lot of unspecified size and shape, situated in an unspecified part of Overland Park. The Browns evidently had a small child in 1970, so quite naturally they erected a chain link fence in their backyard, for the purpose of creating a safe play area for their child. No effort was made to place this fence upon any lot lines however, in fact it appears that the Browns deliberately stopped this fence several feet short of their boundaries, since they had no need and no desire to fence their entire backyard. The Browns apparently moved away, not long after building this fence, and at unspecified times during the 1970s, the Brown lot was acquired by the Perrys, still bearing the fence, while one of the adjoining lots was acquired by the Mendelsohns. There is no indication that either the Perrys or the Mendelsohns were ever told by anyone that the fence was on their mutual lot line, and in fact it appears that the Perrys were fully aware at all times that the

fence was well within the boundaries of their lot. Nevertheless, the Mendelsohns always mowed all of the grass on their side of the fence and the Perrys never raised any objection to that activity, or told the Mendelsohns that they were mowing part of the Perry lot. In 1979, apparently convinced that the fence represented their lot line, the Mendelsohns had a swimming pool installed, which evidently extended to within just a few feet of the fence. In 1982, both parties had their lots surveyed, and both surveys confirmed that the pool crossed the lot line, encroaching about 7 feet onto the Perry lot. The Perrys responded by filing an action against the Mendelsohns, demanding the removal of the encroaching portion of the pool, and the trial court found that the Mendelsohns could not prevail upon the basis of adverse possession, but nonetheless granted the Mendelsohns an easement, which allowed them to maintain the pool just as it stood, holding that it would be inequitable to require them to remove part of it. On appeal however, the Perrys argued that the net effect of the creation of the pool easement was identical to adverse possession, permanently depriving them of the use of 7 feet of their lot, and the COA agreed, striking down the pool easement for that reason. Historical precedent in Kansas had established that adverse possession can function in the boundary context, the COA realized, but only where a visible line, that is physically marked in some way, can be identified as an agreed boundary, so an object which was clearly never intended to function as a boundary does not support the adverse acquisition of part of any adjoining lot, parcel or tract, with the accompanying adjustment, relocation or negation of the relevant existing boundary of record. Moreover, the COA also recognized, if every use of land by an adverse claimant, even for a period short of 15 years, resulted in the formation of an easement, then the 15 year statutory period would be rendered meaningless, because every encroachment would produce an easement, typically leaving the relevant portion of the servient property essentially useless to the fee owner thereof. Therefore, the COA concluded, the judicial creation of an easement is not a legitimate alternative, where adverse possession is argued but cannot be proven, thereby adopting what is known in several other states as the "empty fee doctrine", which mandates that a land owner cannot be left with useless fee title, unless all of the elements of a genuine prescriptive easement are present.

While our last previous case provided a good example of an illegitimate attempt to leverage the prescriptive easement concept, as a surrogate for adverse possession, our next case presents an example of the successful creation of an easement by means of prescription, in an especially unusual context. The legal basis for the development of prescriptive easements lies in adverse land use, and therefore mirrors the foundation of adverse possession, but unlike adverse possession, prescription results in the creation of no fee boundaries, and therefore has no negative impact upon existing boundaries of record. When the intensity of the land use does not merit a transfer of fee title from the land owner of record to the adverse party, yet undocumented rights worthy of judicial protection have come into existence through that usage, the easement context provides an alternative means of enforcing repose, without any alteration of either fee title or record boundaries. As the case of *Maxedon v McClellan* (1988) well illustrates, any land use crossing a boundary can potentially produce mutual land rights, resulting in the formation of an unwritten easement, or in some cases reciprocal easements, to protect and perpetuate an established land use pattern, comprising both a benefit to, and a legal burden upon, each of the relevant properties. McClellan and the father of Maxedon owned adjoining properties of unspecified size and shape in Pratt County. The Ninnescah River once flowed through both

the McClellan and Maxedon tracts, but at an unspecified date the river had relocated itself, leaving an abandoned channel passing through these 2 properties, in which just a small amount of water still sometimes flowed. During the 1950s, McClellan decided to create a pond by building a dam across the old channel, but more water accumulated in the pond than he expected, so the resulting pond extended beyond the McClellan property, submerging about 5 acres of the Maxedon property as well. Maxedon's father did not object to this development however, in fact he welcomed it, and he began stocking the pond with fish. The Maxedon family then used the entire pond as a fishing hole for over 30 years, without any objection from McClellan or anyone else, until McClellan removed the dam in 1985. The Maxedon family protested the removal of the dam, but McClellan refused to rebuild it, so the Maxedons filed an action against him, seeking the replacement of the dam and damages for it's destruction. The trial court held McClellan liable to the Maxedons for substantial damages, ordering him to pay the cost of a new dam, in order to restore the long existing conditions, as they stood prior to the removal of the dam. On appeal McClellan argued that he had built the dam, so he had the right to eliminate it at any time, but the Court of Appeals (COA) upheld the decision against him, informing him that he was mistaken about the legal consequences of the action that he had taken more than 30 years earlier. Since the pond had remained intact for over 15 years, McClellan had acquired a prescriptive easement covering the inundated portion of the Maxedon property, which McClellan was free to use or to abandon at any time, as he had done in 1985, but the easement burdening the Maxedon tract was not the only undocumented easement that had been legally created, the COA explained. Because the Maxedons had used the entire pond for fishing activities, they had acquired an easement burdening the submerged portion of McClellan's land, giving them the right to insist that the entire pond be permanently maintained, so McClellan's construction of the dam generated mutual land rights, held by both parties, since the pond crossed their mutual boundary, thereby forming a legal burden upon both tracts. Mutual acquiescence in the existence and use of a pond built by one property owner, which straddles a property line, results in the creation of reciprocal easements, the COA thus declared on this occasion, validating the pond as a permanent improvement to the land, upon the passage of the statutory period for the development of prescriptive rights, while demonstrating that even recreational use of water can support the acquisition of valuable land rights through prescription.

At this juncture we come to a case which represents the culmination of the long line of cases that we have reviewed on the topic of reversion, and thus holds particular value for those land surveyors who perform ALTA surveys, since they frequently have occasion to deal with title issues. The case of Gauger v State (1991) stands as the Court's strongest modern expression of the widely honored principle limiting the retention of any land rights by grantors by means of description exceptions, thereby preventing the creation of fee boundaries along any right-of-way easement by such means. A railroad right-of-way, 100 feet in width, passing through the SE/4 of a certain Section 19 in Leavenworth County, was acquired in 1887, comprised of a 50 foot strip which was acquired through condemnation, alongside an abutting 50 foot strip which was deeded for railroad right-of-way purposes by Green, who was then the owner of the entire SE/4. A rail line was built in the intended location, and this right-of-way was used in the typical manner henceforward, but in 1903 Green conveyed the SE/4 to Kansas, for use as a penitentiary site. The 1903 deed indicated that the subject property consisted of the entire SE/4 "except

that part thereof occupied as railroad right-of-way". The correctional facility was then built and put to the intended use, while the rail line continued to function, until about 1940, when Kansas City Northwestern, the operator of the railroad, went bankrupt and the 100 foot strip evidently fell into disuse. In 1943, a sheriff's deed describing the former right-of-way was issued to Cowling, pursuant to a tax foreclosure, because no taxes had been paid on that strip since the railroad bankruptcy occurred. What use Cowling ever made of the 100 foot strip, if any, is unknown, but in 1980 he deeded that strip to Gauger, and during the 1980s Gauger evidently decided that he wanted to make some unspecified use of the deeded area. When Gauger attempted to utilize the old right-of-way however, the penitentiary officials evidently denied him access to that area, and informed him that it was part of the penitentiary site owned by the state, to which Gauger responded by filing an inverse condemnation action, demanding compensation from Kansas for that alleged taking of his land. The trial court rejected Gauger's position however, and informed him that he never owned the land comprising the 100 foot strip, so his case was baseless and he was entitled to no state funds. The Court upheld that decision, over Gauger's protests that the strip in question was very clearly excluded from the property conveyed to Kansas in 1903, so Kansas had no valid basis upon which to claim that the state owned the strip at issue. Citing the seminal Abercrombie case of 1905, along with others previously reviewed herein, the Court reminded Gauger that in Kansas every railroad right-of-way is an easement, regardless of how it was acquired, so no fee boundaries defining the 100 foot strip were ever created, the strip was merely an easement which was subject to reversion, and it had thereby returned to it's original status as unburdened land, when the rail line ceased to operate. In addition, the Court also pointed out that the 1903 deed was legally incapable of converting the right-of-way easement created in 1887 into an independent fee strip, because under Kansas judicial policy, grantors can retain neither fee title beneath any such easements, nor any reversionary rights relating to any such strip, in accord with several of the cases which we have reviewed. The 1943 tax deed was therefore worthless, the Court concluded, since the contested strip never existed as a fee tract independent of the adjoining land in the SE/4, the right-of-way was owned in fee at all times by each successive owner of the rest of the SE/4, so neither Cowling nor Gauger had ever acquired any land in the SE/4. Thus the Court reiterated here that a deed excepting or reserving a right-of-way does not prevent the fee title to the land underneath that right-of-way from passing to each successive grantee, whenever the fee beneath such a strip is in fact legally part of the fee estate being conveyed, which is typically the case:

“... it is immaterial whether the railway company acquired by right-of-way deed ... or by condemnation. If or when it ceases to be used for railway purposes ... the land concerned returns to it's prior status as an integral part of the freehold ... a right-of-way ... for public purposes continues to be the property of the fee title owner ... when the purposes related to the acquisition have been terminated the burden of servitude is lifted ... the owner of the basic fee returns to full dominion ... supported by the long standing and important policy ... disallowing long strips of land ... to be severed from the surrounding land ... a reservation ... leaving a long narrow strip of land ... is so absurd and unreasonable as even to be against public policy ... "except

that part thereof occupied as railroad right-of-way" ... merely points out to the grantee ... that a railroad right-of-way exists ... the deed (of 1903) conveys the servient estate to the State of Kansas.”

The decision of the Court of Appeals (COA) in the case of *Akers v Allaire* (1992) heralded the arrival of an era of accelerating use of adverse possession in the boundary context, facilitated by statute 60-503, as the COA became increasingly familiar and comfortable with the concept that adverse possession can operate to functionally adjust property boundaries to conform to existing conditions on the ground. In contrast to the decision of the COA in the highly similar *Perry* case of 1987, previously reviewed herein, this case again emphasizes the importance of physical evidence in judicial boundary determination, while marking the acknowledgement by the COA of the validity of the concept that adverse possession can be completed in good faith, and is typically not an act of aggression, making the once vital element of hostility irrelevant. Allaire acquired a presumably typical rectangular residential lot of unspecified size in an unspecified location in Sedgwick County in 1966, upon which she evidently resided henceforward. The rear end of a similar, if not dimensionally identical lot evidently adjoined the rear end of Allaire's lot, and there was a small fence of unknown origin, made of chicken wire and hog wire, situated upon that lot, about 10 feet from the rear line of both lots. Allaire never suspected that this small fence was not on the rear line of her lot, so she simply maintained the ground on her side of that fence as part of her backyard over the ensuing years, and no one objected to any of her backyard activities. In 1976, Akers acquired the lot bearing the small fence, and just like Allaire, she supposed that it marked her rear boundary, so she saw no reason to seek verification of the record location of her rear lot line. In 1980, a son of Allaire replaced the existing fence with a chain link fence, and Akers raised no objection, still operating under the apparent presumption that Allaire knew the location of the line between the 2 lots. In 1987 however, Allaire had a larger privacy fence installed, 3 feet on her side of the chain link fence, and this apparently disturbed or angered Akers enough to compel her to order a survey of her lot. Nothing is known regarding how the survey was done, but it evidently indicated that the privacy fence was about 7 feet on Akers side of the rear lot line, so she proceeded to file an action against Allaire, to which Allaire responded by asserting that she had acquired 10 feet of the Akers lot by means of adverse possession. The trial court held that Allaire had adversely acquired the 10 foot strip, but had then relinquished 3 feet of that strip, by ceasing all use of the 3 feet that she fenced out in 1987, placing the disputed boundary at the privacy fence on that basis. Allaire was satisfied with the 7 foot strip and did not appeal the 3 feet that she had gained and then lost, but Akers brought the case to the COA, insisting that Allaire had acquired no portion of the Akers lot, because all use of the 10 foot area in question by Allaire was based on a boundary mistake, and was therefore not hostile in character. Under statute 60-503, a genuinely hostile state of mind is no longer required to complete adverse possession in the boundary context in Kansas, the COA informed Akers, so all of the use of the 10 foot area in contention that had been innocently made by Allaire qualified as legitimate adverse land use. The COA also concurred with the lower court decision reducing the adversely acquired area by 3 feet however, and therefore approved the privacy fence, rather than the chain link fence, as the controlling boundary evidence for that reason. Thus the COA adopted the position that even a fence of unknown origin, which was presumably never

intended to mark a boundary, can support adverse possession in an urban context, if it was treated as a de facto boundary by all parties for a full statutory period. In so ruling, the COA made express reference to the failure of Akers to verify her lot boundaries at the time of her acquisition, indicating that the presence of a fence on the lot she was buying put her on inquiry notice, which prevented her from qualifying for the status of an innocent land owner, thereby highlighting the importance of obtaining a survey at a point in time when it is still capable of serving the purpose of boundary protection.

The same essential components of adverse possession that were present in the Akers case, just previously reviewed, were again instrumental in the case of *Graham v Lambeth* (1996) which illustrates the type of potential boundary issues that often confront grantees of any land representing a remainder, from which other properties have been carved. Rosenquist was the owner of any unspecified amount of land in an unspecified location in Lyon County, but how or when he acquired his property, and what use he made of it, are both unknown. In 1964, Graham acquired a parcel of unspecified size from Rosenquist, which was evidently one of an unspecified number of such parcels that Rosenquist had created, although there is no indication that Rosenquist platted his land before selling off portions of it. Rosenquist pointed out a certain fence of unknown origin to Graham, indicating that it marked the north boundary of the Graham parcel, although how the Graham parcel was described in Graham's deed is unknown. The remaining parcel, north of the fence, was owned by Rosenquist until he conveyed it to Wayman in 1968, and neither Rosenquist nor Wayman ever challenged the fence boundary or the use of the full area south of the fence by Graham. What use Wayman made of the north parcel, if any, is unknown, and there is no indication that any structures were ever erected on either parcel, presumably Graham used the south parcel as either cropland or pasture. Wayman neglected to pay his property taxes however, so in 1984 the north parcel was conveyed to Lambeth by virtue of a tax deed, which like Graham's deed evidently made no reference to the fence that Rosenquist had specified as marking the parcel boundary. Lambeth apparently also made little if any use of the north parcel, so the fence boundary went unchallenged for several more years, during which the land use made by Graham continued, unquestioned by anyone. In 1994, Lambeth finally had the north parcel surveyed, and he was advised that the fence was about 10 feet north of his south line, so he ordered Graham to move it, but Graham responded by filing an action asserting that he had adversely acquired any portion of the north parcel lying south of the fence. The trial court upheld Graham's position, quieting his title extending northward to the fence, and the Court of Appeals (COA) approved that ruling, indicating that Graham's title was secured by virtue of his land use well before the tax deed was issued to Lambeth, so the fence boundary was already legally in effect when Lambeth first arrived on the scene. Lambeth pointed out that under the law a tax deed creates a virgin chain of title, maintaining that the issuance of the tax deed had thereby eradicated any adverse possession which may have been previously completed by Graham, but the COA disagreed. The completed adverse possession of Graham effectively limited the north parcel to the area lying north of the fence, rendering the legal description used in the tax deed moot and irrelevant, the COA informed Lambeth, so he had never acquired any land south of the fence, regardless of how his 1984 acquisition was described in his deed. Rosenquist had clearly intended the fenced line to serve as the parcel boundary at issue, the COA recognized, so Graham had the right to rely on that line as his north boundary, and his use

of all of the land south of the fence therefore qualified as land use made in good faith, enabling adverse possession to effectively overcome and nullify the parcel boundary described in Graham's deed. Thus the COA adhered to the well established principle that a boundary location which is visibly marked and is pointed out by a grantor to his grantee is an agreed boundary, generating land use made in good faith, which is subject to protection and validation under the law, through adverse possession. A tax deed is incapable of reversing a completed adverse possession, and therefore cannot convey any portion of the described property which has in fact been thus lost prior to the execution of the tax deed, the COA mandated here, cognizant that in this instance, unlike the Akers case, even if Lambeth had his parcel surveyed prior to buying it, the survey would have been of no assistance to him in his effort to enforce the boundary location of record.

By the late 1990s the Kansas Court of Appeals was handling virtually all land rights appeals in Kansas, so the final pronouncement of the Kansas Supreme Court which we will review comes at this point, and here we find the Court once again upholding the principle of description reformation, in *Landau Investment v City of Overland Park* (1997). While we have previously seen description reformation used to eliminate both boundary and title issues, here the Court approves the use of description reformation in the easement context, even within the rigid legal structure of eminent domain proceedings. In 1994, Overland Park determined that condemnation would be needed to obtain certain easements, in order to facilitate a construction project along 127th Street, and Landau was among the parties through whose land the required easements passed. Overland Park officials set out to accomplish the required condemnations in the usual manner, proceeding in complete good faith, intending to acquire easements only in those locations which were genuinely needed to support the project, but the engineering firm serving as the project contractor bungled the legal descriptions of 2 of the easements. Although these legal descriptions were erroneous and did not accurately cover the intended areas, the location of those areas was properly depicted on the project plans, and those areas were also properly staked on the ground, so the correct areas were appraised, and the condemnation request was judicially approved, all prior to the discovery that a description issue existed. After the intended easement areas had been put into actual use in 1995, the description errors were noticed by city personnel and revealed to all of the parties, leading the astute attorneys or other real estate professionals employed by Landau to recognize a potential opportunity to extract additional funds from the city. Thus Landau elected to file an inverse condemnation action against Overland Park, alleging that Landau had been inadequately compensated, due to the fact that the areas described in the bogus legal descriptions were not the same areas which had been put to use by the city, the conflicting locations being about 200 feet apart, due to a dimensional error. The trial court denied that Landau's assertions held any validity however, upon finding that no harm had resulted from the presence of the erroneous descriptions, because the appraisers had relied instead upon the accurate plans and stakes, therefore Landau was due no further compensation, and the description errors were mere technicalities, which were subject to correction through reformation. The Court upheld that ruling, concurring that inaccurate legal descriptions amount only to "a defect in form" which is "not a vital failure", as long as the actual intended area was properly understood by all parties, and the mutually intended area was put to use. In acknowledging the importance of the accuracy of the project plans, the Court effectively invoked the principle that a graphic document, such as a plan or other

visual exhibit, can function as the controlling component of a legal description, and when so utilized graphic documents can negate any mistakes made in composing descriptive text. Likewise, in confirming the importance of the fact that the appraisers observed the accurately placed stakes marking the intended areas, the Court once again here applied the principle of monument control, which as we have so often noted, renders documentary evidence secondary to the physical evidence outlining any intended area involved in a conveyance on the ground. Every conveyance of land or land rights, the Court understood, is presumed to be carried out with direct reference to the existing conditions upon the subject property, and all parties are presumed to act with their eyes open to those conditions, such as the location identified by the stakes in this scenario, so when stakes exist they are typically presumed to have served as the primary source of reliance. The objective or purpose of any legal description is not a factor preventing its rectification, the Court also demonstrated on this occasion, illustrating that ambiguous, misleading or otherwise mistaken descriptions created for easement purposes stand subject to correction, just as do those created for fee boundary purposes.

Our final case of the twentieth century stands as a rare throwback to the traditional use of adverse possession, for the resolution of a pure title conflict, with no boundary issues, which as pointed out earlier herein was the original and long dominant form of adverse possession, until it was judicially allowed to take control over the resolution of boundary disputes as well. The case of *Buchanan v Rediger* (1999) illustrates that parties who are isolated by distance from real property in which they hold an ownership interest can by no means rest safely, because their ignorance of the legal significance of what is taking place upon their distant land can facilitate the elimination of their land rights. Weddle, who was apparently a widow with one daughter, was the owner of a presumably typical family farm consisting of a quarter section in Smith County. Weddle's daughter married Buchanan and in 1955 Weddle conveyed her quarter section to the couple. Weddle's daughter died in 1968, but shortly before her death she conveyed her interest in the farm to the 2 children she had with Buchanan. Buchanan soon remarried and he had 4 additional children, before his death in 1977. Buchanan evidently died without leaving any will, and shortly after his death, his second wife and her 4 children left their Kansas farm and moved to Illinois. The 2 children of Buchanan's first wife also left the farm and moved to Colorado, at an unspecified date following Buchanan's death, but they continued to control the use of the Buchanan quarter, by renting it out to a tenant farmer who made regular use of the entirety of the subject property henceforward. Buchanan's second wife died in 1988, and her property rights passed to her 4 children, but they never returned to Kansas and they had no involvement at all with the land comprising their former Kansas home after 1977. In 1996 however, Buchanan's 4 children in Illinois, including Rediger, either discovered or were told that they still held an ownership interest in the Kansas farm, and they then evidently informed Buchanan's 2 children in Colorado that they wanted to partition the land of their late father, presumably proposing to divide it equally between the 6 parties who were all children of Buchanan. The 2 Colorado heirs rejected this proposal however, and they proceeded to file an action against the 4 Illinois heirs, asserting that they had extinguished the legal interest of the Illinois heirs in the Kansas quarter through adverse possession, by maintaining complete control over the subject property since 1977. Observing that the 6 litigants were all legal cotenants of the quarter at issue, and noting that none of them had personally occupied the subject

property since 1977, the trial court held that no adverse possession had occurred, and therefore granted the request made by the Illinois heirs to split the farm into 6 parcels. The Court of Appeals (COA) reversed that decision however, pointing out that many Kansas cases have verified that adverse possession can be completed even between legal cotenants who are close blood relatives. Because the use of the land under the control of the Colorado heirs stemmed from the 1968 deed issued by their late mother, which of course made no reference to the Illinois heirs, since they were unborn at that time, the Colorado heirs had a valid good faith foundation for adverse possession, the COA decreed, so all of the use of the subject property made by the tenant of the Colorado heirs was adverse to the Illinois heirs. Absentee owners are not shielded by either distance or innocent ignorance from the consequences of adverse possession, the COA thus reminded the defendants, whose indolence and inattentiveness with regard to their Kansas land had cost them their land rights, regardless of whether it was the result of misplaced trust or plain carelessness on their part. Thus the Colorado heirs, who were also absentees, were able to legally oust their step brothers and step sisters in Illinois without ever even seeing the farm again themselves after 1977, because the ongoing use of the disputed quarter by their tenant operated as a constant legal manifestation of their full control over the land, which accrued to their benefit, just as if they were living on the contested land themselves at all times.

Kaw Drainage District v Attwood (1981)

One of the subtle yet pervasive themes inevitably running through any extensive treatise on real property is the interaction between public land rights and private land rights, and as the thoughtful reader will have undoubtedly noted, this book is no exception to that rule. The decisions of the Court and the Court of Appeals, like those made in every other state, reflect the efforts of the judiciary to strike a proper balance between vital public rights, which must be protected in order to support a functional society, and private rights, which form the core of the American experience, in search of which those who founded our nation came to the New World. In the arena of land rights, this endless battle plays out on a very frequent basis, as land rights either held or asserted by cities, counties, states and even the federal government are often questioned or tested by private challengers, and in many cases rightly so. While statutory enactments can establish ground rules, either bestowing or limiting public and private land rights in various ways, the law as so codified always remains unclear or incomplete in certain respects, leaving plenty of room for disputation, which then requires the judiciary to serve as a referee, attempting to sort out the legitimate rights and claims. As we have observed, certain branches of land rights law typically involve public rights, such as the law pertaining to roads, which relates to both the creation and the subsequent fate of all public right-of-way, and features many inherently public issues such as dedication and vacation. In Kansas, the Court has been a very staunch and consistent protector of public land rights from the outset, as we have witnessed in examining the development of the law through the decades, and one branch of

land rights law which very clearly displays this inclination of the Court is riparian title and boundary law. Like many other states, through the Court, Kansas has long maintained the right to independently establish and enforce riparian title and boundary principles that are suitable to the existing conditions in Kansas, where natural water sources are particularly scarce and riparian land is therefore especially precious. While public rights to the use of water and access to natural water sources are always well guarded by the Court, not every riparian land rights claim set forth on behalf of the public is worthy of protection, and as our present case demonstrates, the Court is also fully prepared to dismantle public claims that run contrary to established riparian principles, thereby protecting the land rights of private riparian land owners.

Prior to 1906 – A certain township in Shawnee County through which the Kansas River flowed was platted by the GLO at an unspecified date, and the river evidently passed through the SW/4SE/4 of Section 21 in this township.

1906 – The Kaw Drainage District (KDD) was formed, and the area covered by the district was described as being bounded on the southwest by the Kansas River, so the portion of this Section 21 lying northeast of the river was within the KDD coverage area.

1936 – The portion of the south half of the SE/4 of this section lying northeast of the river was acquired by KDD. The river was an unspecified distance northeast of its platted location at this time however, so this tract no longer contained the full acreage platted by the GLO, but whether or not KDD realized that the river had moved to the northeast since being platted is unknown.

1938 – Belcher, who was an owner of land lying southwest of the river, situated directly across the river from the KDD tract, filed a quiet title action against KDD, in which he successfully quieted his title to all of the land lying southwest of the river in the SE/4 of Section 21, despite the fact that some of that acreage was evidently northeast of the originally platted river location. What use Belcher was making of his land at this time is unknown, presumably he had been using it as typical cropland for an unspecified number of years.

1939 – Belcher conveyed his property to Attwood, but what use Attwood made of the land he acquired at this time, if any, is unknown.

1940 to 1949 – At an unspecified date during this period, the father of Hansford, who also owned land on the southwest side of the river, lying north of the Attwood tract, began cultivating the portion of the Attwood tract adjacent to the river, along with his own land, without any objection from Attwood. The river continued to move to the northeast throughout this period, and as it did so, the Hansford family continually expanded their land use in that direction, following the progress of the river. What use was being made of the KDD tract on the northeast side of the river

during this period, if any, is unknown.

1950 to 1975 – At an unspecified date during this period, Hansford inherited the land of his father, and he continued to carry out the farming operations that had been established by his father, cultivating and harvesting all of the land in the SE/4 of Section 21 lying southwest of the river. Attwood was evidently unconcerned with the use of his land that was made by the Hansfords, he apparently chose to simply forsake the lower portion of his property since had no interest in using that area himself, so Attwood never made any effort to assert his ownership of any of the land that was being used by the Hansfords. What use was made by KDD of their land on the northeast side of the river during this period, if any, is unknown. The river's location evidently stabilized during this period, an unspecified but apparently quite substantial distance from it's platted location, so some portion of the original KDD tract still remained uneroded and intact on the northeast side of the river, but just how much acreage remained within that tract is unknown.

1976 to 1980 – KDD seized the crops produced by Hansford during the first 2 years of this period and retained the money which was generated by the sale of those crops, acting upon the premise that the grain belonged to KDD because Hansford had grown it upon land that was owned by KDD. Attwood and Hansford eventually protested this action on the part of KDD, apparently refusing to allow any more grain to be taken, thereby compelling KDD to file an action against them, seeking to quiet the title of KDD to all that portion of the south half of the SE/4 of Section 21 which was northeast of the river at the time of the GLO survey.

KDD argued that it had acquired all of the land in the south half of the SE/4 of Section 21 which was northeast of the river when it was platted by the GLO, so KDD was legally entitled to the full originally platted acreage comprising that tract, regardless of the subsequent movement or the present location of the river, because KDD was a public entity, and was therefore not subject to the riparian principles which operate upon titles held by private parties. KDD did not suggest that the river had moved to the northeast by means of avulsion, and conceded that the river had moved accretively, but nonetheless asserted that KDD owned land southwest of the river, because KDD held full jurisdiction and control over all watercourses, therefore KDD was legally incapable of losing any land as a result of erosion or any other form of river movement. KDD further argued that the use of the land southwest of the river by Hansford was immaterial, because adverse possession was inapplicable and useless to Hansford, since the land he was illegally using was public in character. Attwood dropped out of this litigation, since he had no desire to recover any of the property in dispute, leaving Hansford alone to engage KDD. Hansford simply argued that the river had moved northeastward from it's platted location through steady erosion and accretion, therefore the river had remained a legitimate boundary monument dividing the SE/4 at all times, so KDD had no valid claim to any land southwest of the river, and Hansford had acquired all of the accretion that had attached to the Attwood tract by virtue of adverse possession against Attwood. The trial court found no merit in any of the assertions set forth by KDD and agreed with Hansford that he had

adversely acquired all of the land southwest of the river in the SE/4 of Section 21, because it was in fact accretion to the Attwood tract, as Hansford maintained, so it was not public land as contended by KDD, leaving it susceptible to adverse possession.

Putting aside the blatant disrespect for private land rights which was clearly manifested in the arguments made by KDD, it must be acknowledged that the position taken by KDD was highly creative and completely novel in the annals of riparian litigation, moreover it represented the only chance KDD had to prevail, since it was impossible to prove that the river had moved avulsively. Realizing that the eroded area was hopelessly lost, if the standard riparian boundary principles were applied to this scenario, KDD decided to set out to overturn those fundamental principles, on the basis that they were applicable only to private parties. In reality, this strategy was not as outrageous as it may at first appear, because as we have learned and often observed, the Court had long been highly inclined to favor public land rights over private land rights in the riparian context. By this point in time however, the Court was far wiser and better informed with regard to riparian title and boundary issues than it had been a century before, thanks in large measure to the solid guidance on such issues which the United States Supreme Court had provided during the 1920s and 1930s, as previously discussed herein. The folly inherent in the suggestion, made here by KDD, that erosion is comparable to adverse possession, and thus cannot legally operate upon public land, was therefore quite apparent to the Court, dooming KDD to defeat. After reviewing the statutory language which outlined the public role and duties of KDD, as a valid Kansas drainage district authorized and empowered by state law, the Court was unable to concur with KDD that drainage districts are immune to the legal effects of erosive or accretive river movement. As specified in numerous prior Kansas cases, the Court pointed out to KDD, a navigable riverbed consumes both titles and boundaries as it erodes land, so neither titles nor boundaries are capable of emerging still intact upon the other side of the river after being fully submerged and being passed over by the entire width of the river. Kansas always owns the current bed of any navigable river, regardless of where that stream is in relation to its platted location, the Court well understood, unless it can be proven that the river moved avulsively, thus in the absence of avulsion the river always remains a massive boundary monument, erosively grinding away at riparian titles such as that of KDD, and in some cases even completely devouring them. The fact that KDD was authorized to exert control over watercourses for agrarian purposes was irrelevant to both title and boundary law, the Court advised KDD, in fact in this instance the river had turned the tables on KDD, and effectively exerted control through the forces of nature over the land acquired by KDD. Recognizing that the public title argument was a false one, brought forth by KDD out of either ignorance or desperation, and that the trial court had correctly resolved this controversy through the application of the principle of monument control, while properly deeming the contested land to be typical accretion, the Court explained why KDD could not prevail:

“The movement of the river caused an accretion to the Attwood land and erosion to the land owned by the drainage district ... the Hansfords, in the 1940s, proceeded to enter the Attwood accretion land ... the Hansford family then farmed the accretion land until 1977 ... the rights of Attwood and Hansford were obviously derived through ... Belcher ... the land now in

controversy was added onto the former Belcher tract through the process of accretion ... Hansford had acquired title as against Attwood through adverse possession ... all of the land he acquired was the result of an accretion ... the rules of accretion, reliction, erosion and avulsion, as determining riparian boundaries, apply to public as well as to private property rights ... boundaries change when a navigable river undergoes the process of accretion ... title to the bed of a navigable river is vested in the state ... and follows the movement of the river's edge ... counsel for the drainage district ... maintains however that the doctrine of accretion is not applicable to the drainage district because of ... the powers of a drainage district ... there is nothing in the statutes ... to disturb the applicability of the doctrine of accretion to riparian lands ... as a navigable river ... adds land to property on one side and erodes property on the other side ... accretion is added ... 24-454 ... is simply a codification of the common law doctrine of avulsion. It refers to land being abandoned and no longer used as a channel, that is the effect of avulsion ... the doctrine of accretion was applicable ... 24-453 and 24-454 do not change the doctrine of accretion or exclude its application to riparian property owned in fee by a drainage district ... Hansford ... was thus entitled to a decree quieting his title ... west and south of the Kansas River. ”

The statutes cited by the Court were brought into play by KDD, in support of the cleverly devised premise that a drainage district exists for the purpose of water control, so it would be senseless for the Court to allow the action of the water to control the fate or the size of the land owned by a drainage district. As the Court readily discerned however, this premise is a fallacy, because the statutes in question concern only avulsive river movement, and no such event occurred in this location, so the proposition that the erosive action of the water could do no harm to the land of KDD was utterly baseless. What KDD failed to understand is that avulsive river movement leaves boundaries unchanged in terms of location, by stripping the river of its platted status as a boundary monument, but erosion and accretion function conversely, changing boundaries in locational terms, thereby enabling the river to remain a controlling boundary monument wherever it may wander. All of the riparian principles discussed here by the Court were merely reiterations however, most importantly on this occasion the Court successfully resisted the tempting opportunity offered by KDD to elevate public rights above private rights, making the Court's declaration that riparian principles apply equally to all public and private land the most significant aspect of this decision. The immunity of public land to adverse possession is based upon sound policy, but riparian principles do not equate in any respect to adverse possession, and there is no need or reason for public land to have any type of special protection from the legal operation of riparian boundary and title principles, the Court wisely confirmed, in upholding the lower court ruling against KDD. Here the Court also reinforced the distinct limitations upon avulsion, by once again pointing out that proof of avulsion requires the presence of an abandoned river channel, which is the hallmark of avulsion, rather a mere relocation of the same channel which has always existed, and this stance taken by the Court has undoubtedly precluded the development of many riparian

legal battles in Kansas. The high water line of any navigable stream always remains a fee boundary of the bedland title held by Kansas, as it moves through any variety of natural migration, the Court also indicated, unless it can be clearly shown that avulsion has taken place, emphasizing the importance of accurately distinguishing navigable bodies of water from those that are non-navigable, in which no such public title exists. In conclusion, the Court noted that a KDD survey crew evidently did some damage while working on the Hansford property, and made it clear that KDD would have been liable to Hansford on that account as well, but Hansford presented no evidence regarding the specific value of that damage, so on that particular matter he was unable to prevail, but in all other respects, he emerged victorious.

State v Hays (1990)

Our next featured case represents the final word of the Court on the role of navigability in the determination of land ownership in Kansas, having occupied that position for nearly a quarter of a century at the time this book was composed. While navigability for purposes of title determination is fundamentally a land rights issue, it became a politically charged subject during the twentieth century, due to the confluence of 2 factors, the first being the rapidly growing demand for public recreational opportunities, and the second being the fact that relatively few people understand the concept of title well enough to distinguish rights associated with water from rights linked to the underlying land. Those who live in urban centers and the surrounding areas, where few opportunities for recreational interaction with nature exist, tend to view the countryside, with its wide open spaces, as a sanctuary, which the public should have complete freedom to explore, and for many this naturally involves, canoeing, kayaking, fishing, swimming and other aquatic activities. For those with minimal knowledge of land rights, the close physical connection between water and land obscures the fact that rights relating to the use of water are quite different and entirely distinct from rights associated with land, which are governed by title law. The typical boater or fisherman sees the bed of any waterway as a mere supporting structure, like a cup or a bowl, which serves no purpose other than containing the water, rather than fully appreciating the direct connection of such bedlands to the surrounding upland. The concept of title navigability supports the public interest in certain waterways, by deeming fee title to the beds of those lakes and streams which are very clearly suitable for intensive human use to be public in character, thereby facilitating general public use of such waters and eliminating any possibility of legal blockage of such use by any private land owner. Obviously not every natural watercourse meets this standard however, and few would argue that every brook and pond should be legally classified as public in nature, so a line must be drawn in some manner, limiting public access to water, in order to protect private land rights. Placing that line in a position which properly and effectively balances the interests of all parties has proven to be a source of

major strife and frequent litigation in many states, but in Kansas, as a result of the wisdom expressed by the Court in the case we are about to review, it appears that the navigability status of every waterway is now conclusively known and that the limits of navigability in Kansas have been reached.

Prior to 1990 – The public made use of Shoal Creek, which passes through Cherokee County, primarily for recreational purposes, for an unspecified length of time, presumably amounting to several decades, with little or no obstruction or other interference from any of the owners of the land crossed by that stream. No boats of any substantial size were known to have ever successfully navigated this creek however, and in fact this stream had been known to disappear during some particularly dry years. There was also no indication that this creek had ever been used to transport either passengers or products by boat, yet it was evidently navigated with some frequency by fishermen and wildlife enthusiasts, paddling either individually or in small groups. When the townships traversed by this watercourse were originally surveyed is unknown, and whether or not any portion of this stream was meandered by the GLO is unknown as well. At an unspecified date, presumably during the 1980s, a canoe rental business was opened in Joplin, Missouri, and people began embarking upon canoeing trips down Shoal Creek, from an access point in Joplin to Schermerhorn Park, in Galena, Kansas, where they exited the creek, although how often such trips took place is unknown. Hays was the owner of a tract of unspecified size, shape and location, which was evidently situated along the portion of the creek thus utilized by the canoeists, but whether the stream formed a boundary of his land or passed through the middle of his property is unknown. How Hays used his land, and whether or not he resided upon it, are both unknown as well, but he was evidently disturbed or angered by the increased public use of this waterway, so he fenced his property, thereby preventing all access to a stream segment of unspecified length and rendering the creek useless for public travel. The public outcry over this development caused the county attorney to challenge the right of Hays to block public access to any portion of the creek, and when notified of the matter, the Attorney General of Kansas, recognizing that state law was involved, elected to file an action against Hays, seeking a judicial decree proclaiming the title navigability status of Shoal Creek.

Kansas argued that Shoal Creek was a navigable stream, despite having never been used for any significant commercial purposes, because it held clear and distinct value for recreational use, and the public had made consistent use of it for decades, and had never been prevented from using it, prior to the action taken by Hays. Kansas further argued that under the public trust doctrine, all water is fundamentally public in nature, so no private party can deny the public access to any source of water, wherever any amount of water naturally appears, occurs or flows, while pointing out that many other states had formally adopted this stance, on the basis that public access to all water is a matter of superior importance, in relation to land rights. Kansas also asserted that even if Shoal

Creek is legally non-navigable, the public had acquired an easement covering the entire creek, by means of prescription, based upon the well known prior use of that stream, enabling all of the water uses that had been previously made to continue in perpetuity. Hays argued that Shoal Creek was a non-navigable stream, and that he was therefore the sole title holder and sole fee owner of his portion of the bed of the creek, so the public had no title to either the water forming the stream or the bedland beneath it. Hays further argued that title navigability is governed by federal navigability standards, and the definition of navigability for title purposes is not a matter subject to determination by individual states, because the land rights held by all federal patentees and their successors cannot be eliminated or reduced by any state law. Hays also maintained that the acknowledged prior public use of Shoal Creek was of no legal significance or value, because it was all insubstantial in nature, and it was therefore insufficient to support a finding that Shoal Creek was genuinely navigable at any location or at any point in time. The trial court agreed with Hays that none of the evidence pertaining to the historic use of Shoal Creek qualified that stream for navigability status, holding that Hays and all other owners of land along the creek each held title to their respective portions of it's bed, leaving the lands of all such parties unburdened by any public land rights, and thus subject to complete enclosure, so the fence erected by Hays could not legally be damaged or removed.

At the outset, its noteworthy that this battle represented the first controversy concerning navigability to reach the Court in over 60 years, a truly remarkable length of time, during which no serious assertions that any other bodies of water within Kansas are navigable for title purposes were evidently raised, quite unlike most other states, including even the other arid western states. This fact testifies to the power of the Court's enlightened stance on the modern definition and function of navigability, which was very astutely set forth in the Webb case of 1927, previously featured herein, to which the Court made repeated reference in the course of analyzing and adjudicating this highly comparable conflict. The significance of navigability status to a broad sector of the public at this point in time was well attested, by the fact that some powerful organizations lined up to participate in the resolution of this dispute. The position taken by the state and the county was supported by environmental interests, such as the Geary County Fish and Game Association and the Kansas Canoe Association, while the Kansas Farm Bureau and the Kansas Livestock Association supported Hays, who was presumably a typical farmer or rancher. The evidence outlining the prior use of Shoal Creek was relatively clear and undisputed, although how far back in time it extended was unknown, so the principal issue was fairly well defined, and that issue was simply whether or not light and transient uses of a waterway, such as typical recreational activities, can support title navigability. The answer to that question had already been judicially rendered in some other western states, the Court observed, some to the affirmative, such as Arkansas, Idaho and Montana, and some to the negative, such as Colorado. The Court wisely remained uninfluenced by those decisions however, focusing instead upon the Kansas precedent established by the 1927 Webb case, which was based upon sound guidance set forth by the United States Supreme Court. The distinction between water rights and land rights was quite clear to the Court, which unlike some of the litigants, was highly cognizant of the fact that all matters relating to title are controlled solely by title law, making any arguments focused upon water usage irrelevant to the determination of whether Hays held fee title to the land comprising the creekbed or that area constituted an unwritten exception to his fee title. The imposition of

the highly restrictive federal definition of navigability had forced those seeking to expand the parameters and scope of navigability in Kansas to turn to the public trust doctrine, which concerns only water and not land, the Court recognized, in an effort to evade or negate title navigability as a factor in riparian litigation, by replacing it with a more flexible and public oriented standard. The Court was unwilling to be swayed however, and proceeded to uphold the lower court ruling, confirming the right of Hays, as a typical riparian land owner, to physically exclude anyone from his portion of the creek:

“Hays constructed a fence across Shoal Creek ... Shoal Creek is not susceptible of being used, in it's natural and ordinary condition, as a highway for commerce ... it is therefore a non-navigable stream ... if a stream is non-navigable, a riparian owner's title extends to the middle of the bed ... respondents (Hays) ... may exercise the same authority and control over the stream, it's banks and bed, as the property adjacent to the stream ... the accepted rule in this country is to apply the term "navigable" to all the streams which are in fact navigable ... this is true in Kansas ... ownership of the beds of navigable streams and lakes is a federal question to be resolved according to principles of federal law and under federal definitions ... bodies of water are navigable ... if the bodies of water were used, or were susceptible of being used ... as highways for commerce ... at the time of statehood ... only 3 rivers within the state have been declared navigable: the Kansas, the Arkansas and the Missouri ... there is no evidence that Shoal Creek has ever been used for valuable floatage in transportation to market of the products of the country through which it runs ... title to the Shoal Creek streambed did not pass to the state upon entry into the Union ... Shoal Creek has been used for recreational purposes ... however ... there is no public prescriptive easement upon Shoal Creek ... the state finally contends that ... a state may expand the public trust doctrine to non-navigable waters ... it is sufficient to note that ... appropriation cannot be applied to subvert a riparian land owner's right to exclusive surface use of waters bounded by his land ... during the 1986 and 1987 legislative sessions ... the Kansas Recreational River Act ... died ... was resurrected ... and was killed ... owners of the bed of a non-navigable stream have the exclusive right to control of everything above the streambed ... the public has no right to the use of non-navigable water overlying private lands for recreational purposes without the consent of the landowner.”

The highly restrictive concept, implicit in the arguments made here by Kansas and it's partner organizations, that land owners along a creek are legally barred from fencing their properties, or that if they do fence their lands they are legally obligated to fence out the creek, in order to preserve such a waterway as a perpetually open public highway, was undoubtedly a factor in the outcome of this case. Land rights are not inferior to water rights in Kansas, the Court effectively stipulated on this occasion, noting that

repeated legislative attempts to elevate water rights above land rights in Kansas, thereby making the presence of any water on private property a potential source of serious controversy, had been shot down. In Kansas, the highly expansive judicial view of state control over navigability, which long prevailed during the early decades of statehood, has been tempered and curtailed by the Court, in recognition of the fact that riparian title and boundaries are direct products of federal action, created under federal authority, by virtue of the platting and patenting of the public domain, so the rights of all riparian parties, such as Hays, cannot be diminished by any state. The title navigability status of submerged land is not governed by the public trust doctrine, the Court decreed here, the only valid test of navigability is the federal test, which mandates susceptibility of use of the body of water in question as a highway for commerce at the moment of statehood, so no physical modification or subsequent usage of any waterway can legally produce navigability in Kansas, where none existed for purposes of title in 1861. Any navigability determinations made at the state level must conform to the directives of the Supreme Court of the United States on that subject, or stand at risk of being struck down by the High Court, and in fact that has been the fate of various excessive navigability rulings which have emanated from other western states. Recreational use of a natural watercourse creates no land rights, either in fee or in the form of an easement, the Court concluded, dismissing the prescriptive easement argument introduced by the state, on the grounds that it would effectively defeat the non-navigable status of the creek at issue, while noting that no such easement has ever been deemed to exist in Kansas. Perhaps of most significance to land surveyors, here the Court expressly specified that the "middle of the bed", as opposed to the bank, is the true boundary of all riparian properties which are bounded by any non-navigable body of water, emphasizing the importance of accurately evaluating the navigability status of any waterway for boundary purposes. Fortunately for Kansas surveyors, only the 3 navigable streams listed here by the Court, and no navigable lakes, exist in Kansas, and there is no likelihood of any additional streams or any lakes ever being added to that list, so awareness of the legal status of those judicially proclaimed navigable rivers will enable the surveyor to properly depict both boundaries and acreage, when documenting riparian properties in Kansas.

The 21st Century - Perpetuating Established Principles in the Modern Era

As we have observed, the Kansas Court of Appeals (COA) became the principal provider of judicial title and boundary resolution in Kansas during the 1990s, and few land rights cases ever reached the Court. Moving forward into the new century this trend continued, and in fact all of the remaining cases that we will review were handled solely by the COA. While all of the general parameters of land rights adjudication are now well established in Kansas, unusual circumstances still frequently require the COA to consider the legal impact of forms of evidence that have rarely if ever appeared or figured prominently in prior Kansas land rights cases, so although the most recent cases merely represent judicial implementation of existing principles, they still hold valuable evidentiary lessons. The perspective of the COA on land rights issues is always developing and evolving, along with changing societal conditions, which are largely driven by technological

advances, enriching and enhancing the existing body of case law, while also potentially foreshadowing how technologically generated evidence will be regarded and utilized in the future. Although the documentation relating to titles and boundaries available today is vastly superior to that of the past, due to a variety of factors, such as modern platting standards, land surveyor licensing and routine recordation of virtually all conveyances, the judicial emphasis continues to be focused upon repose and protecting the right of reliance. As we shall see, in reviewing the results of the latest land rights litigation in Kansas, the principles employed by the COA in resolving contemporary conflicts are substantially the same as those which were first invoked by the Court during the nineteenth century, so the outcomes reached today are typically quite harmonious with those of even the distant past. In the context of boundaries, the COA continues to honor the concept that physically established boundaries which have been relied upon for purposes of land use and development are worthy of protection, and has thus extended the trend toward judicial approval of adverse possession as a form of practical or de facto boundary adjustment, proceeding in the direction pointed out by the Court, which as we have learned, abandoned the effort to restrain adverse possession to the realm of title law during the prior century. With particular regard to the performance and conduct of land surveyors, we will also discover that the new century has brought an elevated level of scrutiny of the work of land surveyors, as the COA has deemed it appropriate to remind surveyors that they are required to function as professionals in all respects, in accord with the professional status which the law has bestowed upon them, thereby highlighting the need for improved surveyor education, to enable all Kansas land surveyors to fully understand their role in our society.

The case of *Beltz v Dings* (2000) provides a classic example of 2 of the most fundamental principles relating to conveyances, the first being the right of all grantees to rely fully upon information of any kind that is provided to them by their grantor, and the second being the corresponding burden borne by all grantors to describe the land which they are conveying with complete clarity. *Dings* was the owner of an unspecified amount of vacant rural land in Sedgwick County, and he planned to plat and sell some of his land for typical residential use. Therefore *Dings* advertised his land in 1992, offering to sell 5 acre homesites, and *Beltz* was among the parties who responded to this offer. A contract for deed was drawn up by *Dings* or an agent acting on his behalf, in which the tract to be acquired by *Beltz* was described as "Tract 3, Cedar Acres Development", and this contract was duly signed by the parties. *Dings* showed *Beltz* a preliminary plat of Cedar Acres, containing 16 tracts, which had been created for *Dings*, but which evidently had not yet been approved. *Beltz* was satisfied that the land being conveyed to him was adequately defined on this plat, but *Dings* subsequently became involved in litigation of an unspecified nature with other unspecified parties, and his land became involved in that litigation, which evidently delayed his plan to complete the Cedar Acres plat. In 1997, *Beltz* became concerned, because the plat still had not been finalized, so he ordered title insurance upon the subject property, but he was told by the title company that he could not get any title insurance, because the tract that he was buying had never been platted and therefore legally did not exist. Another year went by and *Dings* was apparently still unable to get the Cedar Acres plat approved, or perhaps he gave up and decided not to complete the plat, so in 1998 *Beltz* filed an action against him, alleging that *Dings* was in violation of the Kansas Consumer Protection Act (KCPA) and that he had violated his contract with *Beltz*, by

failing to properly complete the platting of the relevant land. The trial court ruled in favor of Beltz, finding Dings guilty as charged, and ordered him to either complete the plat or pay a substantial fine for failing to do so. The Court of Appeals (COA) upheld that decision, concurring that the KCPA is applicable to conveyances of land, and that Dings was guilty of usury, because he had provided Beltz with a "deceptive subdivision description", and he had neglected to explain to Beltz that the subdivision did not yet exist. Dings proposed to convey the tract at issue to Beltz using a metes and bounds description, but the COA rejected that suggestion, informing Dings in so doing that he stood in breach of his contract with Beltz until such time as the plat in question was properly completed and approved. Dings had freely and voluntarily chosen to describe the land that he proposed to sell in 1992 by reference to a plat, the COA observed, so he was legally bound to provide each of his grantees, such as Beltz, with a properly platted tract, and no option to describe the contested land in any other manner was legally available to him. Thus the COA emphatically stipulated that every grantor will be expected to fulfill all of his contractual commitments to his grantees, while pointing out the folly of making a commitment to sell land which has not yet been platted, since many events can derail efforts to complete a subdivision plat. In addition, on this occasion the COA thus poignantly indicated that any drawing, even an incomplete plat, can become a legally binding document, once it has been referenced in a document of conveyance. An innocent grantee has the right to rely upon his grantor to fulfill all of his contractual obligations, the COA confirmed here, and a failure on the part of the grantor to do so cannot become a legal burden upon the grantee, who has the right to trust his grantor to provide an accurate and fully reliable legal description for his use, and is therefore under no legal or ethical obligation to take any steps to independently verify the validity of any such description.

Boundary issues which went undiscovered for a period in excess of 15 years were dealt with in very short order by the Court of Appeals (COA) in 2 cases that reached the COA just a few months apart at this time, illustrating the increasing inclination of the COA to leverage statutes of limitation to reduce the judicial workload, while effectively penalizing those who are delinquent in raising boundary issues. An alleged but undetermined survey error or platting error, which long remained undiscovered, appears to have produced the controversy which resulted in the case of *Southerland v Pacinelli* (2004). Southerland owned a presumably typical 80 acre rural tract situated on the west side of Kenneth Road in an unspecified portion of an unspecified section in Johnson County, but how and when he had acquired his land, what use he made of it, and whether or not the boundaries of his tract were ever surveyed or marked in any way, are all unknown. The land lying directly west of the Southerland tract was evidently subdivided and platted during the late 1970s, resulting in the creation of Oakmont Estates, a presumably typical residential subdivision. Several of the lots along the east edge of Oakmont Estates adjoined the Southerland property, and these lots were acquired at unspecified times by Pacinelli, Keys, Nance and Boyter, who were all presumably typical home owners. The size and shape of these lots is unknown, but a fence of unknown origin evidently ran along or near the line of division between the Southerland tract and the subdivided tract, and for several years little or no attention was paid to the area through which the fence ran, so no one questioned the location of the fence in relation to the platted boundary. At an unspecified date, presumably circa 2000, Southerland learned that the east boundary of these lots, as monumented, was an unspecified distance west of the fence,

yet he saw that all of the lot owners, apparently acting upon the presumption that their lots extended to the fence, were using all of the land west of the fence. Southerland then filed an action against the 4 lot owners, seeking a decree quieting his title to the strip lying west of the fence, up to the platted and monumented subdivision boundary location. The trial court refused to address any allegations that the survey work or platting done during the 1970s was erroneous or defective however, holding that the boundary in question was controlled by the fence rather than the plat, because more than 15 years had elapsed since the creation of the plat. The COA confirmed that any judicial consideration of any possible survey or platting errors was barred by the passage of the statutory period, and agreed that any such mistakes had been rendered both uncorrectable and irrelevant, upholding the lower court ruling that the fence defined the boundary at issue, as well as the extent of all the relevant titles, through adverse possession. The ability of adverse possession to negate a boundary location of record, thereby preventing any litigation focused upon a long overlooked boundary issue, was again approved by the COA, this time in an urban context, to the benefit of a municipality, in *City of Merriam v Leap (2004)*. In 2000, Leap acquired a presumably typical city lot of unspecified size in Merriam, and in 2002 the city acquired an adjoining and presumably identical lot, which bore a building that had stood since 1985. It was then determined, by unknown means, that the building encroached 3 feet onto the Leap lot, so Merriam filed an action against Leap, asserting that part of Leap's lot had been adversely acquired by the city's grantor, and had thus become city property. The trial court ruled in favor of Merriam, and the COA upheld that decision, informing Leap in so doing that any building encroachment which stands unchallenged for 15 years represents a conclusively completed adverse possession, thus the disputed 3 feet had already been legally detached from the Leap lot long before he acquired it. These cases clearly signaled that boundary issues which have gone unobserved for 15 or more years will be regarded as unwelcome by the COA and will be left unaddressed, thereby putting all Kansas residents and land rights professionals on notice of the critical importance of promptness in raising boundary issues of any kind.

The case of *Bird v Kansas State Board of Technical Professions (2004)* is one in which all Kansas surveyors are likely to take particular interest, since on this occasion Bird became the first Kansas land surveyor, though unfortunately not the last Kansas land surveyor, to have the revocation of his professional registration addressed by the Court of Appeals (COA). Between 1999 and 2001 certain survey work, including boundary work, which had been conducted by Bird in more than one location, came under criticism from various sources, including some of his fellow land surveyors. A long list of violations of highly fundamental survey standards was compiled, evidently by means of an investigation into his usual survey methods and procedures, as a result of which Bird was summoned to appear before the Board, but he chose not to appear, leaving the Board with no alternative but to engage in disciplinary proceedings in his absence. The Board found Bird guilty of numerous violations, and since this was not the first occasion upon which clear deficiencies in his work had been noted, the Board deemed it necessary to revoke his license, while also imposing substantial fines upon him. A district court heard Bird's initial appeal of the Board's decision against him, but left that decision intact, whereupon Bird elected to pursue the matter further, requiring the COA to review his work and the many relevant accusations set forth by the Board in considerable detail. Bird did not deny that his survey work had been genuinely inadequate in several respects, but he asserted that his work was

incomplete at the time when it was scrutinized, and he pointed out that he had eventually fixed all of his mistakes and omissions, maintaining that the fines which had been levied against him and the revocation of his license were therefore unjustified actions on the part of the Board. The Board is charged, first and foremost, with the protection of all Kansas citizens from the adverse effects of poorly executed professional work, the COA was quite cognizant, so the Board is fully authorized to examine the procedures, the methodology and the products of licensed professionals, for the purpose of insuring that the people of Kansas are not victimized by chronically defective workmanship. Therefore, the COA informed Bird, disciplinary decisions made by the Board carry the legal presumption of correctness, so the burden of proving that the Board acted in a manner which was "arbitrary, unreasonable or capricious" falls upon the party insisting that the Board erred in some respect, and since Bird had failed in that regard, he could not prevail. Observing that Bird had demonstrated a generally "cavalier attitude", which included using profane and abusive language while discussing professional subject matter, the COA evidently found little reason to view him sympathetically, and left the Board's decision to terminate his career as a professional land surveyor undisturbed, although the fines and fees assessed against him by the Board were judicially reduced. The principal factors to be considered, when examining the work of any professional registrant or licensee who has been accused of failing to uphold acknowledged professional standards, the COA stipulated, are willfulness, repetition and magnitude, with respect to the alleged violations. As can readily be seen, this 3 part test simply constitutes a framework for the objective evaluation of whether the errors or mistakes that were made were merely sporadic, indicating an understandable lack of perfection, or whether they represent a distinct pattern of abuse, indicating disrespect for the profession, which effectively paints the actions of the relevant party in the fatal colors of bad faith. Such lessons, concerning the importance of exhibiting professionalism at all times, are well worth learning, because as we shall later see, those who neglect to heed valuable lessons learned the hard way by others, may well be destined to one day find themselves in a position which is quite comparable to that of the vanquished plaintiff.

The importance of understanding the operation of reversion, in the context of boundary determination, was very well displayed in *Taylor v Haffner* (2005). At an unspecified date, the townsite of Tasco was platted and the lots thus created were subsequently patented, presumably during the late 1800s. This townsite was situated in the south half of a certain Section 14 in Sheridan County, and a county road right-of-way was evidently also created, at an unspecified early date, apparently running along the southeast boundary of the townsite, but no portion of this right-of-way was taken from any of the lots lying within the townsite. In 1888, a railroad right-of-way was created, running parallel with the county road right-of-way, and a track was installed, 300 feet southeast of the southeast side of the county road right-of-way. This railroad right-of-way was originally just 100 feet wide, but it was later expanded to 400 feet in width, extending it in a northwesterly direction, all the way to the southeast edge of the county road right-of-way. The Taylor family subsequently acquired all of the land in the south half of this section at an unspecified date, except the area comprising the townsite. At an unspecified date, presumably during the early 1900s, the county road right-of-way was vacated, but the road continued to be used by the owners of the lots in the townsite over the next several decades. Haffner and Adams eventually acquired all of the lots in the southeastern portion of the

townsite, and the railroad right-of-way was formally abandoned by Union Pacific during the 1990s, making the question of who owned the land under the former railroad right-of-way, and also the land under the former county road right-of-way, a contentious matter. Following the railroad abandonment, Haffner obtained a survey, and it showed that the Haffner and Adams lots abutted upon the northwest side of the county road right-of-way, which was 40 feet in width. This survey also showed that the railroad right-of-way abutted upon the opposite side of the county road right-of-way, and on that basis Haffner claimed that all of the land lying between the railroad track and his lots had become legally attached to the townsite lots through reversion, making the track his southeast boundary. Taylor disagreed however, so he filed a quiet title action, in which he claimed that the entire 400 foot railroad right-of-way was part of his property, while making no claim to the former county road right-of-way. The trial court ruled in favor of Taylor, quieting title in him to the entire 400 foot strip as requested, while leaving the ownership of the 40 foot strip unaddressed. On appeal, Haffner protested that the full width of the county road right-of-way legally reverted to the townsite lots, because the road served the townsite, and since he owned the full width of that former right-of-way, by virtue of reversion, he was also legally entitled to reversion rights extending southeastward beyond the road, all the way to the railroad track, leaving Taylor with only the 100 feet lying southeast of the track. The Court of Appeals (COA) upheld the lower court ruling however, informing Haffner that he was mistaken and could not prevail, because his knowledge of the manner in which reversion operates was fundamentally flawed. Both the county road right-of-way and the railroad right-of-way were created upon unpatented public land, the COA explained, and they both represented easements, so the Taylors held fee title to all of the land lying southeast of the townsite by virtue of their acquisition. Not only was Haffner incapable of proving that he was entitled to any portion of the abandoned railroad right-of-way, the COA noted, he was also incapable of proving that he was entitled to the vacated county road right-of-way. Haffner's survey showed that his southeast boundary was 340 feet from the track, the COA observed, so his own survey actually militated against his position, by failing to support his assertion that his lots extended farther southeast, and in fact Haffner had no valid claim to any part of the county road right-of-way, unless he could prove that all or part of that strip had been carved out of the townsite, rather than the adjoining public domain. The principle of reversion mandates that vacated centerlines become boundaries in order to preserve the integrity of existing titles, the COA thus indicated, and not for the purpose of extending titles beyond original boundaries. The centerline boundary principle, which is essential to reversion, is not a device that can be used to acquire land which was part of an adjoining property that was in different ownership at the time when the right-of-way was created, the COA thus emphasized, leaving Haffner with nothing outside of the platted townsite boundary.

The case of *Markel Properties v Siebler* (2006) exemplifies how adverse possession can support original boundaries, since it provides a platform for the enforcement of physically established boundaries, thereby facilitating the objective of repose, by preventing the correction of any errors or mistakes made during the process of creating a new boundary. Potter was apparently a typical farmer, who owned a tract that evidently consisted of typical farmland, the shape and dimensions of which are unknown, containing approximately 130 acres, situated in an unspecified part of Reno County. In 1987, Potter decided to sell most of his land, but he wanted to keep a portion of it, so he

flagged up an area containing about 10 acres, identified as his "farmstead", which he desired to retain for a certain period of time, after selling off the rest of his land. Potter then showed the flagged area to his surveyor, who proceeded to create a legal description of the farmstead parcel, as requested by Potter. Potter then erected a fence upon the flagged parcel boundaries, and he conveyed the large parcel to Markel, by employing the farmstead description as an exception, along with an option enabling Markel to acquire the small parcel in 5 years. Markel promptly began utilizing the entire large parcel as cropland, up to the fenced boundaries, acting upon the presumption that the farmstead description inaccurately outlined the fenced area, while Potter continued to reside upon the small parcel. When the 5 year option matured in 1992 however, Markel decided not to acquire the farmstead, and Markel signed an affidavit, formally terminating the option agreement, leaving Potter with clear title to that parcel. Potter then proceeded to convey the farmstead to Siebler, again using the 1987 legal description of that parcel, and Siebler promptly occupied the fenced area, while Markel's use of the unfenced area continued unchanged. No controversy arose between these parties, since they both naturally regarded the fence as their mutual boundary, until 2004, when Siebler evidently obtained a survey, and was thereby informed that the fence was about 50 feet on Siebler's side of one of the described boundaries of his parcel. Siebler then instructed Markel to cease using the 1.1 acre area between the fence and the described line, but Markel responded by filing an action, asserting that the issue raised by Siebler was no longer subject to adjudication, because Markel had adversely acquired the area in contention. The trial court agreed with Markel, and quieted Markel's title extending to the fenced boundaries, deeming all of the land use made by Markel to have been made in good faith, thereby meeting the requirements of statute 60-503. Recognizing that the fence represented the originally intended boundary location, based upon the established land use pattern, the Court of Appeals (COA) upheld that ruling, while confirming that the 1987 description was the erroneous element, which had produced this controversy. Thus the COA once again demonstrated that adverse possession can operate to negate the potentially disruptive impact of both original survey or description errors and resurveys upon boundary security, by bestowing legal force and effect, in cases such as this, upon an established boundary which was put in place by a grantor who physically divided his own land. Reliance by a grantee upon any boundary line marked by a surveyor, or any boundary line created and marked by a grantor when partitioning his property, the COA reiterated here, represents a manifestation of good faith, which can qualify an occupant of improperly described land as a legitimate adverse land holder. As a subsequent grantee of a grantor's remainder, the COA realized, Siebler bore the burden of inquiry notice, having been put on physical notice by the presence of a boundary fence, and he had missed the opportunity to learn about the boundary issue and insist that it be rectified at the appropriate time, by neglecting to order a survey prior to acquiring his parcel. Siebler protested that Markel had disclaimed any interest in the small parcel in 1992, by means of the affidavit, but the COA pointed out that the affidavit related only to title, so it was of no use or benefit to Siebler, because the matter at hand was a boundary issue, rather than a title issue, and the affidavit did nothing to alter any boundary locations. This decision illustrates that the COA has fully adopted the modern judicial stance on adverse possession, viewing it primarily as a tool for the resolution of location issues, thereby enabling adverse possession to eradicate boundary errors of every variety, which in certain instances, such as this one, can also

serve to eliminate potential surveyor liability.

The importance of fences in Kansas has been illustrated by many of the cases which we have reviewed, and as we have frequently had occasion to note, it has long been judicially acknowledged that fences can represent controlling boundary evidence, either as evidence of an adversely created boundary, or more typically as a perpetuation of an original boundary location. Fences are not only of high relevance with regard to boundaries of fee title in Kansas however, they are also significant in the easement context, potentially signaling the presence of a servitude of statutory origin, as the case of *Muhl v Bohi* (2007) demonstrates. Muhl and Bohi were the owners of adjoining tracts of unspecified size, shape and location in Franklin County, both presumably consisting of typical agrarian land, and they shared a mutual boundary which was about 970 feet in length. This boundary had apparently been recently surveyed and its location was well known, being marked by a partition fence, which was very old and was becoming useless by 2004. At that time, Bohi observed that the growth of several trees which stood very near the fence was damaging the fence, and he decided to independently address the situation, without first contacting Muhl, upon whose land the trees were located. Bohi hired Davis, who owned a track hoe, to remove both the fence and all of the trees, and Davis proceeded to do so, then Bohi built a new fence where the old one had been. Whether the trees in question represented natural growth or were planted by Muhl or one of his predecessors is unknown, but Muhl was evidently quite upset that the trees had been removed, so he filed an action in which he accused Bohi and Davis of trespassing and damaging the Muhl property. Bohi conceded that he and Davis had crossed the boundary line and destroyed many trees, but he asserted that he had the right to do whatever was necessary to replace the broken down fence with a useful fence, since the absence of a reliable fence negated his right to use his land for livestock purposes, and he maintained that he was under no obligation to work around any obstacles such as trees in so doing. In addition, Bohi claimed that he and Davis had never intruded more than 3 feet onto the Muhl tract, but Muhl insisted that trees situated up to 30 feet from the fence had been damaged or removed. Nonetheless, the trial court found the position taken by Bohi to be fully acceptable and summarily dismissed the complaint set forth by Muhl, on the grounds that Bohi and Davis had acted under the authority of the existing partition fence statutes, noting that those statutes placed no specific ban upon tree removal during a fence replacement operation. The Court of Appeals (COA) agreed that Bohi had a statutory right to independently replace the fence, and further adopted the concept that the statutes at issue created an implicit right, held by every relevant land owner, to trespass in a reasonable manner, and to a reasonable extent, for fence related purposes, so the intrusion upon the Muhl property was not necessarily in violation of the law and did not necessarily result in any liability. The COA also decided however, that while 3 feet constituted a reasonable intrusion, thus any trees that were within 3 feet of the boundary had been legitimately removed, 30 feet was excessive and unreasonable, so if the tree damage actually extended that far into the Muhl tract, then Bohi and Davis would be liable to Muhl. Therefore, the COA reversed the lower court decision, and directed the trial judge to allow the litigants to present their evidence, in order to provide a sound basis for a judicial conclusion regarding the true physical extent of the tree removal operation. Thus the COA approved the principle that the construction of any partition fence generates reciprocal land rights, in the nature of an easement, legally burdening an unspecified portion of each of the adjoining properties,

highly comparable to the section line right-of-way in the context of the PLSS framework. The COA declined to specify any width for this universal partition fence protection zone however, expressly indicating that it's width in any given location is to be determined by the standard of reasonable land use, which in fact governs the location, size and use of all easements that are left numerically or dimensionally undefined when created.

As we have learned, title issues arising from the presence of linear physical objects, including those which represent encroachments, can have an impact upon property boundaries, since adverse possession in it's modern form has acquired the capacity to split or fragment existing lots, parcels or tracts, thereby becoming a potential means of boundary relocation or adjustment. There remains however, a fundamental legal difference between the title conflicts that result from such circumstances and genuine boundary disputes, which are caused by uncertainty over survey evidence relating to the record location of a boundary, and this distinction is highlighted by the case of *Mulloy v First American Title (FAT)* (2007). Burum acquired a presumably typical city lot of unknown size and shape situated in Overland Park in 1974, and henceforward he used all of the land on his side of an existing stone retaining wall of unknown origin, which he presumed to be on his east lot line. Burum and Kram, who was the owner of the adjoining lot bearing the retaining wall, both treated and regarded the wall as their mutual boundary at all times and for all purposes, in apparent ignorance of the fact that it was actually on the Kram lot, about 2 feet from the lot line. In 1999 however, Kram sold her lot to Mulloy, and from a survey which was apparently done in 2001 for Burum, Mulloy discovered that the lot line was actually about 8 feet from his house, while the wall was only about 6 feet from his house. This presented a problematic situation for Mulloy, because his lot bore a 7 foot building setback, so his house was in violation of a local zoning ordinance, if the wall was in fact his west boundary, as Burum maintained. Mulloy was thus compelled to file a quiet title action, seeking a decree that the lot line location of record was still his west boundary, but he lost that action, *Mulloy v Burum* (2004) as the Court of Appeals (COA) upheld a lower court ruling that the wall had become the east boundary of the Burum property through adverse possession, effectively nullifying the lot line and putting Mulloy's house in violation of local restrictions. Mulloy asserted that adverse possession cannot operate in places such as Overland Park, where building setback lines exist, because such local rules must be honored by all citizens. The COA reminded him however, that adverse possession is supported by state law, and no local rules can ever interfere with the operation of state law, so adverse possession cannot be defeated or prevented by the mere fact that it can produce zoning violations. Having been thus vanquished, Mulloy turned to FAT and demanded compensation for his loss, but FAT refused to pay, informing him that adverse possession was excluded from the title coverage that had been issued to him by FAT, because the wall represented a boundary issue, and Mulloy had not obtained a survey to support his coverage, which would have revealed that such an issue existed. Mulloy then filed an action against FAT, which was summarily rejected by the trial judge, who agreed with FAT that the matter was a boundary dispute, for which FAT bore no liability, forcing Mulloy to place this scenario before the COA for a second time, and in 2007 the COA reversed the lower court decision, instructing the trial judge to give Mulloy a chance to present further evidence. Whether Mulloy ultimately prevailed or not is unknown, and this controversy may well have been settled between the parties without any trial, but the position taken here by the COA nonetheless provides important insight into the perspective

of the COA on the relationship between surveys, boundaries and title. The COA concurred that a wall can represent a boundary issue, but pointed out that since boundaries are integral to title, boundary issues can also constitute title issues, and in this instance FAT had failed to prove that the wall in question was a mere boundary issue, rather than a genuine title issue, and was therefore clearly excluded from Mulloy's title insurance coverage. In reality, the COA recognized, no boundary issue ever existed, the lot line location was never in doubt, the wall was simply not built upon that line, so it created a potential encroachment issue, and thus a potential cloud upon the title to Mulloy's lot, but even a survey accurately showing the location of the wall could not convert that title issue into a boundary issue. Thus the COA indicated on this occasion that a title company must clearly specify what is excluded from title coverage in order to escape all liability, and cannot simply exclude all matters arising from the presence of visible objects from title coverage, on the grounds that boundary issues which can be depicted and clarified on surveys are not title issues, because under such a policy even "an accurate and complete survey would be meaningless".

It is axiomatic that land which is to be conveyed must be described in a deed, because deeds are intended to serve as the formal and legally binding means of communication between the parties concerning their transaction, and land surveyors, along with many others, need to be able to rely fully upon the contents of such documents as definitive evidence of both title and boundaries. This well known premise has distinct limitations however, and as *Unified Government of Wyandotte County v Trans World* (2010) well illustrates, those limitations can become highly significant when evidence of a prior agreement that was not properly captured in the deed appears, rendering that document inaccurate and unreliable. Wyandotte County and Kansas City jointly owned a 9 acre tract situated on Kindelberger Road, which bore an unused commercial building. In 1989 a fire station was built on this tract, and it was soon put into regular use, occupying about 2.5 acres which was fenced, while the other building and the other 6.5 acres apparently remained vacant and idle. No plat formally partitioning this tract was evidently created however, so these 2 buildings simply shared this single undivided tract. In 1997 the county leased the commercial building to Trans World, and this lease included the use of the adjacent 6.5 acres, which Trans World presumably used for parking and storage. The lease document contained a copy of a survey showing that 2 buildings were present on the subject property, but this drawing evidently gave no indication that the subject property had been properly subdivided, and in fact the 9 acre tract remained legally undivided. In 2007, the county agreed to convey the leased area to Trans World, and a title report was issued, which evidently contained an accurate legal description of the entire 9 acre tract. Failing to recognize however, that the legal description in the title report embraced the fire station site, as well as the intended 6.5 acre area, the county employees handling this transaction inserted the title description directly into the deed to Trans World, and that deed was executed before this error was discovered. Trans World then asserted ownership of the fire station, forcing the county to file an action, seeking judicial rectification of the mistakenly excessive legal description. The trial court granted the description reformation requested by the county, removing the fenced 2.5 acre area from the deed, and the Court of Appeals (COA) upheld that ruling, over the protest of Trans World that legal descriptions used in deeds represent final and conclusive evidence of both title and boundaries, which cannot be legally negated by any extrinsic evidence. The evidence made it plain, the COA

observed, that the conveyance in question was intended to cover the leased area, no more and no less, so the description used in the lease was the true controlling legal description, and the erroneous subsequent description had been correctly reformed to match the lease description, thereby approving the creation of a new boundary, defined by the fire station fence. Land can be added to, or subtracted from, any legal description by means of description reformation, the COA thus reiterated, applying the rule that a legal description controls as written only if it embodies the actual intent of the parties. Evidence of an earlier agreement between the parties, either written or unwritten, can control over subsequent written evidence of that agreement, when that subsequent documentation was generated through a mistake, the COA explained, because the intent manifested in the original agreement comprises the controlling intent of any conveyance. In so ruling, the COA applied the well established rule that any error appearing in a legal description, of which neither party was aware, constitutes a mutual mistake, which is legally correctable, since any description failing to properly communicate the true intentions of the parties stands potentially subject to reformation when the error is discovered. Moreover, the COA stipulated, negligence on the part of a land owner, in either composing a legal description, or failing to understand it's contents, or even failing to read it at all, does not prevent description reformation, because giving legal effect to the actual intent of the conveyance is the sole objective of description reformation. Thus the COA emphasized on this occasion that not all legal descriptions can be safely regarded as reliable, since even an apparently complete and accurate legal description can be nullified in part by extrinsic evidence.

While its true that the contents of a deed can be dramatically altered by means of description reformation, though which whole paragraphs can be judicially added or removed, as demonstrated by our last previous case, its equally true that the legal implications of a single word can cause serious discord and require adjudication, as the case of *Gilman v Blocks* (2010) poignantly illustrates. Nash was the owner of a tract of unspecified size, shape and location, consisting of 4 lots situated in Johnson County, and the Nash property bore a presumably circular pond of unspecified but apparently substantial size, which was evidently situated near the center of the Nash tract. When and how the 4 lots were created is unknown, and whether the pond existed at that time is unknown as well, but Nash decided to sell all 4 of the lots, each of which bore a portion of this "party pond". Nash intended all 4 of the lots to have free and complete access to the entire pond, so he planned to bestow upon each lot a right of access to the entire shoreline of the pond, in order to enable each lot owner to legally walk all the way around the pond without any interference. In 1976, Nash conveyed 3 of these 4 lots to a certain developer, and he conveyed the other lot to another party. Each of these conveyances was made subject to a declaration, which was jointly created and recorded by Nash and the developer, expressly indicating that each lot was endowed with a license for the use of a 15 foot strip extending landward from the shore of the pond for access purposes. These 4 lots and the 15 foot access strip were all routinely used by many successive lot owners over the ensuing years, without any controversy, as the various lots were sold several times. *Gilman* acquired one of the lots in 1998 and he used the access path around the pond, until *Blocks* acquired an adjoining lot in 2005 and denied *Gilman* access across the *Blocks* lot. *Blocks* then proceeded to build a berm and plant bushes up to the edge of the water, making it difficult if not impossible for anyone to cross his lot within the 15 foot access area. *Gilman* was therefore compelled to file an action, seeking a decree that he held a right to travel

within the 15 foot strip, which Blocks could not legally obstruct or revoke. Blocks responded that since the access right asserted by Gilman had been characterized as a license in 1976 it was not a permanent right, so Blocks was fully authorized to revoke it, as he had done, and the trial court agreed with Blocks, approving his closure of the access path. The Court of Appeals (COA) reversed that decision however, pointing out that the trial judge had wrongly focused solely upon the word "license" and had erred by failing to enforce the spirit and the intent of the 1976 declaration. The fact that the declaration expressly stated that the access strip was intended to function as a benefit to each lot, and was intended to "run with the land", clearly identified the access area as a genuine easement, and not merely a license, the COA concluded, effectively striking the word "license" from the document and replacing it with the word "easement", to bring the relevant portion of the document into line with the intent quite definitively spelled out elsewhere therein. The way in which a right is labeled in a document of conveyance "does not dictate it's legal effect", the COA informed the litigants, recognizing that the original parties had simply chosen the wrong word due to ignorance, when attempting to create the access easement in 1976, so Blocks had no right to obstruct the 15 foot strip and he was required to remove his landscaping, in order to allow free passage through that portion of his yard by all of his fellow lot owners. Any legal document will be judicially evaluated in totality, and a single poorly chosen or inappropriate word cannot alter it's intended legal effect, the COA thus mandated on this occasion, emphasizing that an appurtenant right cannot be classified as a mere license, which by definition is perpetually subject to revocation, any appurtenant right is necessarily an easement, because it is legally attached to the land, rather than to any party or parties. An easement is a strong permanent land right, while a license is a mere personal privilege that can be unilaterally terminated, and is thus not a true land right at all, the COA confirmed here, thereby providing a stern warning to those such as Blocks, who choose to take unjustified action, in unwise reliance upon a single word found within a legal document.

In the Matter of the Estate of Hazelbaker (2010) shows that the manner in which a deed is physically handled by the parties, the circumstances under which the deed was executed, and the subsequent conduct of the parties in their use of the land, can all have a major impact upon the deed's legal force and effect, equal in importance to the language used in the deed, if controversy arises over it's validity. Hazelbaker was a widow who owned a presumably typical rural tract of unspecified size and shape situated near Pleasanton, upon which she resided. She had 2 adult sons, and in 1973 her older son moved a trailer onto her property and began living there. In 1983, Hazelbaker's older son was married, he and his new wife then moved into Hazelbaker's house, and they moved the widow out of the house and into the trailer. Hazelbaker also deeded her tract to the couple at this time, but just a few months later Hazelbaker's older son died in a traffic accident, leaving just the 2 widows occupying the Hazelbaker tract, and the young widow as the sole record owner of that tract. In 1984, the young widow deeded a small parcel bearing the trailer to the old widow, but no survey was done, and how the 150 foot square occupied by the trailer was described is unknown. The young widow handed the deed to the old widow, but she also indicated that it should not be recorded, because it was intended to take effect only upon the death of the young widow, so the old widow simply stored it away and never recorded it, as instructed. The 2 widows each occupied their respective portions of the Hazelbaker tract alone until 1998, when the young widow remarried, and henceforward

her new husband farmed the Hazelbaker tract, but he never made any use of the trailer parcel, as the old widow retained control over that area. When the old widow died in 2008, her younger son found the 1984 deed among her possessions and recorded it, then he claimed that he was the owner of the trailer parcel, as the sole surviving heir of his late mother. He was subsequently informed however, by Linn County tax personnel, that the trailer parcel was not a separate or legitimate parcel, because the Hazelbaker tract had never been legally divided, and the young widow had always paid all the taxes on the entire Hazelbaker tract, so she was still the record owner of that whole tract, including the trailer parcel. During the estate proceedings, the young widow testified that the 1984 deed was not intended to function as a transfer of any land, or to create any new parcel, and that was why it was never recorded, so it was not a valid document of conveyance and she still owned the trailer parcel. Hazelbaker's younger son nevertheless insisted that the 1984 deed was legally valid and binding, and the judge partitioning the estate agreed with him, upholding the validity of that deed and his ownership of the 150 foot square bearing the trailer. The Court of Appeals (COA) upheld that decision, concluding that the physical transfer of the deed from the hands of the young widow to those of the old widow in 1984 was the controlling and dispositive evidence, and that event alone was sufficient to legally validate the contested deed. The physical delivery of a deed by a grantor to a grantee is always presumed to signify a valid conveyance, the COA reminded the young widow, so title to the disputed area had passed to the old widow in 1984, despite the fact that the deed remained unrecorded, and despite the fact that the creation of the parcel in question was not in compliance with local provisions pertaining to the division of land. The subsequent conduct of the 2 widows, each maintaining and using only their own respective portions of the Hazelbaker tract, made it clear that a de facto land division had occurred, the COA observed, so the fact that the old widow never paid any taxes on the trailer or the parcel which it occupied was irrelevant, because taxation does not control title to land. The young widow made the mistake of failing to realize that a deed need not be recorded to become fully effective, so her ownership of the trailer parcel was not preserved by the secret storage of the deed, while her brother-in-law astutely recognized that the legal efficacy of the deed was unhindered by the fact that the deeded parcel was never surveyed or properly documented as a formal division of land, enabling him to prevail. The young widow lost because she failed to expressly state in the deed that it was intended to operate only as a contingency, and having missed that opportunity due to her ignorance of the law, she could not be allowed to later deny the efficacy of her own deed, the COA realized. Deed validity is determined by delivery and not by recordation, the COA thus reiterated on this occasion, while also confirming that a mere failure to comply with local regulations or restrictions relating to the use or division of land cannot invalidate any otherwise valid document of conveyance.

The dire consequences of failing to recognize the need for a survey, along with foolish reliance upon baseless assumptions regarding a boundary location, were yet again vividly displayed in *Wright v Sourk* (2011) providing the Court of Appeals (COA) with an ideal opportunity to expound upon the role of adverse possession, as a source of boundary definition for the protection of innocent grantees. The Sourk family owned a group of several presumably typical platted residential lots in a certain block in Cherryvale, and in 1979 they sold off Lots 9 through 11, while keeping Lots 12 through 16. The dimensions of these lots are unknown, but they were all vacant at that time, except Lot 13, which bore the

Sourk home. In 1985, Sourk acquired Lots 12 through 16 from her parents, but she apparently took no steps toward verification of the boundaries of her lots, since she evidently believed that she already knew where the lot lines were located. When Wright acquired Lot 11 in 1992, he met Sourk and asked her if she knew where the line between Lot 11 and Lot 12 was located. Sourk pointed out 2 bricks, and she told Wright that those objects marked their mutual boundary, even though Sourk evidently knew nothing regarding the origin of the bricks. Wright was satisfied with the brick line, and they both honored that line as their boundary henceforward, but neither party made any substantial use of the vacant area through which that line ran, so for several years the only physical activity that was actually controlled by the brick line was the lawn mowing done by each of them. In 2004 Wright built an addition onto his house in reliance upon the brick line, and Sourk raised no concerns about that activity, apparently still convinced that the brick line was accurate. Then in 2007, Wright decided to fence his property, but after making some measurements he informed Sourk that he had come to suspect that the brick line was inaccurate, and he suggested that a survey was needed, so Sourk obtained a survey, which indicated that the lot line was actually about 22 feet from the brick line, and it ran through Wright's house. Wright then filed an action, asserting that he had adversely possessed the portion of Lot 12 lying on his side of the brick line, and the trial court quieted his title up to that line. Sourk protested on appeal however, that Wright's land use was not intensive enough to qualify as legitimate adverse possession for many years, and she also insisted that no definitive boundary agreement had ever been made, so Wright had no valid basis upon which to believe that the brick line was a boundary. Cognizant that the evidence revealed that Wright had clearly acted in good faith at all times, relying upon the brick boundary only because Sourk had pointed that line out to him, the COA nonetheless upheld the decision in his favor. In so doing, the COA reminded Sourk that statute 60-503 provides that any words or acts creating a scenario under which land use is made in good faith can support adverse possession, once again illustrating that innocence will always be judicially protected, while concluding that the innocence of Wright was not diminished by his failure to obtain a survey in 1992, because his lot was never encroached upon. Conversely, contributory negligence on the part of Sourk left her standing in the shadow of bad faith, and thus sealed her fate, since she had made the fatal error of providing inaccurate and misleading boundary information to Wright, so in the eyes of the COA she could not successfully assail any of the land use that had been made by him. Sourk's failure to order a survey until the need for one was pointed out by Wright, by which time it was too late for the survey to be of any benefit to her, because the 15 year adverse period was already complete, also strongly militated against her, by revealing her own long held belief and acquiescence in the brick line, the COA noted. Good faith adverse possession in the boundary context can be based upon any kind of representation or suggestion regarding a boundary location, it need not be based upon a clear and complete boundary agreement, the COA thus confirmed here. In addition, very minimal land use can support adverse possession, even in an urban context, permanent structures are unnecessary, the COA verified, because physical control over the relevant area is all that is required to openly signify a claim of title to the entire area being used. An adverse party has no duty to take notice of public records defining boundary locations, the COA also reiterated on this occasion, the burden rests upon the owner of record to know, or to learn, the record boundary location and to guard against encroachments, or suffer the stern consequences of

failing to do so, thereby serving notice that those who long neglect to apprise themselves of their property boundaries can expect little judicial sympathy.

As our last previous case indicates, adverse possession can flourish and mature in the absence of action on the part of a record owner, whose land is being utilized in some manner, either in whole or in part, by an unauthorized party, because that lack of action reveals a lack of knowledge, which in turn betrays a fatal lack of concern or interest in defending property rights. Conversely however, the case of *Crone v Nuss* (2011) shows that basic knowledge and appropriate action are all that is required to prevent or halt adverse possession, thereby illustrating one key reason why adverse possession in the boundary context has become far more common than traditional adverse possession in the title context. Nuss was the owner of an unspecified amount of rural land in Barton County, including a vacant 48 acre tract which was evidently separated from the rest of his land by an unspecified distance. In 1988, Crone acquired a 60 acre tract adjoining the isolated Nuss tract, and over the next few years Crone noticed that Nuss never made any use of the 48 acre tract, so in 1993 Crone decided to start planting grass on the Nuss tract and letting his horses graze on it, presumably with the intention of eventually acquiring it by means of adverse possession. Nuss observed all of the use being made of this tract by Crone, but Nuss said and did nothing about it, and he was advised by some friends that it would be a good idea to dedicate the isolated tract as a wildlife sanctuary, since he was not interested in making any use of it himself, yet Nuss took no such action. Over the next several years, both Crone and Nuss gave various hunters permission to use the Nuss tract, and Nuss visited the area once a year, but no encounters took place between Nuss and Crone, so no conflict arose over the use of that tract. In 2003 however, Crone began cultivating and harvesting wheat upon the Nuss tract, and this triggered Nuss to contact Crone, demanding a share of the wheat crop. Crone responded by asking Nuss to verify that he was the owner of the isolated tract, which Nuss did, by sending Crone a copy of the 1968 deed by which Nuss had acquired the 48 acre tract. Crone continued using the Nuss property however, while declining to share the wheat, so in 2005 Nuss posted no trespassing signs around the tract, and his attorney sent Crone a certified letter, stating that Nuss was the land owner of record and demanding that Crone cease trespassing. Crone then filed an action in which he alleged that he had acquired the entire Nuss tract through adverse possession, but the trial court rejected his assertion and quieted title in Nuss, on the grounds that Nuss had successfully ended the adverse period in 2003, by telling Crone to stop using his land. The Court of Appeals (COA) confirmed that Crone had not completed adverse possession, finding that he never held the tract at issue adversely for even one full year, because his use of the land was never exclusive, since hunters authorized by Nuss had used the contested area at various times every year, and such shared land use cannot support adverse possession. Nevertheless, the COA deemed it necessary to correct the erroneous conclusion reached by the trial judge regarding the termination of adverse possession, and thus went on to clarify that Nuss had not halted the accrual of the statutory period in 2003, but the actions he took in 2005 were sufficient to arrest the progress of the 15 year period, had it ever begun to run. An owner of record cannot orally oust an adverse occupant, mere verbal declarations of ownership accomplish nothing, the record owner must take some form of physical action to successfully interrupt the adverse land use, the COA specified, so the demands made by Nuss in 2003 were inadequate for that purpose, and if the land use made by Crone had been genuinely adverse it would have continued to be adverse, despite the

protest openly made by Nuss at that time. A record owner can oust an adverse possessor however, by posting no trespassing signs and formally notifying the possessor in writing that the use being made of the land constitutes a violation of the law, the COA decreed, so the steps taken by Nuss in 2005 would have nullified the land use made by Crone after just 12 years, well short of the 15 year period, if Crone's use of the land at issue had been adverse in nature. As can readily be seen, Nuss was able to prevail because Crone attempted to adversely acquire the entire Nuss tract, rather than a mere portion of it, so no boundary knowledge was required on the part of Nuss to prevent the loss of his title. Adverse possession in the boundary context, to the contrary, leverages and thrives upon the lack of boundary knowledge held by many land owners, such as that demonstrated by Sourk in our prior case, and this vital distinction explains why traditional adverse possession of entire titles rarely occurs in modern times, while adverse possession involving boundaries has become dominant.

Our final case involving easement rights, *McCoy v Barr* (2012) serves very well to highlight the importance of understanding the true nature, and appreciating the legal implications, of land rights of all kinds, both public and private, including easements as well as fee properties, that were created in the distant past. In 1876, an unspecified quarter section in Greenwood County was patented to Gage, and in 1888 he deeded his quarter to his son, but a 2 acre area, described as a "family graveyard", occupying an unspecified portion of that quarter, was excepted from the 1888 deed, and was never subsequently used or claimed by the Gage family. The land surrounding this 2 acre parcel, which evidently consisted of typical cropland, was used in the normal manner and was conveyed an unspecified number of times over the many subsequent decades, but no further reference was ever made to the graveyard, and no one ever used or disturbed that area. In 1973 the surrounding property was acquired by Barr, who evidently also made no use of the 2 acre parcel, leaving the 16 headstones which had been erected there during the nineteenth century intact. In 2005 however, the county sold the 2 acre parcel to McCoy, pursuant to a tax foreclosure, and McCoy then proceeded to ask Barr for an easement, so he could build a road across her land leading to the graveyard site, but Barr refused, so McCoy filed an action against Barr and the county, demanding that legal access to the landlocked site be provided to him. The trial court determined from the evidence that the site at issue was a genuine cemetery, and for that reason the sale of that parcel to McCoy was illegal and void, requiring the county to refund the money paid by McCoy for the 2 acres in question to him. The involvement of McCoy in the matter thus ended, but since this decision left the cemetery site in the hands of the county, and the county was legally bound to maintain all such county property, the access issue still needed to be resolved. On that issue, the trial court ruled against Barr, declaring that her tract had been legally burdened by an undocumented public access easement since 1888, so a public road could be built through her land to reach the cemetery, and she had no right to block public access to the old site. The trial court made no effort however, to define either the location or the width of the easement which had thus been judicially announced, indicating only that the county held the right to build a road upon the Barr property, suitable for public use by county employees and cemetery visitors, to access the old graveyard. Barr died during the proceedings, but on appeal her heirs maintained that their property no longer bore any cemetery access easement, because no one had visited the cemetery for any purpose for well over a century, and no road to that site had ever existed, so the easement set forth by the

trial judge had clearly been abandoned for several decades, if it had ever existed at all. The Court of Appeals (COA) specified that a "family graveyard" is a private cemetery, which like every other form of human burial ground is immune to adverse possession, so no opportunity ever existed for Barr or any of her predecessors to assert that they had extinguished the distinct nature of the contested site by any adverse means, regardless of whether or not anyone had ever visited that site, or used the surface of that area in any way, since the nineteenth century. Regarding the access issue, the COA rejected the position set forth by the Barr heirs, and upheld the existence of the easement in contention, confirming that it had never been abandoned, even though it had never been used by anyone, because abandonment by definition represents a cessation of use, rather than a mere absence of use, thus any land use which never commenced cannot be abandoned. The COA agreed with the Barr heirs however, on their assertion that the disputed easement had been inadequately defined by the trial judge, observing that since the cemetery was of private origin, access to it could be limited to those parties whose ancestors were buried there, along with the county personnel, and for that reason the COA returned the matter to the lower court for further proceedings, to properly define the scope of the easement. Whether any roadway to this historic site was ultimately built or not is unknown, its quite possible that a settlement was eventually reached, under which foot access may have been deemed adequate to enable the county to maintain the grounds, but on this occasion the COA nonetheless provided a poignant reminder that even the absence of any physical pathway for over 100 years is not proof that no unwritten legal access exists, in any location where a need for access to land can be shown.

Chesbro v Board of County Commissioners of Douglas County (2008)

As we have often had occasion to observe, in watching adverse possession cases play out in the boundary context, any form of agreement relating to a boundary location can support adverse possession in Kansas, because from the judicial perspective, any evidence of an agreement upon any visible line as a boundary removes the mistake doctrine, which long served to prevent land use from adversely impacting boundaries, from the equation. The basis for this judicial position lies in the concept that once there has been an agreement of any kind upon any given line as a boundary, it can no longer be portrayed as a line that was adopted through a unilateral mistake, made by just one uninformed or misinformed property owner, acting independently, with no contributory or confirmatory input from the owner of the adjoining land. As all surveyors know from experience however, 2 parties can be mistaken about any given boundary location just as easily as one party can be mistaken, and as a result a great many inaccurate lines have undoubtedly been agreed upon. Nonetheless, once adjoining land owners have settled upon any given boundary line in any manner, either expressly or tacitly, that line takes on an elevated level of validity in the eyes of the judiciary, and the concept that reliance upon such an agreed line is worthy of protection under the law, although the agreement supporting it went undocumented, has been codified into statutory law in Kansas since the 1960s. This judicial

emphasis upon the element of agreement is driven primarily by 2 factors, the first being the basic premise that all parties should be required to honor their agreements, which includes accepting the consequences of an agreement that was carelessly or foolishly made, and the second factor being the right of all innocent subsequent grantees to rely upon the existing conditions that appear on the ground when their properties were conveyed to them. This second factor, the right of physical reliance, which is based upon the principle that all conveyances are made with reference to the physical conditions that are in existence when the conveyance is made, typically operates in favor of grantees, who can thereby benefit from acts of their predecessors, through which physical boundaries have been established. Genuinely innocent grantees are always judicially protected, but as we shall see here, the valuable mantle of innocence is not available to shelter one who neglects to obtain boundary verification when acquiring burdened land, because once he has acquired it, he stands flatly in the shoes of his grantor, thus the unwelcome consequences of any unwise agreements relating to boundaries made by his grantor descend directly upon him.

Prior to 1972 – Lone Star Lake Park was established in Douglas County. How and when the park was acquired or created by the county is unknown, but the park boundary was evidently surveyed and monumented at an unspecified date, and the accuracy of those monuments marking the boundaries of the park was never challenged by anyone. County Road 1-E, which was the park entrance drive, ran through the park property, presumably leading from a nearby highway down to the lake, and one edge of that roadway was evidently within a few feet of one segment of the park boundary for an unspecified distance. At an unspecified date, Fishburn acquired a tract containing about 174 acres, which abutted upon the portion of the park boundary along which the entrance drive passed. How the Fishburn tract was described and when it was created are both unknown, but it was evidently comprised of vacant land, and it may have been landlocked as well, so whether or not any actual use was made of this tract during this period is unknown.

1972 – Fishburn apparently wanted to prevent park visitors from entering and using his property, so he asked the County Board to erect a fence on the portion of the park boundary bordering his property. The Board agreed to install the fence, but little if any effort was apparently made by the county employees or contractors who did the work, to ascertain the exact location of the relevant portion of the park boundary, and the fence was simply installed parallel with the entrance drive, at a distance of 10 feet from the edge of the existing roadway. Unknown to anyone therefore, the entire fence was actually located on the Fishburn tract, an unspecified distance from the monumented boundary of record, upon which it was supposed to have been built. Whether or not Fishburn ever realized that the fence was not in the intended location is unknown, but if he did, he never expressed any concern about it's location, and he never made any use of the portion of his tract that had been

thus fenced out.

1973 to 2003 – The fence remained undisturbed throughout this period, and county personnel maintained all of the land on the park side of the fence at all times, which area evidently consisted of lawn with a ditch or drainage swale, which presumably ran parallel with the entrance drive in the typical manner. What use Fishburn made of the land on his side of the fence during this period, if any, is unknown.

2004 – Fishburn conveyed his tract to Chesbro, presumably using the same legal description under which Fishburn had acquired that tract, but whether or not Chesbro viewed the Fishburn tract, or took any particular interest in the location of any of the property boundaries, before buying the land is unknown. Fishburn apparently never told Chesbro anything about the origin of the fence, and Chesbro evidently never asked anyone about either its location or its significance, before making his acquisition.

2005 – Chesbro evidently decided that he wanted to build a home on his property, and he noticed that the park entrance drive could provide convenient vehicular access to his land, so he devised a plan to build a driveway connecting with that existing road, and he applied to the Board for a residential entrance permit, which would enable him to do so. Chesbro and Browning, who was the county engineer, met at the site and evidently walked the area together, and they found one of the property corner monuments marking the park boundary near the edge of the road, several feet from the fence, but there was apparently no discussion pertaining to the fence at this time. The Board subsequently denied Chesbro the permit that he had requested, so he filed an action against the county, seeking a judicial decree overturning the decision rendered by the Board and requiring the county to allow him to install a driveway connecting to the existing road.

Chesbro argued that he was an owner of land abutting upon a public roadway, so he was legally entitled to utilize that public road for purposes of typical residential access to his property, while charging that the Board's denial of his access request was arbitrary and capricious, and was therefore illegal. Chesbro further argued that the fence built in 1972 was not a boundary fence, by virtue of either adverse possession or boundary agreement, so the monumented park boundary was still the boundary of his tract, and he therefore had the right to remove a portion of the fence and build a driveway upon the land on the park side of the fence, as a means of legal ingress and egress to and from his property. Chesbro also asserted that the county had no right to the strip between the fence and the monumented park boundary, because the county had never made any substantial use of that land, and because that area had always been taxed as part of his tract, and because the county had never recorded any document providing public notice that the county owned that area. The Board argued that the fence was built as a boundary fence, and that it had become the boundary of the Fishburn tract before Chesbro acquired that tract, by virtue of both boundary agreement and adverse possession, so Chesbro never acquired any land beyond the fence. The Board further argued that since the park boundary had been

extended to the fence, and the park now included an additional strip of land which was once part of the Fishburn tract, Chesbro did not own any property abutting directly upon the park drive, so the county was under no obligation to allow him to build his proposed driveway upon any part of that strip. The Board also maintained that a county can acquire land through adverse possession, and the use of the area in question since 1972 was sufficient to support adverse possession, so the county owned the whole strip between the fence and the road, and thus had the right to prevent Chesbro from making any use of that area. The trial court agreed that Fishburn had lost the strip which had been fenced out of his property by 1987, through adverse possession, so Chesbro had acquired no land outside of the fence, and since his tract did not abut upon the county road, his permit request had been properly denied.

The access request submitted by Chesbro had finally brought to light the carelessness exhibited by the county workmen in 1972, at which time they had clearly made a highly typical boundary mistake, by failing to take the time to properly locate the park boundary and place the fence upon that line. Perhaps the location of the park boundary was actually known in 1972, and the workmen were instructed to place the fence 10 feet from the road anyway, in order to put it on level land, rather than putting it in the ditch along the roadside, but in reality it made no difference why the fence had been mislocated, because enough time had passed to legally bar any investigation into what really happened in 1972. The amount of land fenced out of the Fishburn tract was evidently negligible, but the small size of the disputed area militated against Chesbro, because although he was deprived of only a trivial amount of land, it was situated in a critical location, and the fact that the deviation of the fence from the boundary of record had gone undiscovered or unrectified for more than 15 years left Chesbro in an untenable position. The Court of Appeals (COA) focused upon the testimony of Fishburn and Browning, which was devastating to Chesbro, since that testimony made it clear that the fence at issue was intended to function as a genuine boundary fence, and it had been allowed to do so by Fishburn for over 3 decades, without any regard for whether it had been properly placed or not, enabling adverse possession to control the contested boundary. Once the COA was satisfied that the fence was intended to serve as a boundary fence, and all parties had adopted it as such, despite its erroneous location, the outcome was inevitable, because the situation fell squarely within the parameters of KSA 60-503, the statute of limitations devised in 1963 which defines adverse possession in Kansas, as previously discussed herein. The fact that the fence was obviously built in a mistaken location was irrelevant under 60-503, the COA pointed out, because the presence of a boundary mistake can only destroy adverse possession by eliminating the element of genuine hostility, which was once a vital component of adverse possession. A second legal channel for adverse possession, which requires no hostility, was opened by 60-503 however, the COA reiterated on this occasion, so the presence of boundary errors can no longer operate to shield boundaries of record from alteration or elimination through adverse possession in Kansas. Under that statutory mandate, providing that innocent "belief of ownership" is worthy of legal protection, an undocumented boundary agreement can support adverse possession completed in good faith, the COA explained here, observing that the conditions revealed by the testimony given in this case were indicative of a state of boundary agreement, centered upon the fence, making it impossible for Chesbro to prevail:

“Chesbro claimed ... his property was located adjacent to Douglas County Road 1-E ... we disagree ... Chesbro's land did not abut the county road ... according to Fishburn, he intended the fence to be a boundary line fence ... it was constructed with the intention that it would mark the separation between his property and the County's property ... Browning ... attested that the County had treated the fence as a boundary ... Nichols, the individual responsible for maintaining Lone Star Lake Park for approximately 33 years, attested that he had understood that the fence represented the boundary ... the County had openly and exclusively ... treated the property as it's own ... the true owner of property, who fails to protect rights of ownership ... is considered as having acquiesced in the transfer of ownership ... adverse possession can now be acquired in Kansas either under ... a hostile holding or ... a belief of ownership ... in good faith and reasonable under all the facts and circumstances ... the County had ... a belief that the County owned the land ... weed killing and mowing were sufficient acts to establish adverse possession ... the County did not need to file a deed in order to establish that it had adversely possessed the property ... an adverse possessor is not required to pay taxes ... Fishburn and the County agreed and understood that the fence would be the boundary ... the fence was constructed with the intention that it would mark the boundary ... the County ... always understood, intended and acted as if the fence represented the boundary ... Defendant has believed in good faith for more than 30 years that it owned the strip ... the boundary pin no longer marks the true boundary, because the true boundary, having been set by adverse possession in 1987, is now the fence ... Browning's acknowledgement to Chesbro that the property line was marked by a pin, many years after the county had already acquired ownership of the property through adverse possession, would not operate to destroy the County's ownership ... Fishburn's affidavit ... stated that both he and the Board believed the strip of land to belong to the county ... we cannot say that the Board's decision was unreasonable ... arbitrary or capricious ... Defendant owned the strip of land by adverse possession ... consequently Defendant was not obliged to allow access ... Chesbro's property did not abut the road ... Chesbro had no right of access.”

In one respect, Chesbro was certainly betrayed by his grantor, who testified against him, but by the same token, Chesbro himself was at least equally responsible for the predicament in which he had landed, in the eyes of the COA, since he initially paid no attention to the fence, and thus failed to discover that it was on his side of the line of record at the appropriate time, prior to completing his acquisition. By acquiring his land without obtaining a survey, Chesbro essentially ratified the 1972 fence agreement, in the view of this scenario taken by the COA, since he thereby followed in the acquiescent footsteps of his grantor, who either never cared about the land outside the fence, or simply never

bothered to take notice of the fact that the fence stood within his tract. Chesbro's right to rely upon the boundaries described in his deed was effectively nullified, the COA recognized, because he had clear physical notice, provided by the misplaced fence itself, at the time he acquired his tract, so if he had heeded that open warning, and inquired about the potential significance of that object, he would have learned that it was a boundary fence, which had already legally reduced the size of the tract that he was about to buy. Thus the COA upheld the lower court ruling, finding no grounds upon which to sympathize with the plight of Chesbro, since he had foolishly taken the problem created by his grantor upon his own shoulders, by making unjustified assumptions and neglecting to address the access issue before acquiring the problematic tract. A public entity, such as a county in this instance, can acquire land through adverse possession, the COA thus confirmed, and such a development does not constitute a public taking of private land, requiring compensation to the private party, because the resulting loss is a product of the conduct of that party, who is victimized only by his own failure to take any action in defense of his land rights. Mowing grass and clearing weeds or brush is sufficient to support adverse possession, when such activities reflect reliance upon an agreed boundary that is visibly marked, the COA once again indicated here, because the magnitude or intensity of the land use is not the measure of adverse possession in the boundary context, reliance upon a distinct boundary location is the key enabling factor. Adverse possession becomes conclusive upon the passage of any 15 year period during which an adverse condition persists undisturbed, and nothing that may happen thereafter can eradicate it, or restore control to the boundary of record, the COA also informed Chesbro, so the fact that Browning had verified the record location of the park boundary in 2005 did nothing to negate the county's adverse acquisition, which by that date had already been complete for 18 years. The sole glimmer of hope left for Chesbro was the fact that Fishburn had conveyed his tract to Chesbro by means of a warranty deed, so if Chesbro was still inclined to engage in litigation, even after suffering this defeat, the option was open for him to file another action, attacking Fishburn for breach of warranty, but whether Chesbro elected to do so or not is unknown.

Rucker Properties v Friday (2009)

Our last previous featured case provided an ideal demonstration of how even very well defined original boundaries, that have been physically monumented at all times, can be effectively nullified and displaced or relocated, for purposes of title and land ownership, by land use which qualifies as adverse in nature. The application of adverse possession to boundaries was once highly controversial, and the mistake doctrine was developed to prevent the expansion of adverse possession from the realm of title law into the realm of boundary law, but as we have observed in traversing the progress of Kansas law through the decades, adverse possession has nonetheless become a major factor in judicial boundary determination in modern times. Land surveyors typically object in principle to the intrusion of adverse possession into the arena of boundary resolution, and not without

sound justification, based upon the fundamental premise that boundary and title issues are separate and distinct in nature, but as we have learned, that partition has long been judicially obliterated, due to the need to address all land rights issues at once in each case, in order to efficiently burn through the enormous judicial workload. In contrast to the Chesbro case, which emphasized the consequences of a boundary mistake resulting from mutual disregard for a well marked and clearly defined boundary of record, our present case features the use of adverse possession to support an established boundary location, the origin of which lies in the distant past, introducing the key element of uncertainty regarding the validity of it's origin. The physical conditions seen here are highly typical throughout those vast portions of the modern rural west that have been put to productive agrarian use, based upon boundaries which have been standing so long that their origin and potential validity has become quite difficult to prove, and the judicial treatment of such scenarios illustrates the real basis for the approval of adverse possession as a form of judicial boundary control. Whenever boundary issues appear, the availability of relevant evidence becomes a crucial factor, and whenever the evidence relating to any original boundary location is less than completely decisive, as is so often the case, adverse possession becomes a highly attractive judicial boundary delineation alternative, under the principle that statutes of limitation exist to prevent the intrusion of any evidence which would have a disruptive effect upon a long established land use pattern.

Prior to 1900 – At an unspecified date, a tract of unspecified size, apparently consisting of typical rural land in an unspecified section in Greenwood County, was created by means of a presumably typical conveyance between unknown parties. This tract evidently comprised the westerly portion of a presumably typical quarter quarter, although how it was described is unknown, and the other conditions in place at the time it was created, such as whether or not it's boundaries were originally marked in any manner, are unknown as well. This tract was apparently vacant when it was first conveyed, but a house was later built upon it, along with various other small buildings, and for an unspecified number of years the land evidently comprised a typical small family farm.

1900 to 1970 - How the aforementioned tract was utilized during this period is unknown, and how many times it was conveyed is also unknown, but at or near the end of this period it was evidently acquired by Davis, who was the mother of Friday, and the land was jointly owned by other members of her family as well. This tract was apparently owned by the Whipples, who were the parents of Davis, during the middle or latter portion of this period, but it may have been owned by various other members of the Whipple family who lived elsewhere for most of this period, so the land may well have been unused and idle for many years, or even for decades, during the early portion of this period. Who owned the surrounding properties and how they were used during this period is unknown, but at some point in time,

presumably early in the twentieth century, the PLSS line forming the west boundary of the Whipple tract was marked by an unknown party using an unspecified number of railroad ties. Whether the west line of the Whipple tract was a section line, or a quarter line, or a sixteenth line is also unknown, and whether or not the railroad ties were placed pursuant to a survey is unknown as well, but by the end of this period only one of these railroad ties apparently remained in place, and it was located at or near the south end of the west line of this tract.

1971 to 1984 – The Whipple family apparently lived on their aliquot tract for most if not all of this period and they evidently regarded the sole remaining railroad tie as their principal boundary marker, so they used all of the land to the east of a line running northward from that railroad tie, thus a distinct crop line was present during most if not all of this period. Who owned the adjoining land to the west of the Whipple tract at the beginning of this period is unknown, but by the end of this period that area had evidently been acquired by Rucker, and it was being farmed by a tenant of Rucker, who apparently honored the old railroad tie line as the east boundary of the Rucker tract. At or near the end of this period, the Whipple family apparently moved away, leaving their tract once again vacant for an unspecified period of time.

1985 to 2003 – At or near the beginning of this period, the relevant members of the Whipple, Davis and Friday families, who all held various legal interests in the Whipple tract, leased their property to Rucker, so during most if not all of this period the entire Whipple tract was evidently farmed along with the Rucker tract by Rucker's tenant. In addition to the typical cultivation and harvesting activities conducted upon the Whipple tract under the direction of Rucker, portions of the Whipple tract were used by others for activities such as hunting and access to the Rucker tract, all under the authority of the lease held by Rucker. This lease agreement also included an option arrangement, known as a right of first refusal, under which Rucker could purchase the Whipple tract, so the terms of the lease prevented any members of the Whipple, Davis or Friday families from selling their tract to anyone else, without first allowing Rucker an opportunity to buy their land. Also at an unspecified date, presumably near the end of this period, title to the leased tract was consolidated in Friday, as all of her relatives who held any legal interest in that tract conveyed all of their rights and interests to her. At or near the end of this period, the lease expired or was otherwise terminated by mutual agreement, and Rucker never exercised the option to buy the leased tract from Friday.

2004 to 2008 – After the use of the leased tract made by the tenant or tenants of Rucker ended, Friday evidently decided that she wanted to reside upon her tract, so early in this period she had a modular home placed upon the land, but whether or

not she ever occupied that structure is unknown. The west end of this building was evidently very close to the old railroad tie line, which apparently caused Rucker to take some interest in the location of that boundary and to become concerned that the new home might represent an encroachment. Therefore, at some point during this period, a survey was evidently ordered by either Rucker or Friday, which indicated that the line forming the west boundary of Friday's tract was about 28 feet east of the railroad tie line, so this structure was partly on the Rucker tract. Nothing is known about how this survey was conducted, and whether or not any original monuments or any other type of survey monumentation existed in the relevant area is unknown as well, but when this new information appeared, Rucker decided to file an action seeking to quiet title to all of the land west of the boundary location thus identified.

Rucker argued that the record location of the relevant line represented both the east boundary of the Rucker tract and the west boundary of the Friday tract, and that line had always been the only true boundary between those tracts, regardless of the railroad tie line, which could hold no controlling significance. Rucker further argued that no boundary agreement had ever been made regarding the railroad tie line, and that line had not been maintained over the decades, and the land on both sides of that line had been used for legitimate purposes under the authority of Rucker for several years, so no adverse possession had taken place and Friday had no right to regard the railroad tie line as a boundary. Rucker also charged that Friday had violated the lease agreement, by acquiring sole ownership of the leased tract from the other members of her family, without giving Rucker any chance to acquire that tract, as specified in the lease. Friday made no effort to contest the record location of the line in question, instead she argued that her family had adversely possessed the east 28 feet of the Rucker tract, based upon the existence of the railroad tie line, which they had regarded as their west boundary for decades. Friday further argued that she and her family had never ceased to believe that the railroad tie line was a genuine boundary, even after it had substantially disappeared, and they understood that line to be their boundary, both when the lease was issued to Rucker and while Rucker was using the leased tract, so Davis and Friday had adversely held the land east of the railroad tie line at all times for over 30 years, despite Rucker's presence upon that land. Friday also denied that she had violated her family's lease agreement with Rucker, maintaining that the option clause in the lease only prevented the leased tract from being sold to strangers, it did not prevent that tract from being conveyed to any of the signatories of the lease, such as herself. The trial court ruled in favor of Friday on all counts, deeming the historically respected railroad tie line to be the boundary between the litigants, by virtue of adverse possession, despite the fact that only very minimal physical evidence of that line remained intact.

As is readily apparent, this case confronted the Court of Appeals (COA) with a highly typical PLSS boundary location issue, but conclusive original boundary evidence was absent, and this scenario was further complicated by the unusual shared land use pattern, which had the effect of physically obliterating all traces of the disputed boundary for many years, with the exception of one railroad tie. The COA never made any reference to any resurvey of the PLSS line at the heart of this controversy, so provided that the

boundary location of record set forth by Rucker resulted from a resurvey, as is presumably the case, that survey was simply not viewed or treated as dispositive evidence by the COA. If a survey showing the contested area was among the evidence, the fact that the COA took no heed of it is not necessarily a negative reflection upon the quality of the survey however, and in reality the fact that Friday made no effort to disprove the validity of the line location asserted by Rucker may well indicate that Friday knew that disputing the record location of that line would be futile. The decision by Friday to rely solely upon adverse possession, for the purpose of securing the railroad tie line as her west boundary, may at first glance appear foolish, since Friday made little if any personal use of the land at issue, but in fact it was an astute decision on her part, because by this point in time it was well established that adverse possession can displace and overcome record boundaries in Kansas. Even though the line contended for by Friday was very minimally marked and may never have been fully or clearly marked, nor was anything known about how or when the railroad ties were put in position, the COA accepted that line as a legitimate adverse boundary, which stood undiminished even though the passage of time had rendered most of it invisible. Since the origin of the railroad tie line was lost in the mist of time, there was no way of telling whether or not it represented a perpetuation of a line that had been surveyed in the distant past, but since statute 60-503 had enabled adverse possession to control such boundary disputes, the COA realized, the authenticity or veracity of that line was simply irrelevant. Physical possession or use of land by any particular party or parties is not the sole component, or even the primary component, of adverse possession, the COA understood, the principal factor to be noted is the source of the authority under which the land use was made, so the party who was the ultimate beneficiary of the land use is the legal possessor under the law, and that party need not be the one who actually used the land. Thus after disposing of the bogus assertion made by Rucker that the option clause in the lease agreement had been broken by the sale of the leased tract to Friday, the COA explained to Rucker why all of the land use that had occurred had contributed to the adverse acquisition of the area in contention by Friday and her predecessors, rather than defeating it:

“The Fridays were lessors under the lease agreement ... no ownership was transferred to anyone outside of the lease agreement, the right of first refusal was not triggered ... The Fridays ... gained title ... through adverse possession under belief of ownership under KSA 60-503 ... neither cultivation nor residence is necessary to establish actual possession ... the Whipples first moved onto the land in the early 1970s ... Davis leased the land after she moved away ... the Whipple-Friday family did not occupy the land after 1985 ... Rucker Properties ... or it's tenant farmers ... regularly farmed over the line designated by the railroad tie ... people testified that the boundary line was the railroad tie and ... several witnesses understood the boundary line to be based on the railroad tie ... the recognized boundary was the railroad tie ... when the land was farmed across that line it was done with the permission of the Whipples or their tenant ... Rucker Properties overlooks an important point when it argues that exclusivity was compromised by it's tenant farming

over the railroad tie line ... Rucker Properties was leasing ... when use of the property was done with the permission of the party claiming adverse possession, that does not negate exclusivity, because the act of obtaining permission recognizes the superior authority of possession of the party from whom permission was sought ... thus any actions by Rucker properties or it's employees while it was leasing the property don't dispute the exclusive claim of ownership staked by the Whipple-Friday family ... Rucker Properties was using it under the authority given to it by the lease ... the actions of Rucker Properties were not contrary to the exclusive possessory interest that the Whipple-Friday family claimed. To the contrary, it actually supports their possessory claim ... the lease of the land did not contradict the family's claim ... but rather confirms their belief in their right of possession and ownership ... the Whipple-Friday family was operating under a good faith belief in ownership.”

Amazing as it must have seemed to Rucker, the use of the east 28 feet of the Rucker tract by Rucker and the tenants of Rucker was legally adverse to Rucker, because by entering the lease agreement, at a time when the railroad tie line stood as the best evidence of the east boundary of the Rucker tract, Rucker had effectively disclaimed ownership of the land east of that line. By failing to question or challenge the railroad tie line before entering the lease, Rucker had essentially ratified the railroad tie line, in the eyes of the COA, as a valid mutually accepted boundary, thereby allowing adverse possession to proceed, so during all the time when the leased tract was in use, the Rucker tenants were actually eliminating the Rucker title to the 28 foot strip, by serving as subtenants of Friday and her family as well. Quite ironically, Rucker's use of the disputed strip thereby facilitated the ongoing adverse possession that was being completed by Friday and her predecessors, so Friday was able to benefit from adverse possession even though she may never have set foot upon the relevant property at all, and in addition to that, the party who was actually using the relevant area was an agent of the record owner of the land. Thus the COA upheld the lower court ruling, even though the quarter mile long line in contention was marked by only a single visible object for many years, and no visible boundary line existed during at least part of the adverse period, when Rucker was using the whole area as one tract, thereby acknowledging the sole remaining railroad tie as a valid landmark, upon which Friday and her predecessors were entitled to rely. In so doing, the COA also employed the principle that land use made by an adverse party need not be physically exclusive, if any use made of the relevant area by the owner of record can be shown to have been permissive in nature, because land use that is not made under any claim or belief of title is of no significance for purposes of title, and is therefore of no benefit to the record owner. As this decision shows, an adverse possessor can lease land that is being adversely acquired, even to the record owner of that land, and doing so supports the completion of the adverse acquisition, rather than halting it, because that act exhibits the authoritative control being exerted by the adverse party, since such land use made by an owner of record is not independent, in fact it actually represents the legal subjugation of the record owner by the adverse possessor. Here the COA again poignantly demonstrated that good faith adverse possession can operate to bring repose to historically

established boundaries, regardless of the origin of those lines, once they have long stood unquestioned, in order to bring security and stability to land ownership. Thus the COA provided a powerful reminder that one prime objective of adverse possession in the boundary context is to prevent potentially disruptive information, such as that which is often introduced by resurveys, from having any controlling effect upon boundaries, by making it unnecessary for the adverse claimant to present long vanished evidence, in order to sustain the historically established physical extent of his title.

Harris v Neill (2009)

From the 2 featured cases just previously reviewed, we have obtained verification that adverse possession now functions primarily as an alternative legal pathway for boundary relocation or adjustment in Kansas, having been enabled for that purpose by judicial interpretation of statute 60-503, which has now defined adverse possession and governed its application in Kansas for over half a century. Whether or not that legislative enactment and its subsequent judicial implementation represent sound policy can be endlessly debated, but factually adverse possession has simply been adapted to serve as a means of preserving physically established boundary locations, by preventing the correction of past boundary errors and mistakes of all kinds. Both surveyors and land owners are capable of generating boundary issues, through an infinite variety of errors and mistakes, and the law, as manifested in 60-503, merely silences those who seek to raise any such issues for corrective purposes after the passage of the statutorily designated time period, thereby bestowing legitimacy upon those physically established boundaries which have endured for that period. The application of adverse possession to boundaries is a modern development however, brought about initially during the nineteenth century, when adverse possession was first judicially enabled to create new boundaries, to support partial adverse claims which were made by squatters, who were not acting under any color of title, and thus could make only fragmental adverse claims. Over several subsequent decades, the principle of adverse land use continued to evolve along with modern society, and gradually came to be more extensively utilized in the context of boundaries, to address the increasing prevalence of boundary disputes, which appeared as improved measurement technology revealed countless boundary issues during the twentieth century. The core objective of adverse possession remains the settlement of title issues however, specifically the conclusive elimination of both valid and invalid claims that represent a challenge to the title of any occupant of land, forming a cloud upon his title, which makes conveyance of that land problematic, and this constitutes the legally affirmative role of adverse possession, as it was originally intended to function. Although adverse possession is now only rather rarely employed in the context of pure title resolution, without the presence or intervention of any boundary issues, the case we are about to review stands as a fine modern example of adverse possession operating in a manner that fulfills the purpose for which it was created,

while leaving all boundaries of record intact.

1993 – The father of Neill was the sole owner, and apparently also the sole occupant, of a presumably typical lot in Atchison bearing an old house. Neill's father was evidently an elderly widower, and Neill, who lived in California, was his only child, but Neill's father had 3 living brothers, who apparently all lived in Kansas. When Neill's father died, apparently without leaving any will, Neill's 3 uncles immediately took control of all of the property of their late brother. They promptly informed Neill that his father had died, and they also told him about their plans for the lot upon which the deceased man had been living. Neill's uncles told Neill that they intended to tear down the old house, and that they would send him a share of any profits that they made from the sale of the vacant lot. Neill simply accepted this news without question, and made no suggestion that he had any right to the house or the lot, apparently trusting his uncles to deal fairly with him. Just 5 days later however, his 3 uncles executed a quitclaim deed to Harris, conveying both the house and the lot to her, and she immediately took control over that property, by renting it out, after recording her deed.

1994 to 2006 – Harris rented the house on the Neill lot to a succession of various tenants during this period, so that property was under her control at all times, although the house was periodically vacant, and the lot may have gone unused for months, at those times when the house was left unoccupied by departing tenants. Neill apparently never visited Atchison, so he remained unaware that the house still existed, and he never asked his uncles what had become of his late father's lot, nor did he ever ask them why he had never gotten any money from them, and by the end of this period 2 of his 3 uncles had died.

2007 – For unknown reasons, Neill finally decided to investigate what had become of his late father's lot at this time, so he contacted a realtor in Atchison who told him that the old house still existed, and that it was currently occupied as a rental property, and that his late father was still the record owner of that lot. Through further investigation, the quitclaim deed to Harris was found, and her name and contact information was provided to Neill, who then called her and verbally informed her that he was the true owner of the house and lot, as the sole heir of his late father. Harris took no action in response to this information however, she simply disregarded this news and continued to rent out the house, and her renters continued to live in it. Neill proceeded to obtain a judicial decree of descent, verifying that he was the sole legitimate heir of his late father, and identifying Neill as the true owner of all of the property left by the deceased man, but Neill did not file an action to quiet his title to the Atchison lot.

2008 – Having gotten no satisfactory response from Harris, to his demand for her to turn control of the subject property over to him, Neill decided to take unilateral

action, so he ordered the locks on the house to be changed, and that was done, thereby preventing Harris and her renters from entering the house. Harris reacted to this action on the part of Neill by filing a quiet title action against him, seeking judicial confirmation that she was the legal owner of the subject property.

Harris did not deny that Neill became the true legal owner of the lot at issue upon the death of his father, she simply argued that she had acquired the subject property by virtue of adverse possession, if in fact her deed was not a valid conveyance of that property to her, and that any title once held by Neill had been legally extinguished, by his failure to take any effective action upon his rights for a full 15 year period. Neill argued that no adverse possession had taken place, because Harris never had any valid basis upon which to believe that she owned the lot, since her deed was only a quitclaim and the law bestows no presumption of good faith upon the holder of a quitclaim, and in fact Neill's very existence was conclusive proof that her deed was invalid. Neill further argued that Harris had actual knowledge in 1993 that his uncles, who had granted the subject property to her, were not the true owners of that property, and she had conspired with them to cheat Neill out of his inheritance, so Harris was guilty of fraud, therefore it was not possible for her to complete adverse possession in good faith, as outlined in statute 60-503. Neill also asserted that even if the use made of the lot in question under the authority or direction of Harris was adverse from 1993 to 2007, he had disrupted that adverse land use in 2007, short of the completion of a full 15 years, by informing her that he owned the property, and also by filing his initial legal action which resulted in a decree confirming his ownership of the lot, so Harris had not held the subject property in good faith for a full statutory period. The trial court concluded that the quitclaim deed was invalid, but found that it did form a valid basis for adverse possession, and nothing that Neill had done had legally disrupted the adverse possession, until after it had been successfully carried through to completion in 2008 by Harris, quieting title to the subject property in her and leaving Neill with nothing.

It should be noted at the outset that Neill was a highly typical victim of adverse possession, even though he held no deed, because heirs who are unaware that they have acquired property rights in a distant location, through the passing of some relative, have long been prime targets of adverse possession, and such heirs have frequently lost their land rights, just as Neill did here. Neill was certainly cheated, but in the eyes of the law he facilitated the problematic situation, through a series of mistakes, which enabled the scheme concocted by his uncles to succeed. First, Neill was ignorant of his rights under the law, therefore he failed to realize that the lot belonged to him and not to his uncles, second, he failed to promptly educate himself about his land rights, by which means he would have learned that his land was subject to loss as a consequence of inaction on his part, third, and most importantly, he never visited the subject property, to take actual notice of the physical conditions, which the law expects of every land owner. In addition, the Court of Appeals (COA) pointed out to Neill, even when he finally opted to take action to enforce his rights, he fumbled his opportunity to halt the ongoing adverse land use, which was still available to him in 2007, because he failed to understand what the law requires a land owner to do in such a situation. In his ignorance, Neill may well have felt that he was protected from adverse possession by his status as an absentee land owner, who was unable to see how his land was being used, because he was living in another state, so Kansas law did not apply to him, but the law grants no such exemption, the COA informed him, and in fact every land

owner, wherever he may be, is expected to know what he owns and to monitor the use of his land in some manner. The charge of fraud lodged against Harris by Neill may well have been accurate, its quite possible that Harris knew from the outset that her grantors did not own the lot that they deeded to her, and Neill's uncles may have even told Harris that they planned to deprive their ignorant nephew of his land and keep the money paid by Harris for themselves. Even if all of that was proven to be true however, none of it held any benefit for Neill, because the statute of limitations upon fraud expires in only 2 years, moreover, even if he was defrauded, he was still legally charged with notice of what was taking place, because he could have seen that the house in question still existed, contrary to what he had been told, and that it was in active use by strangers, at any time. Neill was about to find out the hard way, from the COA, like many before him, that adverse possession serves to promote and motivate diligence, by inflicting consequences for complacency, indolence and all other forms of ignorance which result in negligent disregard, on the part of a land owner, toward his own land rights. Since conditions were long in place which provided Neill with full notice that his rights to the subject property were being abused, his failure to pay any attention to those open conditions, or even to recognize that he needed to do so, left him in an entirely unsympathetic position, in the eyes of the COA:

“Neill inherited title to the property under the law of intestate succession ... Neill ... relied on the Neill brothers, his uncles, to dispose of the property and distribute any inheritance, and failed to make further inquiry when he received no inheritance from them ... Neill claims Harris ... failed to present any admissible evidence to support her adverse possession claim ... one claiming title by adverse possession need not provide proof of actual residence or improvements to the property ... all that is necessary ... is that visible and notorious acts of ownership should be exercised over the premises ... Harris ... maintained the property as a rental property ... until Neill changed the locks ... a period in excess of 15 years ... even if we were to consider Neill's allegations of fraud, we would not find that those allegations prevented ... adverse possession ... Neill contends that ... Harris could not have had a good faith belief of ownership. However, a claim of adverse possession can be based on a good faith belief in ownership or a claim knowingly adverse to the true owner's interests ... even if Harris had known ... that the quitclaim deed was defective, she would nevertheless have ... obtained title to the property through adverse possession ... Neill asserts ... the decree of descent ... a decree of descent merely establishes title to property ... the decree of descent ... did not change the fact that Harris continued to continuously and openly occupy the property ... Neill ... was informed by the Neill brothers that his father's home would be demolished ... he took no action ... when he learned the home was still standing ... in granting summary judgment in favor of Harris on her claim of adverse possession ... the district court did not err.”

At the core of Neill's argument was his misguided perception that 60-503 replaced hostile land use with good faith land use, as the sole pathway for the completion of adverse possession, but as we have previously observed, that is not the case, 60-503 merely opened a second route along which adverse possession can be completed, while leaving the consequences of genuinely hostile land use intact. Neill set out to prove that the land use made under Harris was hostile, and he succeeded, but in so doing he accomplished nothing, because genuine hostility, manifested by deliberate use of land that is known to be owned by another party, remains an entirely viable channel for the acquisition of adverse title, since good faith is merely an option, and not a requirement, as pointed out here by the COA. As the holder of a quitclaim deed, the good faith of Harris was certainly open to question, but even definitive evidence that she participated in a conspiracy against Neill, would have only strengthened her position, by making it perfectly clear that her land use was unequivocally hostile to his title. Moreover, Neill only further solidified the position of Harris, as a party acting in outright hostility to him, when he verbally notified her that he was the true owner of the contested lot, because in so doing he gave her a golden opportunity to openly ignore his land rights, which of course is exactly what she proceeded to do. The decree of descent also served no beneficial purpose, as indicated by the COA, since it merely verified to Neill that he was the legal owner, whose property was in the process of being adversely lost, and that decree had no impact upon Harris whatsoever, since she was not charged with any responsibility to take notice of any such document, or to honor it once it was brought to her attention. If Neill had locked the renters out of the house before the 15 period had elapsed, he may well have prevailed, because that action constituted a genuine physical assertion of his land rights, but by the time he took that step it was too late to do him any good, and in fact it could have resulted in liability, since Neill no longer had any rights to either the house or the lot by that time, so his agent who changed the lock was actually guilty of trespassing. Thus the COA upheld the lower court ruling against Neill, explaining to him that adverse possession can be transformed from good faith status to hostile status when a record owner confronts an adverse party with information, as Neill had done, yet the adverse possession can still proceed to completion, because hostile land use and land use made in good faith are equally valid under the law for that purpose. Adverse possession is not interrupted by the mere existence of a dispute or conflict, the COA thus stipulated on this occasion, the land owner of record must either take action that blocks the ongoing use of the land or terminates the physical possession, or else he must file a properly targeted legal action, in order to effectively halt the progress of the statutory period. Neill's name was thus added to the immense list of those who have experienced the traditional form of adverse possession, focused solely upon title, which results in the loss of an entire lot, parcel or tract, without any regard for the location of any of the boundaries thereof.

Appeal by Janet Reed (2010)

Perhaps the most fundamental rule of law governing the work of land surveyors is the rule that only original surveys establish boundaries, and all of the work conducted during any subsequent surveys is to be directed toward just one objective, which is

restoring original corners and lines in their original locations, regardless of where those corners and lines may turn out to be in relation to their intended or theoretically ideal location, as defined by dimensions of record, due to a lack of precision in the original survey work. This very basic rule, which has been judicially espoused on countless occasions, in every state, throughout our nation's history, is captured in the often reiterated maxim that all retracement surveyors merely follow in the footsteps of the original surveyor, emphasizing that the path which was physically established on the ground, by an original surveyor in the course of initially marking any boundary, is the legally controlling location of that boundary. The legal basis for this rule is the right of reliance, which enables every land owner to safely and confidently utilize and improve their respective properties with reference to any physically marked boundary that was put in place during an original survey, because original surveyors are authorized under the law to conclusively define boundaries through their physical actions. This concept has universal judicial support, because the use and development of land is clearly vital to society, and land development can only proceed once boundaries have been defined on the ground, since boundaries that are defined on paper but are invisible on the ground are useless for all practical purposes, so legitimate reliance for purposes of land use can only occur once boundaries have been visibly marked for all to see. Thus the right of boundary reliance ultimately rests upon what was actually done on the ground, rather than boundary information that may be found in the public record, and for this reason physical boundary evidence has historically been regarded as primary, while all forms of documentary evidence pertaining to boundaries have been regarded as secondary. As all experienced land surveyors know however, boundary controversy frequently arises, despite the presence of this simplistic concept, because conflicting boundary information is virtually omnipresent, and many highly problematic questions concerning how to address such scenarios typically confront those dealing with such information. The case we are about to review may well hold the greatest value for Kansas land surveyors, because in resolving this boundary dispute involving competing surveys the Court of Appeals (COA) very wisely treated and adjudicated the matter as a boundary location issue, controlled solely by boundary principles, rather than a title conflict, and therefore invoked the elementary premise enumerated above, thereby providing truly superb guidance for Kansas land surveyors.

1870 – The Foot & Beach Addition to the City of LaCygne was platted, within the north half of a certain Section 33 in Linn County. The size of this subdivision is unknown, but this plat was presumably a typical product of it's time, apparently bearing no evidence that any of the lots or blocks depicted thereon were surveyed on the ground at this time, or that any of the lot or block corners were monumented in any way. The location of the platted area within the relevant section was graphically or dimensionally indicated on the plat, and an unspecified portion of the south line of the north half of the relevant section was evidently depicted on this plat as a line controlling the intended location of this subdivision.

1871 to 1955 – Nothing is known of what transpired during this period, but presumably LaCygne was populated and developed in the manner of a typical town, and most if not all of the lots platted in 1870 were sold and occupied during this period, as typical residential properties. How the location of the many platted lot lines was ascertained by the early residents of LaCygne or the surveyors who were employed by them is unknown, presumably numerous lot and block corners were set by various surveyors over the decades, and quite possibly some were set by other parties as well, which were then adopted and perpetuated by surveyors of subsequent generations.

1956 to 1961 – The county surveyor evidently set the center quarter corner of Section 33 early in this period and then reset or re-monumented that point again, in the same position, late in this period. Block 9 of the Foot & Beach Addition and the adjoining streets were apparently developed to some unknown extent at this time, evidently in reliance upon this survey work done by the county surveyor, so the boundaries of this block, and those of the lots within it, as they functionally existed on the ground, were apparently in general conformance with the quarter lines which were monumented by him at this time.

1962 to 2006 – The 4 lots forming the northern portion of Block 9 were acquired by Reed, while an adjoining group of 4 lots comprising the southeastern portion of that block were acquired by Heide, at unspecified times during this period, if not earlier. What use these parties or their predecessors made of their land is unknown, presumably these lots comprised typical residential properties, and whether or not the particular lot line forming their mutual boundary was physically marked in any way is unknown as well.

2007 – For unknown reasons, Reed ordered a survey of her property at this time, and her surveyor deemed it necessary to reject the aforementioned work of the county surveyor, although it had been treated as satisfactory by several other surveyors, who had found it to be acceptable over the previous 5 decades. Grant, Reed's surveyor, then proceeded to re-subdivide Section 33, in a manner which shifted the south line of the north half of that section about 10 feet to the south of its long established position. Reed's surveyor evidently positioned the boundaries of her lots in accord with the relocated quarter line, bypassing any physically established boundaries that may have existed in Block 9, and effectively relocating the public right-of-way lines bounding that block as well, in so doing. Reed's survey thus deprived her of 10 feet on the north side of her property, which she had imagined that she owned, but it also bestowed a corresponding 10 foot strip upon her, taken from the north side of Heide's lots lying directly to the south, and Reed was evidently satisfied with this result. Heide was unsatisfied however, so he applied to the county surveyor for a statutorily authorized survey of his property, and Walker,

the deputy county surveyor, completed that survey for him. Heide's surveyor declined to support Reed's survey and instead produced a survey that conformed more closely to both existing visible boundaries and the work of the earlier county surveyor, evidently based upon a variety of survey monuments of unknown origin which he found in or around Block 9, along with the center quarter corner that had been established 50 years before, resulting in a 10 foot overlap with Reed's survey. Reed and her surveyor declined to retract their position however, and instead filed a formal appeal of Heide's survey.

Reed argued that no original survey of the subdivision in which her lots were situated was ever performed, and only original monuments carry controlling legal force, so until her 2008 survey the boundaries of her property were defined solely by the 1870 subdivision plat, and not by any monuments that had been set by any other surveyors, known or unknown, since 1870, therefore her surveyor had properly disregarded all such monuments within Section 33. Reed further argued that under statute 19-1409, her surveyor was legally required to locate all of the quarter corners of Section 33, and to then subdivide that section, in order to properly position the entire platted addition, including her block, within that section, without regard for any prior surveys in which that section had been improperly subdivided, and since her surveyor had done that, his survey was clearly superior, so it controlled the boundaries of her property. Reed also charged that Heide's survey was improperly executed and could not stand, because Heide's surveyor had neglected to subdivide the relevant section, and had instead wrongly utilized various points that had been set subsequent to 1870, which points were therefore all unreliable and useless for purposes of boundary control. Heide argued simply that his surveyor had diligently located and properly accepted legitimate boundary evidence that he found within the platted subdivision, and he had also properly honored the sectional subdivision work done by the county surveyor during the 1950s and 1960s, making it unnecessary to re-subdivide the section in question, and the rejection of all existing monumentation within that section by Reed's surveyor was unjustified, so Reed's survey was insufficient to negate the legally controlling force of Heide's statutory resurvey. The trial court ruled that Heide's survey controlled over Reed's survey, because Heide's surveyor had properly utilized the best available boundary evidence, while Reed's surveyor had mistakenly rejected acceptable physical boundary evidence which existed within the relevant area, on the erroneous premise that only positively original monumentation can have any legally controlling effect, and therefore dismissed Reed's protest.

This controversy obviously brought the COA an ideal opportunity to address some of the most essential issues confronting land surveyors, concerning the value of physical boundary evidence which stands in apparent conflict with information of record and cannot be conclusively linked to any original survey. The initial question was simply what does, and what does not, constitute an original survey or the legal equivalent thereof, which can be safely relied upon by land owners and surveyors alike, since disagreement over which boundary evidence was legitimately reliable generated this dispute between fellow professionals, having presumably equal competence and expertise regarding such evidence. That question, the COA realized, leads directly into the additional question of whether or not the work of prior surveyors can carry a legitimate right of reliance, making

it equivalent in legal effect to the work of an original surveyor, on the grounds that significant reliance was placed upon that work, regardless of whether it represented a genuinely original survey or not. The COA was also cognizant that high reliance has historically been placed upon the work of county surveyors in Kansas, such as that which was being challenged here, raising the additional question of whether or not the work of past county surveyors carries any greater weight than that of any other surveyors, due to the fact that the work of county surveyors has always been statutorily authorized in Kansas, and their work has been widely viewed as reliable for that reason. Moreover, since Reed's surveyor chose to take a negative view of the historically accepted survey work which had been done in LaCygne over a period of several decades, a question was raised as to whether or not subsequent surveyors are authorized to correct past survey errors, even after land rights have attached to the relevant properties as a result of innocent land owner reliance upon such work, regardless of whether that reliance was originally justified or not. Whether or not modern surveyors are authorized to evaluate physically established boundaries and dismiss them as having been improperly located, based solely upon documentation, such as legal descriptions and plats, which purport to define the originally intended location of those boundaries, was also a matter of concern to the COA, since Reed's surveyor had effectively elevated the originally platted location of the relevant addition above the location in which it physically existed. Ultimately, the answers to these questions are all controlled by the judicial position on what represents sound public policy for the protection of all land rights, and the here the COA astutely recognized that shifting the location of long physically established boundaries, in order to place those boundaries where information of record appears to indicate that they were once intended to be, runs directly contrary to the vital and highly fundamental policy of repose. The COA well understood that the efforts of surveyors to correct past errors, by rejecting physical boundary evidence and placing a boundary in a location on the ground where no visible line has ever existed, while treating measurements as controlling evidence, typically represent misguided violations of established land rights, making such efforts unworthy of judicial support, as Reed and her surveyor were destined to learn. The COA focused therefore upon the testimony of Heide's surveyor, who had properly executed his role, in the eyes of the COA, by seeking out the nearest and thus most relevant physical boundary evidence, adhering in so doing to the long held judicial stance that measurements to distant points cannot control, when nearer and better boundary evidence exists. The COA agreed with Heide's assertion that statute 19-1409 was misinterpreted and misapplied by Reed's surveyor, because re-subdivision of the long occupied section at issue was obviously unwarranted, and acceptance of the previous subdivision of that section was clearly appropriate, since extensive reliance had been placed upon that prior survey work, which was duly authorized, placing it beyond correction by any subsequent surveyor. Reed's surveyor erred in principle, the COA determined, by applying PLSS principles out of context, but in reality his defeat resulted primarily from his failure to recognize the evidentiary value of the land development that had taken place over many decades within the relevant section, which had rendered the spatial relationship between the sectional boundaries and any given lot or block in the old addition utterly irrelevant, long prior to his arrival upon the scene. In high contrast, the appreciation of the COA for both the diligence and the sound judgment of Heide's surveyor was very clear, making this one of those rare occasions upon which the efforts of a land surveyor have been judicially

analyzed in depth and judicially applauded:

“Walker attempted to establish the chronology of the monuments ... concerning which of the found monuments to honor ... Walker also created a final narrative report of his findings, in which he recounted ... the techniques, methods and steps taken ... his reasoning ... and the basis for his conclusions ... Walker provided detailed and consistent descriptions of his findings ... Grant ... relied primarily on the section quarter corners ... Grant concluded that the center corner established by the county surveyor in 1956 was in the wrong position ... Walker stated that ... he first looks for monuments on the corners of the lot ... Walker testified that ... there were sufficient monuments inside the subdivision ... Walker relied on internal monuments rather than the external section quarter corners ... Grant's approach ... would shift the boundary lines ... Grant's survey would conflict with existing infrastructure ... the survey methodology of Grant was inappropriate ... there is no basis for the court to adopt Grant's survey ... Reed's reliance on KSA 19-1409 was misplaced, because that statute applied only to the initial division of a section ... the center quarter set by the county surveyor in 1961 was reliable ... that corner had been relied upon in approximately 30 subsequent surveys ... long occupancy of city lots and improvements ... are better evidence ... than deductions and measurements of a surveyor ... within a city plat ... monumentation should control over measurements taken from outside the plat ... Reed concludes ... Walker should have relied on quarter section lines ... Reed's argument here rests upon the erroneous factual assumption that the internal monuments relied upon by Walker were insufficient ... Walker's permanent survey is supported by sufficient evidence ... there was no need to resort to the external government lines or corners, because the internal monumentation was acceptable ... all of Reed's arguments are ... without merit.”

Long honored lines of occupation marked by improvements can represent valid and potentially controlling boundary evidence, the COA thus verified in upholding Heide's survey, particularly those improvements in which an investment of public funds has been made, while also noting that acquiescence in the existence of such objects can function as a potent equitable component in judicial boundary determination. While dimensions of record indicate intended boundary locations, and those intended locations can now be more precisely defined by modern measurements, precision is never the principal objective of boundary retracement surveys, the COA well knew, the ultimate objective is the protection of all established land rights, and the goal of retracement work is to document what has been done, rather than to discard all that has been done and begin the land division process anew. The originally intended locations of both the center quarter corner in dispute and the 1870 subdivision itself were both entirely moot, in the view taken by the COA, because substantial reliance for land use purposes had taken place, based upon the work of the

county surveyor who monumented the center of that section half a century before, and the work of his predecessors who were required to stake the various lots in the absence any original lot corner monuments. Even the lack of any genuinely original monumentation anywhere within the platted subdivision was inconsequential under the law, the COA observed, because the reliance placed upon the subsequent monumentation had effectively elevated it to the equivalent of original status, so any opportunity to shift the position of the entire platted area for corrective purposes, as Reed and her surveyor essentially proposed, had long since evaporated, perhaps more than a century in the past. The work of early county surveyors carried a valid right of reliance, and their work must be respected where reliance upon it has occurred, the COA thus informed the litigants, regardless of whether the quality of their work accorded well with modern standards or not, because the early citizens of Kansas were justified in relying upon the survey work that was done to enable them to put their land to productive use, and the law will invariably protect, rather than punish, those who have innocently engaged in beneficial land use. This matter was thus fully resolved by the COA, with respect to Reed and Heide, and neither of them apparently saw fit to file a liability action against the vanquished surveyor, so their involvement ended with the conclusion of this case, but the legal ramifications of this and other survey work done by Reed's surveyor had yet to play out, as the Kansas State Board of Technical Professions (KSBTP) elected to take disciplinary action against him.

What truly motivated Reed's surveyor is unknown, but despite the negative impression which he clearly made upon the trial judge, whose comments painting his conduct in the colors of bad faith were noted by the COA, it's quite possible that he was simply misguided, and was actually acting in good faith. Many surveyors have major misconceptions concerning statutory requirements, such as the mandate to subdivide sections in this instance, so Reed's surveyor may well have been truly convinced that he was legally obligated to re-subdivide every section in which he worked, just as if no survey work had ever been done there before. The fallacy in that concept is readily exposed however, merely by recognizing that no surveyor is authorized to unilaterally elevate himself to the status of an original surveyor, only a land owner has the authority to anoint an original surveyor, and even then the original surveyor can function only within the property of that land owner, and cannot alter any established boundaries of the subject property. Thus regardless of the motivation driving the decisions and the actions of Reed's surveyor, he was clearly guilty of exceeding his authority, by carrying out independent resurveys, and conducting himself in so doing as if he had been duly appointed to embark upon corrective resurveys, when in fact he had not. If indeed his motivation was innocent, then that simply points to a dramatic collective failure on the part of the land surveying profession, to insure that all those entering the profession are provided with sound and complete education upon the true meaning of the law before obtaining licensure. Reed's surveyor had evidently undertaken numerous other surveys in LaCygne and elsewhere, and it appears that his work was consistently discordant with that of prior surveyors, which naturally resulted in the appointment of an investigator when this came to the attention of KSBTP. The investigation evidently revealed a pattern of monument rejection, directly comparable to that which was exhibited by the Reed survey, along with numerous recordation failures, creating the appearance that this surveyor had been attempting to divert attention from his work, by neglecting to place all of his results upon the public record. The Board thus deemed it necessary to penalize him, but he responded by filing an action challenging the

Board's decision, alleging that the Board had treated him unfairly. The trial court found the action taken by the Board to be appropriate however, and upheld the penalties imposed by the Board, leading him to take the matter on to the COA. Quoting with favor from the report submitted by the KSBTP investigator, before summarizing the problematic surveys, in *Grant v KSBTP* (2012) the COA confirmed that the disciplinary action taken by the Board was both justified and appropriate:

“KSBTP ... alleging that Grant violated the Minimum Standards and/or statutory filing requirements on 6 land surveys ... Grant ... clearly and repeatedly violated KSA 58-2011 ... the health, safety and welfare of the public is not being protected ... Grant has a lack of understanding of the role of a land surveyor ... he appears to view the world of surveying and title as one of right and wrong that must be fixed ... Grant's conduct ... constitutes misconduct ... Grant ... claims that the only monuments he had to accept are government stones ... Grant failed to follow previous surveys ... Grant violated the Minimum Standards on ... monumentation ... Grant ... failed to accept the center corner ... his surveying method was questioned and rejected ... Grant used improper surveying techniques ... because of his belief that it is necessary to correct prior surveyors work ... professionals must account for mistakes that result in violations ... there is substantial competent evidence in support of the Board's decision ... KSA 58-2011 clearly authorizes the Board to suspend or revoke Grant's surveyor's license ... Grant pleads ignorance, be that as it may, Grant's livelihood depends on his knowledge ... if his errors were not willful, the surveys were at least prepared with great indifference to the Minimum Standards ... a surveyor ... should be knowledgeable about the statutes and Minimum Standards regulating his or her profession.”

All surveyors are capable of making mistakes, and of course all surveyors make errors of many kinds, but mistakes that damage property rights ultimately generate the gravest concern, particularly when they are repeated, indicating either a disinclination to learn and mature as a professional, or perhaps even a pattern of deliberate abuse. The multitude of errors made by this individual resulted in his undoing, because he demonstrated neither the capacity to learn nor any willingness to respect property rights, yet one can hope that the comments of the COA awakened his ability to modify his behavior, leading him to embrace the true role of a retracement surveyor, and to employ his considerable skill constructively, to properly serve the residents of Kansas. This ruling of the COA clearly demonstrates that a lack of respect for the work of prior surveyors can generate liability for subsequent surveyors, when land rights have become vested under the law in reliance upon past survey work, because once such rights have accrued, the matter is no longer a mere contest between the views of different surveyors, and it cannot be resolved at the discretion of any individual surveyor, since surveyors have no authority to engage in adjudication. This decision of the COA also well illustrates the widely held judicial view that setting out to rectify past errors is never the proper mindset for any retracement surveyor, because it has long been understood that the application of precise modern

measurement technology to historical dimensions of record will typically not support physically established boundary locations, and is therefore not a valid means of boundary verification or resolution. The fundamental flaw in Grant's methodology, the COA pointed out, was his inclination to leverage dimensions and measurements as primary boundary evidence, despite presumably knowing that such numerical values appearing in any form stand at or near the bottom of the evidentiary scale, in direct opposition to the long judicially approved principle of monument control, which the judiciary expects all surveyors to honor. Re-subdivision of a previously monumented section is typically unnecessary, and judicial approval of repeated re-subdivision would be unwise, since re-subdivision of a populated section is not within the spirit of the law, as the law is expressed in statute 19-1409, the COA acknowledged, emphasizing that the professional surveyor must be able to recognize when PLSS subdivision is appropriate and when it is not, if professional status is to hold any real value to the public. The law authorizes KSBTP to safeguard all Kansans, by penalizing, when necessary, any licensee whose work jeopardizes land rights, the COA thus reminded all Kansas surveyors, since the primary role of the Board is to insure that the land rights of all parties and entities, both public and private, are being adequately protected by all of the professionals operating under the Board's jurisdiction.

Kinder v Sugar Creek Partners (2012)

Contrasting the cases of successful adverse possession in the boundary context that we have previously reviewed, it can be readily observed that adverse possession now has the capacity to negate boundaries of record in fundamentally different ways. For example, in the 2008 Chesbro case adverse possession resulted in the creation of an entirely new boundary, which was clearly distinct in terms of location from a nearby monumented boundary of record, while in the Rucker case of 2009 adverse possession served to confirm the validity of an existing monumented line, which may or may not have been accurately marked in the distant past, when that line was eventually called into question. All such cases show how adverse possession has been judicially adapted over the decades, and its scope, which was once strictly limited to litigation in which a title conflict was present, has been dramatically broadened, enabling it to serve as a judicial boundary resolution device under widely varying circumstances. Once adverse possession acquired the capacity to create new boundaries, to protect unauthorized but long maintained use of a mere portion of any lot, parcel or tract, which took place during the nineteenth century, as previously noted herein, the opportunity to utilize adverse possession as a tool for de facto boundary relocation was recognized and leveraged by astute attorneys, until through frequent repetition this eventually became the dominant or typical form of adverse possession. Ultimately, adverse possession is just one of many functions that are facilitated by statutes of limitation, which simply impose silence upon those who seek to raise issues that are no longer timely, often described as stale claims, and boundary issues are among the

numerous matters to which statutes of limitation have been deemed to be applicable, in recognition of the value of repose, as the most essential form of boundary security and stability. It is under this justification that adverse possession has obtained the power to both affirm the location of ambiguously documented but physically established boundaries, and to adjust the known location of well documented boundaries, in support of established land use patterns, without any regard for whether the adverse line actually conforms to, or materially varies from, the boundary location of record. Given the virtually unlimited potential to control boundary determination at the judicial level, which is now embodied in adverse possession, it is not surprising that adverse possession can even convert a crooked fence, which was obviously never intended to define or follow a straight line of record, into a property boundary, as the case we are about to review demonstrates.

1944 – Brownback acquired the south half of the SW/4 of a certain presumably typical Section 11, apparently consisting of typical rural land suitable for use as pasture, and he began using his tract for that purpose. This tract had evidently already been fully fenced, by an unknown party at an unknown time, and no issues ever arose over the location of the fences running along its east, south or west sides, which were all presumably straight, but the north fence was apparently built along a path of least resistance, following the topography, so it contained an unspecified number of bends and curving sections. Nothing is known regarding the ownership of the north half of the SW/4 at or prior to this time, and whether or not that land had ever been put to use is unknown as well. In addition, there is no indication that the sixteenth line dividing the north and south halves of this quarter had ever been marked by a surveyor.

1945 to 1999 – The Brownback family utilized their entire tract, as fenced, as pasture land throughout this period, without disturbance from anyone. Who owned the north half of the relevant quarter during this period is unknown, title to that tract may have been held by multiple parties in succession or by an absentee owner who lived elsewhere and allowed the land to remain unused, since there is no indication that any structures ever existed upon that tract.

2000 – The north half of the SW/4 was acquired by Sugar Creek Partners, which was evidently a farming operation, solely owned by the Hale family, although to what extent Hale made use of this tract is unknown. Hale apparently paid no attention to the fence running along or near his south boundary, and he raised no objection to its location when he acquired his tract.

2001 to 2005 – Brownback, whose wife had preceded him in death, died at the beginning of this period, leaving his tract to his married daughter, who was Kinder's mother. There is no indication that Brownback ever met either Hale or any predecessors of Hale, and no indication that the fence dividing their tracts was ever the subject any boundary agreement. The Kinder family continued to use all of the

pasture land south of the fence during this period, at the end of which Kinder's mother conveyed her tract to him.

2006 – Since the fence on the north side of his tract was becoming dilapidated, Kinder's son apparently wanted it replaced, so he requested a fence viewing session, and a group of Linn County fence viewers visited his land for that purpose, but after viewing the fence they declined to classify it as a boundary or division fence, evidently due primarily to its crooked course. Shortly thereafter, Hale obtained a survey of his tract, and although nothing is known regarding the manner in which this survey was executed, it indicated that portions of the curving fence were an unspecified distance north of the relevant sixteenth line, encroaching substantially upon the Hale tract. Nonetheless, Hale took no physical action with respect to the fence at this time, and the Kinders continued to maintain it.

2007 to 2008 – During this period the Kinder tract was rented out for grazing purposes, but the fence continued to deteriorate, and as a result cattle evidently strayed onto the Hale property on a regular basis, yet Hale apparently took no action.

2009 – Hale evidently became disgusted with the frequent intrusion of cattle onto his land, so he took down most if not all of the old fence. When Kinder asked Hale why he had done so, Hale informed Kinder that the fence was on the Hale tract, so it was under the control of Hale, thereby alerting Kinder to the fact that Hale claimed to be the owner of some of the land lying south of the fence. Kinder responded by obtaining a survey which documented the path that had been followed by the old fence, while that location was still clear on the ground. This survey done for Kinder raised no challenge to the location of the sixteenth line that had been identified during the survey that was done for Hale, it merely outlined and quantified the area lying between the fence and the surveyed sixteenth line, which turned out to be about 2 acres. Armed with this information, Kinder then proceeded to file an action against Hale, alleging that Kinder owned the portion of the Hale tract lying south of the fence.

Kinder argued that Brownback had acquired the portion of the north half of the SW/4 of Section 11 lying south of the old fence in 1959, by virtue of adverse possession completed in good faith over a 15 year prior, commencing with Brownback's acquisition of the south half in 1944, since Brownback had always regarded and treated all of the land south of that fence as part of his tract. Kinder further argued that his mother had become the owner of that portion of the north half in 2001, and that he had acquired it from her in 2005, despite the fact that no reference was ever made to either the fence or the north half in those documents, because adversely acquired land passes from a grantor who has completed adverse possession to his grantee without being described as part of such a conveyance. Kinder further argued that even though Hale's survey correctly positioned the relevant sixteenth line, only the survey done for Kinder correctly portrayed the location of

the boundary between the Hale and Kinder properties, which followed the curving course of the old fence. Hale argued that no adverse possession in good faith had ever taken place, because it was unreasonable for anyone to believe that a crooked fence was intended to represent a sixteenth line, since all such PLSS boundary lines are well known to be straight. Hale further argued that no genuinely hostile use of the relevant area had ever taken place, due to the fact that the sixteenth line location remained unknown for decades, and even if Kindred thought the fence was his north boundary, he had owned his tract only since 2005, so the land use which had occurred during his period of ownership could not meet the 15 year requirement for adverse possession. The trial court was satisfied that the fence in question constituted a genuine division fence, regardless of its configuration, since its open treatment as a boundary fence for several decades had never been disputed by anyone, and quieted title extending northward to the fence in Kinder as requested by him, but declined to award damages to Kinder for the removal of the fence by Hale, since the fence was insufficient to retain cattle and thus had no practical value.

One major lesson taught by this case is the great significance to every land owner of maintaining solid knowledge of the law, so that when either title or boundary issues appear, they can be properly dealt with, rather than simply ignored and allowed to ripen into serious problems. Hale and his predecessor or predecessors were typical in their long disregard for the real location of their south boundary, but Kinder must have been unusually well informed or well advised, because unlike most property owners, he recognized and seized the opportunity that presented itself to him, by doing exactly what the law deems to be necessary and appropriate to secure his title to the area in contention, under the circumstances which were in place when he acquired his tract. The key factor, which would control the outcome of this dispute, was the view taken by the Court of Appeals (COA) on the question of whether or not a land owner can reasonably and innocently believe that a fence containing bends or curves represents a PLSS boundary line. This proved to be the decisive issue, because the long use of the relevant area by the successive members of the Brownback and Kinder families, and also the location of the aliquot line that was called for as their mutual boundary by the deeds of both litigants, were both undisputed, so the critical question was simply whether or not the use of the land by the Brownbacks qualified as adverse possession. In sharp contrast to early adverse possession cases, the COA gave no consideration to the fact that the contested boundary was defined with complete clarity by the titles of both litigants, and neither title was superior to the other in any respect, so no title conflict ever existed between these typical aliquot tracts. Although the physical position of their mutual boundary was the sole point of contention, making this a boundary location dispute, rather than a matter involving any deficiency in the title of either Kinder or Hale, the COA was fully prepared to allow adverse possession to operate upon and effectively adjust this boundary. Under early Kansas law, the position set forth by Kinder would have been summarily rejected, as a plain boundary mistake, and a particularly foolish one at that, since it was clear at all times that the wandering fence could not possibly follow the aliquot boundary of record, so the mistake doctrine would have carried Hale to certain victory, had this case played out in 1912 rather than 2012. As noted yet again here by the COA however, in 1964 statute 60-503 provided an alternative legal pathway for occupants of land who had innocently relied upon or adopted boundary errors or mistakes of any kind, allowing them to leverage adverse possession to bring locative certainty to their titles, and facilitated by the long

standing boundary negligence of the various owners of the north half of his quarter, Kinder found himself in an ideal position to do just that. Thus although the old fence was never referenced in any deed, or even verbally agreed upon as a boundary, and it may well have been built at a time when the whole quarter was owned by one party, the COA agreed that it constituted an entirely viable basis for adverse possession, under the good faith standard enunciated in 60-503:

“A meandering fence runs ... on the land deeded to the Hales ... Kinder ... pastured cattle up to the fence as long as he could remember ... he walked the fence line and performed necessary maintenance and repairs on the fence ... part of the fence in question had been torn down ... the Kinders decided not to repair the fence over the embankment because they did not believe that cattle would be able to get up the embankment and escape ... fence viewers made no finding whether the fence was a partition fence or whether the fence existed as an interior fence ... the survey filed in 2006 ... showed that the Kinders property did not include the disputed land ... Hale alleged that ... cattle came onto his property, destroying crops ... Kinder ... saw that the wire on the fence had been removed ... Brownbacks and Kinders pastured cattle on all of the disputed area ... and always considered the land as belonging to them ... the Hales argue that under KSA 58-2222 ... Brownback is presumed to have known he did not own the disputed land ... the Hales contend that the land described in the deed is obviously rectangular, accordingly Brownback could not have had a good faith belief that a meandering, curving fence constituted a boundary ... since the Kinders did not purchase the property until 2005, Brownback's belief must be proved to meet the 15 year time requirement ... KSA 60-503 ... states in relevant part ... the parties belief of ownership must be in good faith and must be reasonable ... Hale's argument ... under KSA 58-2222 has been rejected by the Kansas Supreme Court ... the fact that the deed described a rectangular tract of land, while the fence did not follow a straight line, does not defeat the Kinder's claim of a good faith belief of ownership ... adverse possession ... can be proved by circumstantial evidence ... Kinder testified that throughout her life ... she believed that they owned the land up to the fence ... all of Brownback's actions ... were consistent with a belief of ownership of the disputed land.”

A fence along a PLSS line need not be straight in order to support adverse possession under a good faith belief that it represents a boundary, the COA thus mandated, upholding the lower court ruling extending Kinder's title into the north half of the relevant quarter, while truncating Hale's title to his tract, based upon the old fence, as it was depicted and presumably numerically defined on Kinder's survey. Modern adverse possession can operate to validate any physically established boundary, the COA recognized, without regard to either the accuracy manifested therein or the purpose for which the fence or other defining object was placed. Adverse possession is typically based

on mere circumstantial evidence, the COA realized, and that fact provides the record owner, having once accepted the presence of a physical intrusion penetrating his land, with no basis upon which to protest, once the statutory period which the law allows for such objection has expired. This outcome also provides a poignant reminder that the acts of predecessors can be just as important to adverse possession as the acts of the current land owners, and in fact past acts often comprise the most important evidence, as was the case here. In addition, once again at this juncture the COA upheld the vital concept of privity between successive adverse land holders, sometimes known as tacking, which has always been judicially honored as a legitimate component of adverse possession in Kansas. The COA thereby verified yet again that conveyances of land, such as the 2005 acquisition made by Kinder, typically carry any and all adverse land rights that have accrued under the grantor, regardless of the manner in which the conveyed property is described, in accord with the principle that all grantors presumptively intend to retain nothing. Hale's survey was ultimately useless to him. despite being presumably well executed and quite possibly flawless, because a survey of a PLSS line which has been rendered moot by adverse possession, the COA well knew, can hold no controlling value. Kinder's survey however, which documented and thus preserved the historically honored fence location, was highly valuable, allowing him to present definitive evidence of the established location upon which his position was based, thereby enabling the fence to control even after it had been removed. Statute 58-2222, which merely expresses the axiomatic principle that all recorded documents provide public notice, is irrelevant to adverse possession, the COA also clarified on this occasion, because the concept of adverse land use anticipates usage which stands in conflict with documentation of record, and allowing 58-2222 to diminish the efficacy of 60-503 would be antithetical to the legislative intent that both title and boundary issues are subject to resolution focused upon physical evidence.

Baraban v Hammonds (2013)

In any modern society, the value of deeds, plats and other documentation relating to conveyances of land and land rights is clear, and the benefit derived from recordation of such documents is immense, yet the primary and controlling aspect of any conveyance always remains the true intent of the parties, which represents the real essence of their agreement. In a perfect world, all parties engaging in conveyances would be aware of their responsibilities and the need to carry them out, and they would have the competence and the knowledge required to properly do so, which would result in completely reliable recorded documentation outlining every conveyance. It has long been judicially acknowledged however, that perfection in documentation is seldom achieved, therefore conveyance documents often fail to fully or accurately capture the true intentions of the parties, and the result is unreliable, incomplete and misleading information standing upon the public record. While a well known legal presumption exists, that all such documentation is accurate and reliable, the contrary can always be shown, and once it appears that the documentation supporting any given conveyance does not properly

express the terms of the agreement that was made by the parties, the equitable power of the judiciary enables justice to intervene to rectify the incomplete or misleading documents of record. This is the concept that supports the principle of description reformation, under which both poorly written and unwritten agreements can control over documentation of record, necessitating the correction of existing documentation, which was accurate to all appearances, until evidence indicating a need for corrective action was brought forth. For land surveyors, it is particularly vital to realize that the reformation principle, as it operates within the realm of land rights, applies only to documentation and not to monumentation, because monumentation represents physical evidence, and physical evidence is understood to be primary in nature, meaning that it is presumed to comprise the highest and strongest evidence of the true intentions of the parties. It is this key distinction, between the actual elements of the physical world, and mere efforts to document what has been done in the physical world, that forms the foundation of the principle of monument control, which of course mandates that original monumentation, unlike documentation, is never subject to reformation, regardless of whether monuments were originally placed in their intended positions or not. Our final case on the topic of description reformation highlights the fact that the validity of the information found in all conveyance documents, including deeds and plats that may appear to be completely reliable, is always subject to question, so reliance upon such documents must be tempered with prudence, particularly when the information in those documents stands in contradiction to physical evidence of any kind.

2003 – Hammonds was the owner of an unspecified number of lots of unspecified size and shape in Overland Park, some of which bore houses and some of which were undeveloped. His lots were situated in Spring Hill, which was a presumably typical platted residential subdivision, although when it was created, how well it was platted, and how many of the lots were occupied at this time, are all unknown. After acquiring this group of lots, Hammonds discovered, by some unknown means, that one of the houses had been built in such a position that it straddled one of the platted lot lines, so that particular house actually occupied part of 2 of his lots. When this house was built and who built it are both unknown, so whether or not it was intentionally built partially upon 2 lots is unknown, but it was apparently located mostly on one lot, and only a small portion of it occupied the adjoining lot. Hammonds was evidently not upset about this situation, and he apparently saw no reason for concern about the position of the house, so he simply proceeded with his plan to advertise and sell off each of the lots that he had acquired individually. Piccirillo, who was a developer, offered to buy the adjoining lot, and Hammonds informed him of the fact that the house encroached upon that lot, but Piccirillo decided to acquire that lot anyway. Before this lot was deeded by Hammonds to Piccirillo however, these 2 men signed a written agreement, entitled "Easement for Dwelling Placement", which addressed the situation by creating an easement upon

the Piccirillo lot, allowing the Hammonds house to remain in place, and effectively reducing the amount of useful ground within the Piccirillo lot, in order to insure adequate space on that side of the house. The deed given by Hammonds to Piccirillo however, made no reference to either the house or the easement, it simply indicated that the entire lot, as originally platted, was being conveyed to Piccirillo. By this means, Hammonds and Piccirillo apparently sought to avoid the need to formally adjust the location of the lot line upon which the house sat, and shortly after this conveyance was made, Piccirillo proceeded to build a house on his lot, while Hammonds began renting out the encroaching house.

2004 to 2005 – Piccirillo completed the construction of the second house, and he offered it for sale, and Baraban proposed to buy that house and lot. Piccirillo did not inform Baraban about either the encroaching house or the easement agreement, and the easement did not appear in the title exceptions that were listed in the title report which was prepared for Baraban, since it was unrecorded, so Baraban believed that he was acquiring an entire platted lot, free of any encumbrances whatsoever. The title package prepared for Baraban included a survey of his lot, which evidently showed both the house encroachment and the easement which had been created to protect it, but Baraban evidently trusted others to deal with any title issues that might appear, and he never personally looked at all of the information in his title package, so he did not know that a survey of his lot had been done. Baraban therefore proceeded to acquire the Piccirillo lot, unaware of the legal burden which it bore, and he then rented his lot to Campbell.

2006 – Some bushes were removed by either Hammonds or his tenant from the backyard area between the 2 houses, and Campbell thought the bushes were on the Baraban lot, so he asked Hammonds why they had been removed. Hammonds told Campbell that the platted lot line had been adjusted, and informed him that the bushes were actually on the Hammonds lot. Campbell then passed this information on to Baraban, who informed Hammonds that Baraban would not honor the unrecorded agreement between Hammonds and Piccirillo, and demanded that the Hammonds house be removed from the Baraban lot, but Hammonds declined to take any such action.

2007 – Having gotten no satisfactory response from Hammonds, Baraban filed an action against both Hammonds and Piccirillo, seeking a judicial decree nullifying the dwelling easement and requiring Hammonds to move the encroaching house.

2008 – Baraban obtained another survey of his lot, which once again verified both the location of his platted lot boundaries and the location of the Hammonds house, essentially duplicating the survey that had been done for the title company in 2005. Piccirillo evidently decided that he wanted to avoid participating in the legal action which had been launched by Baraban, so he agreed to engage in a legally approved

mediation session with Baraban, conducted by a retired local judge, but no formal agreement was reached during that session. Following the completion of the mediation effort, Piccirillo asked to be removed from the legal action, and the trial judge granted that request, on the grounds that Piccirillo was willing to settle the matter with Baraban out of court by making certain payments to Baraban, leaving only Baraban and Hammonds to engage in direct legal combat.

Baraban argued that he was a genuinely innocent grantee, who had been victimized by deception on the part of Hammonds, who had failed to properly document the situation created by the house encroachment upon the public record, therefore the deed held by Baraban must control, and Hammonds had no valid basis upon which to assert that he held any rights within or upon the Baraban lot. Baraban further argued that no boundary agreement relocating or altering the platted line between the Baraban lot and the Hammonds lot in any manner had ever taken place, and the location of that line was never unclear or disputed, so the platted lot line still legally defined the boundary between the Hammonds and Baraban properties. Baraban also maintained that description reformation was inapplicable to the situation, because no written evidence expressly stating that a boundary adjustment had been completed existed, so his deed could not legally be reformed to exclude the area occupied by the encroaching house, and any such alteration of his deed would constitute a violation of the statute of frauds. Hammonds argued that the 2003 easement document constituted valid written evidence of the existence of an agreement specifying that the encroaching house need not be moved, and that the portion of the Baraban lot occupied by the Hammonds house was thereby acknowledged to be part of the Hammonds lot, thus the easement document provided written evidence indicating that a boundary adjustment had in fact occurred, satisfying the statute of frauds. Hammonds further argued that a legally binding boundary adjustment had taken place between Hammonds and Piccirillo in 2003, and that agreement was entirely legitimate, because the remainder of the Baraban lot was still useful and available for development even after being reduced in size, so the fact that the platted location of the lot line was known at all times was irrelevant and could not negate the relocated lot line. Hammonds also asserted that Baraban was not an innocent grantee, because the Hammonds house was plainly visible at all times, so Baraban was thereby placed upon notice by that physical evidence, despite the lack of recorded documentation relating to the relocated boundary, and if Baraban had properly inquired, he would have learned that he was not acquiring an entire lot, so Baraban's deed did not control, and his legal description was subject to reformation. A jury accepted the unrecorded easement as valid and legally binding, but found that no boundary adjustment had taken place, yet the trial judge elected not to follow the results produced by the jury and ordered Baraban's deed to be reformed, to exclude fee title to the land under the Hammonds house, requiring Baraban to accept both the presence of that house and a reduction in the size of his property.

The arguments set forth on behalf of Hammonds were masterful, showing extensive knowledge of land rights law, and effectively targeting the issues in a manner which his legal team knew would prove to be highly persuasive when scrutinized by the Court of Appeals (COA). Hammonds had foolishly, and perhaps even negligently, painted himself into a very difficult position, by failing to recognize the need for an authentic lot line adjustment, properly documented by a licensed professional land surveyor, before

completing his conveyance to Piccirillo, but his legal team had the expertize to extricate him, saving him from liability for that omission. Conversely, Baraban failed to expressly argue that allowing an unrecorded easement agreement to operate as a surrogate for a genuine lot line adjustment amounted to evasion of the law, for which Hammonds should be held liable, so the COA focused upon the shortcomings of Baraban, rather than those of Hammonds. Encroachment claims which are based upon objects that were not observed, recognized or known to be problematic until after the burdened land was conveyed are always judicially unwelcomed, because the law contemplates that all conveyances are made with direct reference to the visible physical condition of the property as it stood at the moment of conveyance. Thus every typical grantee bears the serious but often neglected burden of diligent physical property inspection, prior to acceptance of the land, and the law accordingly attributes knowledge of all visible encroachments to each grantee, regardless of whether he bothered to take actual notice of them or not, provided that he had an opportunity to do so. Under this powerful principle, known as inquiry notice, the grantee is legally charged with knowledge of all objects upon the subject property which he could have learned about had he engaged in diligent inquiry, and if he failed to do so, he cannot successfully maintain that he acted in good faith, which exposes him to potential loss of his documented land rights, through reformation. Description reformation, when applied to the land rights of a grantee, is typically a product of inquiry notice, and is highly analogous to adverse possession, effectively punishing the grantee for his implicit negligence, or for his procrastination, in those instances when the grantee was aware that encroachment issues existed, but planned to deal with them only after acquiring the burdened land. Thus the COA agreed that Baraban, rather than Hammonds, bore the primary responsibility for the existence of the present controversy, since he failed to utilize relevant information which was readily available to him prior to his acquisition, such as the survey that appeared in his title package, leaving his deed unworthy of judicial protection:

“Hammonds had a house that sat mostly on one lot but overlapped a few feet over the lot line ... the district court ruled ... Baraban's deed ... should be reformed or modified to show that the portion on which the Hammonds house sits belongs to the neighboring lot ... Hammonds and Piccirillo ... intended to exclude the portion of land containing the house from the sale ... Piccirillo and Hammonds signed an agreement ... but neither Hammonds nor Piccirillo filed the agreement ... Baraban and the Piccirillos attended mediation ... Baraban ... never authorized the settlement ... the Piccirillos were dismissed from the lawsuit ... there was no basis upon which to enforce a settlement ... we therefore reverse the district court's order granting enforcement of that settlement ... the district court ... ordered that the deeds to the 2 lots should be reformed ... the district court ... concluded that the Piccirillos and Hammonds reached a specific agreement that the property boundary would be altered to match the cut-out where the Hammonds house sits ... where parties by mutual agreement fix a boundary ... it must be considered as the true boundary ... the Piccirillos and the Hammonds reached a boundary line agreement ... the Barabans had constructive notice

that the Hammonds house overlapped the recorded boundary ... sufficient to cause a reasonable person to inquire as to the boundary ... even if the Barabans had no actual notice ... they could not prevent reformation of the deed to reflect a boundary agreement ... if the buyer has knowledge of facts that a prudent person would investigate ... then the buyer isn't a bona fide purchaser ... the Hammonds intended not to sell the cut-out portion on which the house sat ... the boundary was changed before the sale ... the Hammonds and the Piccirillos reached an agreement to change the boundary ... it didn't include the cut-out ... the Barabans raise ... the statute of frauds, but ... the statute of frauds does not apply to a contract fully carried out by the parties ... various technical objections are raised by the Barabans ... but we find none of merit ... the jury finding does not control our result ... the parties could agree upon any boundary they chose to apply to what was bought and sold between them. This was not a case that arose between parties who already owned neighboring lots ... Kansas has no requirement of a pre-existing dispute ... where parties agree to fix a boundary line and then acquiesce to follow the agreed upon line, it is considered the true boundary line ... the evidence supports ... reformation of the deed ... the Barabans weren't bona fide purchasers, because the location of the Hammonds house provided the Barabans with notice ... physical inspection of the property or the survey would have imparted notice of a boundary issue ... the Barabans had such notice as would cause a reasonable person to inquire as to the boundary and/or any other unrecorded property rights ... a prudent person would have inquired about the boundary sooner and could have obtained the information at the time of sale ... Baraban ... assumed the title company would notify him if there was a problem ... while a survey ... at the time of sale would have raised red flags, it isn't clear whether paying for such services should be considered required components of a reasonably diligent investigation ... investigation would have revealed the problem ... the Barabans ... can't prevent reformation of the deed ... judgment ... between the Piccirillos and the Barabans is reversed ... judgment between the Hammonds and the Barabans is affirmed."

Thus the COA fully upheld the lower court ruling with regard to Hammonds, verifying that a legally binding boundary adjustment had been agreed upon and enacted, despite being poorly or improperly documented and mistakenly characterized as an easement, under the authority vested in Hammonds as the owner of both lots in 2003, which had been accepted by Piccirillo, and was therefore binding upon Baraban, who had simply stepped into Piccirillo's shoes, as his grantee. If Baraban asked Piccirillo about the lot line issue, and Piccirillo lied to Baraban or hid the existence of the 2003 agreement from him, then Baraban could prevail against Piccirillo, and for that reason the COA gave Baraban the option to continue to litigate against Piccirillo, by reversing that aspect of the

lower court decision, but even if Baraban prevailed against Piccirillo, he could not eliminate the 2003 agreement or regain any of the land from Hammonds. Every grantor and grantee are free to enter an undocumented boundary agreement, and their failure to describe the agreed line clearly, or to describe it at all, can be rectified through description reformation, the COA thus reiterated here, when reformation is necessary to give legal effect to their true intentions. No boundary uncertainty or dispute is required to support a boundary agreement initiated by a grantor, the COA noted in so ruling, while also informing the litigants that acquiescence in land use can comprise valid evidence of an agreed boundary, highlighting the fact that the validity of any boundary agreement is determined by the presence of the legal authority to enter such an agreement, and such authority resides in every grantor who conveys any portion of his land. The COA also very pointedly reminded Baraban that unrecorded conveyances, of either land in fee or an easement, are legally binding upon all parties with notice thereof, which is derived from the presence of existing objects of any kind upon the land being acquired, and the grantee is expected to know the law well enough to recognize the potential legal implications of all such objects. In addition, the statute of frauds has no application to the resolution of building encroachments, the COA observed, because the physical presence of an encroaching building always warrants investigation extending beyond mere information of record, moreover the statute of frauds cannot prevent description reformation when reformation is used to accommodate existing physical improvements, which come within the performance exception to that statute. On this occasion, the COA stopped short of mandating that a grantee must obtain a survey in order to qualify as a bona fide purchaser acquiring land in good faith, but the COA appears to be open to that concept, and may eventually adopt it in a future case, should a sufficiently compelling scenario appear. A genuine bona fide purchaser can block description reformation, but one seeking to do so always bears the heavy burden of proving a complete absence of any form of notice, in order to support his allegedly innocent status, and accomplishing that can be quite difficult, since extrinsic evidence can be utilized to show the true intent of a grantor, which can effectively negate even an ostensibly accurate and complete legal description, as Baraban learned the hard way.

Yan Wang v Reece (2013)

While our last previous case demonstrated how the placement of objects in unexpected, unintended or unauthorized locations can result in controversy involving boundaries, when the location of such improvements is poorly documented, our final case highlights the equally unfortunate consequences of poor original documentation, emphasizing the importance of care in platting, to prevent boundary issues from subsequently arising unnecessarily. While the principal topic of our concluding case is adverse possession, and all surveyors understand that adverse possession is not a matter for determination by any land surveyor, this case features the involvement of a surveyor with an adverse possession scenario, and thereby provides great insight into our proper role in such situations, directing our attention to the limitations under which all land

surveyors operate. Perhaps nothing is more vital to any professional than developing a sound understanding of the limits of his or her authority, and although it may often be assumed that the authority of every professional land surveyor is well defined and well understood, events such as those which unfold here make it clear that enhanced surveyor education on that subject is needed. Professional land surveyors generally know very well what is expected of them in terms of technical expertise, and accordingly the typical surveyor focuses intensely upon always providing high quality technical data, in an effort to be deemed worthy of recognition as a genuine expert on the application of measurement science to real property. The professional equation has another perhaps less frequently apparent but at least equally important side however, which goes beyond technical issues, making it necessary for every professional to be cognizant of the rights of all parties, public and private, including both clients and others, to legally rely upon his or her work. The wise surveyor realizes that protection from liability is best achieved by respecting the right of all parties to rely not only upon the work of the present surveyor, but also upon that of past surveyors, and reaching this realization is essential, given that our collective objective as a profession is to properly carry out our mission in a manner which supports all such reliance, since nothing less merits professional status. It has often been rightly said that professional status represents both a great benefit to, and a serious burden upon, each licensed professional, and as this final lesson well illustrates, knowing the stern limits which the law places upon the authority of subsequent surveyors to take corrective action is clearly among those burdens borne by every licensed professional land surveyor.

1996 – Reece acquired Lot 11 in Block 75 of Sherwood Estates, a presumably typical residential subdivision in Shawnee County, which was platted in 1962. Whether or not this subdivision was originally monumented, and how many of the lots in this block had already been developed at this time, are both unknown.

1997 – Reece wanted to build a house on his lot, which was apparently vacant, so he hired a construction contractor who hired an engineering company to stake the east lot line and also to stake the foundation of Reece's house. The house was built in the staked location and a fence was also erected, using the stakes that had been set by an unspecified employee of the engineering firm to mark the lot line, which was an unspecified distance east of the house. How the location of the east line of Lot 11 was ascertained, whether or not any monuments existed on that line or elsewhere in this block at this time, and who owned the adjoining lots at this time, are all unknown.

1998 to 2005 – Reece presumably occupied his house and used all of the land on his side of the fence, without disturbance or comment from anyone throughout this period. Whether the lots adjoining Lot 11 were vacant or occupied during this period is unknown, but there is no indication that Reece ever had any interaction with any neighbors during this period.

2006 – Wang and Chakraborty, who were evidently life partners, acquired Lot 12,

lying directly east of Lot 11, and they occupied that lot henceforward, but they apparently took no interest in the existing fence which had been built for Reece, presumably assuming that it had been built upon their west lot line, so they simply bypassed the opportunity to seek survey verification of their lot lines at this time.

2007 to 2010 – Reece continued to occupy the land on his side of the fence, although what specific use he made of that area is unknown, while Wang and Chakraborty presumably used all of the land on their side of the fence, and apparently no issues arose between these parties during this period.

2011 – Reece made some additional improvements to his property at this time, including a swimming pool and a sprinkler system, both of which were evidently installed very close to the fence, and Reece also had the original chain link fence replaced with a vinyl privacy fence, which was installed in the same location. Wang and Chakraborty decided to have their lot surveyed at this time, and the survey indicated that Reece's fence was encroaching about 3 feet onto Lot 12. In reaching the conclusion that the fence was on Lot 12 however, Stickler, who was the surveyor employed by Wang and Chakraborty, did not utilize the platted dimensions of Lot 12. For unknown reasons, Stickler was convinced that the rear dimension of record for Lot 12, which was called out as 75 feet on the Sherwood Estates plat, was actually intended to be 80 feet. Whether or not this conclusion was supported by any original monumentation that Stickler may have found elsewhere in the vicinity is unknown, but he did find a monument on the rear line of Lot 11, about 3 feet west of the north end of Reece's fence, which Stickler concluded was set in 1997, around the time when Reece's fence was built. Since he was fully convinced that the original plat was erroneous, Stickler proceeded to inform the relevant county personnel of this situation, and they either allowed him or directed him to file an affidavit of plat correction, clarifying that Lot 12 was actually 80 feet wide, which was presumably then physically attached to the recorded plat. Several letters discussing this situation were exchanged between the attorneys working for the respective lot owners, but no agreement or resolution was reached, and the land use on both sides of the fence continued.

2012 – Wang and Chakraborty filed an action against Reece, seeking a decree requiring Reece to remove his fence, swimming pool and sprinklers from Lot 12, as the dimensions of that lot were defined upon the affidavit.

Wang and Chakraborty argued that their lot was actually intended to be 80 feet wide, and the true originally intended location of the lot line in question was marked by the lot corner monument set in 1997 and found in 2011 by their surveyor, so Reece's fence and other improvements represented encroachments upon Lot 12 which were subject to removal upon demand. Wang and Chakraborty further argued that the correction of the relevant plat by means of the affidavit was entirely accurate and fully appropriate, and they asserted that since such corrective action bore the approval of the county it was legally

binding upon Reece. Wang and Chakraborty also maintained that no adverse possession had taken place, because the fence had been accepted as marking the relevant lot line only by mistake, and even if the use of the land west of the fence by Reece was genuinely adverse in nature, he had not used that land without interruption for a full statutory period, because the fence had existed for less than 15 years when Reece was notified that it was on Lot 12 in 2011. Reece simply argued that both the platting error and the correction of the plat were irrelevant and had no impact whatsoever upon his land rights, because he had adversely acquired any portion of Lot 12 lying west of his fence, based upon the fact that the fence was built on the platted lot line, as that line was staked for his use in 1997, while also pointing out that the full 15 year adverse period had run, prior to the time when the present action was filed, without any physical interruption of his land use. The trial court agreed that none of the arguments presented by Wang and Chakraborty were sufficient to overcome the adverse possession which had been completed by Reece, as an innocent occupant of land acting in good faith reliance upon a line which had been surveyed expressly for the construction of his fence, and therefore issued summary judgment in favor of Reece, leaving the plaintiffs with only the portion of Lot 12 lying east of the fence.

All experienced surveyors will undoubtedly recognize that the location of the lot line in controversy could have been adjudicated and resolved through the use of survey evidence alone, but in order to conclusively do so, the litigants would have needed to present evidence based upon, or directly linked to, original monumentation, and neither of them had done so, quite possibly because no original monuments existed in the platted area at issue. This scenario stands as a classic example of the reason why adverse possession was judicially enabled to control boundary determination during the nineteenth century, to eliminate the need to seek out obscure evidence relating to long bygone acts or events, such as the possible establishment of original monumentation half a century in the past in this instance. As can readily be seen, the adverse possession argument set forth by Reece made both the absence of original monumentation and the correctness of the original plat moot issues, by simply bestowing the same controlling force that is carried by an original monument upon the fence, even though there was no evidence indicating that the line upon which it was built was a genuine originally monumented lot line. This judicial perspective, as we have observed in reviewing several prior cases, is supported by statute 60-503, which stands as the Kansas codification of the principle that all actions taken in good faith, such as the reliance by Reece upon his 1997 survey in this case, are worthy of protection under the law, even if later shown to have been the product of a mistake. In addressing the plat correction issue, the Court of Appeals (COA) simply accepted the proposition that the plat contained an erroneous lot dimension without question, because that corrective effort was irrelevant and could not control the land rights of Reece, since neither surveyors nor government officials at any level are authorized to make any decisions or take any actions which are damaging to private land rights, without providing proper compensation to the damaged party. Reece was under no obligation to accept the plat correction, even when it was communicated directly to him, the COA realized, moreover no information provided to him in 2011, even if perfectly correct, could retroactively alter the fact that he had always believed that the line staked for him in 1997 was accurate and reliable, and since that line had been professionally staked, his reliance upon it was fully justified. The plaintiffs certainly could have prevailed, even without any affidavit, if they had acted sooner and proven by means of original monumentation that their lot was actually 80 feet

wide, but in the eyes of the COA they were guilty of failing to make a diligent inquiry into the location of their lot boundaries when they acquired their lot, and they had also failed to effectively halt Reece's adverse land use, allowing him instead to complete the statutory period right under their noses. Thus the COA found that the critical balance of good faith stood in favor of Reece, clearly viewing the position taken by the plaintiffs as an opportunistic attempt to leverage a platting error for their own benefit at the expense of their neighbor:

“Reece's contractor hired Schmidt Engineering Company to stake the foundation and east boundary of Lot 11 ... a chain link fence was erected along that staked property line ... the fence was understood to represent the eastern property line of Lot 11 ... Stickler discovered what he described as a discrepancy in the original 1962 plat ... Stickler reasoned that the 1962 plat was incorrect and that Lot 12 was actually 80 feet wide ... Stickler filed a correction affidavit with the Shawnee County Register of Deeds ... the Shawnee County Zoning Administrator ... corrected the plat ... the district court found that the demand letters from Chakraborty's attorney alone were insufficient to toll the 15 year statute of limitations ... ineffectual protest short of a disturbance of the rights of the adverse claimant in a legal sense will not toll the statutory period ... mere oral notice ... is insufficient ... Chakraborty argues that ... written notice as to a land dispute is sufficient ... written notice must be accompanied by some sort of overt act ... Chakraborty argues that ... correspondence ... qualifies as an overt act ... the letters upon which Chakraborty relies ... were nothing more than notification to Reece of a dispute ... conducting a survey is not, in and of itself, sufficient ... simply surveying the land ... would not be a sufficient exercise of dominion or control over the property to toll the statute of limitations ... however ... the statutory period can be interrupted when the survey is conducted with an intent to exercise dominion and includes ... the placement of survey flags ... Chakraborty could have flagged or painted Stickler's survey line and posted no trespassing signs ... to toll the statute ... he could have requested the county surveyor to examine the tract under KSA 2012 Supp 19-1423 ... that would have tolled the statute of limitations ... demand letters alone are insufficient ... a demand letter must be coupled with another act that demonstrates that party's intent to reclaim or repossess the disputed land ... Chakraborty failed to couple his lawyers demand letters with any other demonstrative act ... his claim of tolling must fail ... Reece ... specifically refers to his reliance on the 1962 plat, which shows both properties to have back property lines 75 feet in width ... a defect in title is, in itself, insufficient to defeat a party's good faith ... it was not unreasonable for Reece to continue to have a good faith belief in ownership ... good faith ... differs from the traditional adverse possession element of hostility ... allowing disputes over

land to be resolved on the basis of a party's mistaken belief ... Chakraborty places great emphasis on the fact that Stickler filed a plat of survey and correction affidavit ... the Minimum Standards state that a surveyor must record the survey ... but ... it could be argued that Stickler did not follow this Minimum Standard when he decided the plat was in error ... the Minimum Standards do not contemplate ... plat correction ... Stickler's authority to take the additional action of filing an affidavit to correct the original plat on his own initiative is unclear. We find no statutory or regulatory authority for such an action by a private land surveyor ... Reece ... always disputed the accuracy and legal effect of the Stickler survey ... the filing by Stickler did not change the legal effect of the original plat ... Reece does not agree with ... the plat correction ... he has continued to maintain a good faith belief that the fence and pool do not encroach on Lot 12 ... for over 15 years ... he was entitled to summary judgment."

Although it can be perpetually argued that land use constituting adverse possession should never have been allowed to intrude upon the realm of boundary law and become a controlling factor in judicial boundary determination, the uncertainty inherent in this dispute, with regard to the original lot line location, exemplifies precisely the type of boundary ambiguity which adverse possession now serves to negate. In its modern form, as defined in Kansas by the parameters outlined in statute 60-503, adverse possession operates to uphold physically established boundaries which have been put to practical use, in part by barring any corrective actions which may appear to be necessary or appropriate, after being brought to light during a resurvey, the COA confirmed yet again on this occasion. In upholding the lower court ruling in Reece's favor, the COA applied the fundamental and time honored principle that all innocent reliance upon a survey is worthy of protection, regardless of the degree of correctness manifested in the survey work, and reliance on an inaccurate plat must be likewise protected, because the law does not require land owners to obtain multiple surveys before they can rest in confidence that their boundaries have been properly verified. A resurvey showing a platted boundary in a corrective manner has no legal effect on any established boundaries, the COA thus informed the litigants, because the correction of platting errors, even by means of an official affidavit attached to the plat, cannot disturb any vested land rights, acquired through legitimate reliance upon the information presented by the original plat. Here the COA also provided valuable clarification of exactly what it takes to legally arrest or toll an ongoing adverse land use, and in so doing emphasized the importance of physical action, as opposed to either verbal or written communication, yet again highlighting the immense value of physical notice, by deeming it to be essential to the success of any effort to bring the accrual of adverse possession to an end. A resurvey can stop adverse possession, the COA acknowledged, but only if the surveyed location of the entire disputed line is visibly marked, making the record location of that line perfectly clear to all who view the relevant area, since completing a survey in a surreptitious or covert manner does not constitute an open declaration of dominion over the relevant land on the part of the owner of record. The ideal manner in which to halt the progress of adverse possession, provided of course that the statutory period has not already elapsed, the COA reminded the vanquished

plaintiffs, is to request the assistance of the county surveyor, who has the authority to initiate formal action, under statutes which were wisely put in place during the first decade of statehood, to facilitate orderly boundary resolution in the glorious Sunflower State.

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