Brown's Boundary Control and Legal Principles

WALTER G. ROBILLARD & DONALD A. WILSON
BROWN’S BOUNDARY CONTROL
AND LEGAL PRINCIPLES
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PREFACE TO THE SEVENTH EDITION

It is amazing how technology in the surveying profession has advanced in the last 50 years, as it has in other professions. The medical profession has extended the average human life span, and now we see many octogenarians, some even in our own families. In contrast, the law, with the exception of a few areas such as human rights and minority rights, has remained fairly constant. In the field of real property and boundaries, easements, rights of view, and especially air rights, contemporary laws still are tied to ancient laws and doctrines. As surveyors struggle to come into the modern world, we now have ready and easy access to modern technology for retracing and re-describing ancient boundaries and rights, some of which were originally created decades ago by unknown surveyors who left few records. With this comes a conflict between technology and law, creating for modern courts and surveyors the dilemma of selecting the best course of action.

Since this text is used by students as a source for their knowledge of the legal aspects of boundaries as well as by the courts to support their legal decisions concerning boundaries, we hope this new addition will provide the modern guidelines for making correct decisions based on sound evidence and proven historic principles rather than bad decisions based on speculation, guesswork, and poor retracement practices.

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BROWN’S BOUNDARY CONTROL AND LEGAL PRINCIPLES
CHAPTER 1

HISTORY AND CONCEPT OF BOUNDARIES

1.1 INTRODUCTION

The history and location of boundaries are steeped in the history of the world from the time before records were kept to today. These boundaries are a result of actions of individuals and nations and law. Boundaries can be related to the areas of history, politics, surveying, and law. Both boundaries of an international nature and those between individuals have caused problems that have been fought, are still being fought, and will continue to be fought in the future over their locations between nations, states, and individual parcels of land within “Happy Acres” subdivisions. In recent years, both local and international judicial tribunals have had to apply old, proven doctrines and have created new legal doctrines to resolve boundary issues. One cannot pick up a newspaper or a magazine without reading about some individual or nation with a boundary issue that is new or that has been festering for many years.

Wars have been fought both on an international scale and in local neighborhoods, and people have been killed over boundary disputes of an inconsequential nature involving pieces of land that have ranged from hundreds of miles to a fraction of a foot or meter. Boundaries are personal in nature, and people have been and will continue to be protective about the misidentification or misalignment of a known or perceived boundary infringement. The surveyor may become the common factor in a boundary problem, as a result of, for example, preparing an erroneous map showing the boundary between two or more nations or the erroneous depiction of a single line between two landowners.

Even after modern boundary issues have been, seemingly, resolved, members of both the legal profession and the surveying profession may question the results,
asking incredulously, “How could the court do that?” Both the trial attorney and the testifying survey expert could not believe the Court disregarded the case law on the subject.

In the primeval forest, particularly in the plant kingdom, there are no known boundaries between living things. Although some horticulturists dispute this, we accept the fact that plants do not create boundaries to separate themselves. Animals—especially humans—do create boundaries. We like to think that only humans create and appreciate boundaries, but it has been observed in nature that most mammals, some reptiles, and a few fish create, identify, mark, and defend boundaries.

In this book, we discuss the creation, identification, description, and recovery of boundaries among people. We do not include the recovery and interpretation of the evidence of once-created boundaries; rather, we examine how boundaries are created, how they are described, and the technical legal and ethical ramifications of such boundaries that separate rights, both real and perceived, in real property.

Some boundaries are created in a random manner, whereas others are created according to preconceived plans, identified by any manner of a written description(s), and then litigated according to common law, case law, or statute law. Although it is not our intent in this book to dwell on the creation of boundaries by the lower forms of animal life, their actions in creating boundaries should be examined, because certain principles are similar. Many of these boundaries humans create remain for generations and, when they are retraced by modern methods and with a modern approach, may cause technical and legal problems for today’s surveyors and courts.

Field examinations and studies by naturalists have revealed that most animals really don’t create boundaries per se. However, it is recognized that they usually create terminal points (corners) and then identify the boundaries between these points, although lower forms of animals may create boundaries that are not necessarily of a permanent nature.

Humans usually create boundaries in several ways. For the sake of simplicity, these may be placed in the following categories:

1. *By action.* Physical acts create a line and points on the ground. This is followed by placing actual monuments at the corner points and identifying these points (corners) and line objects. The lines and objects are then described and may be identified on plats or in field notes. This evidence created and left “on the ground” becomes the proof of the original work and lines and becomes the legal controlling factor in conducting retracements.

2. *By writings.* The written word becomes the method of creation when a person describes corners and/or lines in a deed and then conveys to these described lines, prior to the completion of a survey. The problem is created when what the surveyor places on the ground is and then fails to create a solid paper trail.

3. *By law.* Ancient common and modern statutes are relied on to create, modify, and relocate many modern boundaries.
The following principles are introduced in this chapter and discussed in detail in later chapters:

**PRINCIPLE 1.** Boundaries enjoy a long history in both mythology and Judaic-Christian history.

**PRINCIPLE 2.** A surveyor creates land boundaries. These created lines, which are separate and distinct from property lines, are determined by legal principles and law.

**PRINCIPLE 3.** A described closed boundary identifies a claim of right to any property interest for which any person can make a claim of possession through a claim of title. These boundaries may be either macro or micro in nature.

**PRINCIPLE 4.** A person or landowner can legally convey only the quality and quantity of interest in land to which he or she has title.

**PRINCIPLE 5.** In most instances, there are no federal laws describing real property rights.

**PRINCIPLE 6.** Although there are no federal laws of real property, property rights are identified by the state laws and are protected under the U.S. Constitution.

**PRINCIPLE 7.** Real property rights are determined according to the laws in effect in the particular locale where the land is located. English common law is the predominant law, and it is described as the *lex loci*.

**PRINCIPLE 8.** Once boundary lines are created, the contiguous lines may, by law or by the actions of landowners who have vested rights, be changed or altered.

**PRINCIPLE 9.** Law does not provide for two original descriptions of the same parcel.

**PRINCIPLE 10.** Multiple boundary descriptions may exist for the same parcel, but only one is controlling.

**PRINCIPLE 11.** There can be only one original boundary survey and description; all subsequent ones are retracements.

**PRINCIPLE 12.** A resurvey can be conducted only by the entity who conducted the original survey. The law provides for resurveys of parcels, but only on a limited basis and under certain restrictions, the main one being that the bona fide property rights granted under the previous survey are not jeopardized.

### 1.2 SIGNIFICANCE OF BOUNDARIES

The description of property by surveys and landmarks and by reference to boundaries is very ancient. Basically, property interests are separated by boundaries. From precolonial times in the United States, many wars, both local and regional, have been
fought and people have been killed as a result of disputed boundaries. This problem was probably inherited from the European continent when the United States adopted English common law as the basis of its common law.

In Great Britain and in Europe, territorial boundaries have, for the most part, generally been stable because the lines were etched in antiquity. Once parish boundaries were established in England—many during Roman times—they formed invisible webs or lines around families and bound them into communities, and ultimately separated communities from one another. This historical background was passed on to the United States, and these distinctions exist today as a result of this influence.

Stories abound in both the United States and Great Britain in which boundaries have affected people’s lives. Individuals and groups go to extremes over boundaries, for a boundary can have political ramifications in areas such as citizenship and jurisdiction in legal matters. A tale from colonial times tells of the decision of surveyors who were engaged to run the boundary line between Kentucky and Tennessee to place a jog in the line when a landowner placed a jug of rum near his property and told the surveyors that it was theirs if they found it to be in Kentucky. They did. Naturally, the line has a jog in it. One of the authors of this book, Walt Robillard, remembers that when he was a young boy growing up near the Canadian border, his grandfather would take him to a tavern that straddled the U.S.–Canadian border. On the U.S. side of the bar, the serving of drinks stopped at midnight and was “never on Sunday”; however, on the Canadian side, the drinking continued. At the stroke of midnight and on Sundays, all drinks were served on the Canadian side. The bar patrons would move physically from the United States into Canada.

In 1870, the Reverend Francis Kilvert, an Anglican priest in Wales, related how one of his parishioners occupied a house that straddled the border in Wales on the edge of Brilly Parish. It was suggested that it would be more desirable for this parishioner to give birth to her child in his parish. The line between the parishes was indicated by a notch on the chimney. To ensure that the child would be born in the proper parish, the midwife had the mother give birth standing up in a corner on the appropriate side of the parish line.

People take boundaries seriously. Yet what they really are saying is, “I want the rights that I am entitled to in this property” or “I want those rights in that parcel of land.” Boundaries do not determine rights in land, but they identify the limits of any rights a person or group of people may have created or identified and now claim.

1.3 BOUNDARY REFERENCES

**Principle 1.** Boundaries enjoy a long history in both mythology and Judaic-Christian history.

Historically, the English language, using actual occurrences, developed certain terms that depicted and/or identified boundary problems. Until the advent of published maps, boundary identification and the resulting problems and discrepancies were passed from generation to generation by word of mouth.
It was not until mapping became a part of everyday living that boundaries were identified to such a degree of certainty that they no longer relied on the spoken word. In all probability, many of the boundaries on modern maps were placed there based on the testimony of people who identified them at an earlier time. There are many place names that indicate evidence of boundaries. The Old English term *maere* translates to “boundary.” An examination of modern British Ordnance Survey maps or maps produced by the U.S. Geological Survey indicate names like “Merebrook” and “Merebeck,” indicating that certain streams were considered boundaries.

Once boundaries were established and identified, they would be of no value if society could not ensure them with a degree of certainty. Once again, the gods and society were called on for guidance. The ancient Greeks ensured that boundaries would be sacrosanct. They “appointed” the goddess Terminus to be the protector of boundaries. This system was inherited by the Normans and Saxons in England in two ways: first, by the manner in which boundary stones were originally marked, and second, by the practice of *beating the bounds*.

The historic practice of beating the bounds consisted of the ritual of selecting children from the locality (usually boys), who, accompanied by a member of the town, a clergyman, and the parties to the land transfer, would walk, or perambulate, the boundaries. At each corner, one of the boys would be suspended by his feet and his head would strike the monument. Then, in the event of a future dispute, the boy would go to the corner marking the boundary and point out its location, as he remembered it.

For centuries, surveyors have marked boundary stones (corners) by cutting crosses into rock monuments (see Figure 1.1). This practice was probably brought

![Figure 1.1 Boundary stone marked with a + of medieval origin. (Courtesy of Prof. Angus Winchester.)](image)
to America by early English surveyors, who used the same practice in their home country. An examination of early survey and mapping practices indicates that early English surveyors would cut a cross into the monument as protection or to indicate the bounds of a religious holding. They then indicated these beacons (monuments) on maps in the form of crosses (see Figure 1.2). In all probability, these crosses were cut into the stone and then shown on maps in hopes that the Christian God would protect them as Terminus had protected Greek boundary stones.

1.4 TERMINUS: THE GOD (OR GODDESS) OF BOUNDARIES

Following the Greeks, Terminus was designated by the ancient Romans as the god of boundaries. Some believe that this god evolved from the ancient Greek goddess Terminus. Today, surveyors, real estate attorneys, and judges who must make legal determination on land matters should consult the wisdom of this ancient god(dess).

There are numerous references in the Old and New Testaments concerning boundary stones, markers, landmarks, and boundaries. Ovid, the Roman poet, wrote: "O Terminus, whether thou art a stone or a stump buried in the field, thou hast been deified from days of yore . . . thou dost set bounds to peoples and cities and vast kingdoms; without thee every field would be a root of wrangling. Thou courtest no favour, thou art bribed by no gold; the lands entrusted to thee thou dost guard in loyal good faith."³

Figure 1.2 1675 Map of Exmoor Forest, Devon. Note crosses at some corners. (Courtesy of Public Records Office, London.)