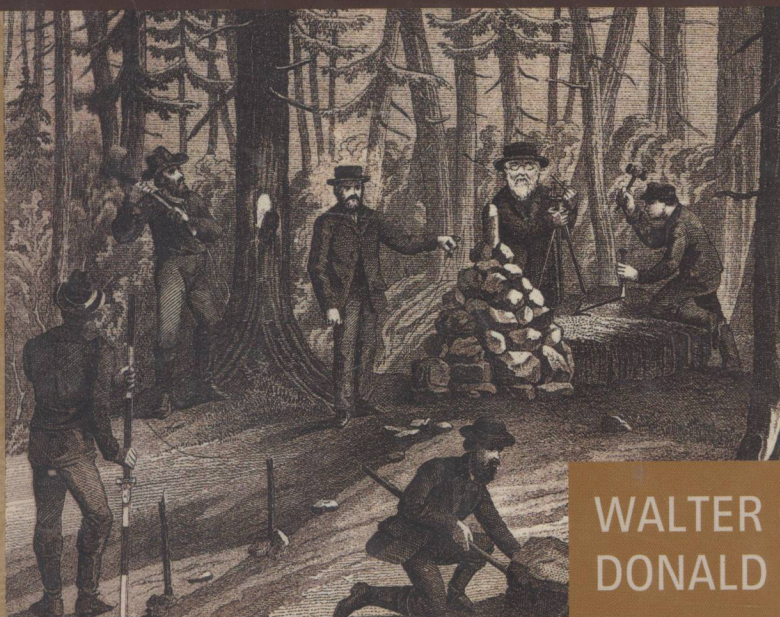


BROWN'S BOUNDARY CONTROL AND LEGAL PRINCIPLES

SIXTH
EDITION



WALTER G. ROBILLARD
DONALD A. WILSON

CURTIS M. BROWN

Based on the original ideas and concept created by

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BROWN'S BOUNDARY CONTROL AND LEGAL PRINCIPLES

PREFACE TO THE SIXTH EDITION

In recent months we have become aware of some writers who are attacking our philosophy and teachings as being outdated and not in keeping with modern surveying. In the nearly 20 years we have been writing this book, we have not wavered from our beliefs and teachings, that “Surveyors should practice surveying, as defined by the law, and not law, as practiced by attorneys.”

It has now been five years since the last edition of *Boundary Control and Legal Principles* was published. In the intervening years we have become a little older, gained more experience, hopefully have gained more wisdom, had some medical problems, won a few boundary cases, and lost a few boundary cases, have become frustrated and dumbfounded as to some judicial decisions rendered by the courts, yet in this time thousands of original monuments have disappeared and thousands of new monuments have been created, probably to place burdens on the surveyors and courts in the future.

In this new edition we have hopes that new surveying students and past graduates, as well as those many surveyors who get up every morning, put on their field boots, and then go to the field to look for evidence of boundaries that may have been created years ago or who will create new boundaries to be recovered in the future, will find this book a companion to be used, with confidence.

This book is dedicated to those new surveyors who will attempt to “follow the footsteps” of many unknown surveyors who have left this world and have taken worlds of information with them, never to be recovered.

May, 2008
Walt Robillard, Atlanta, GA
Don Wilson, Newfields, NH

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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 prerecorded times to today. These boundaries are a result of actions and law. Boundaries can be related to the areas of history, politics, surveying, and law. Both boundaries of an international nature as well as between individuals have caused problems to have been fought, are being fought, and will be fought, in the future over the location of boundaries between nations, states, and individual parcels of land within “Happy Acres” subdivision.

Wars have been fought on both an international basis and in local neighborhoods, and people have been killed over boundary disputes of an inconsequential nature 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 over the misidentification or misalignment of a known or perceived boundary infringement. The surveyor may become the common denominator in a boundary problem, from preparing an erroneous map showing the boundary between two or more nations to the erroneous depiction of a single line between two landowners.

In the primeval forest, particularly in the plant kingdom, there are no known boundaries between living things. Although some horticulturists dispute the fact, we accept the fact that plants do not create boundaries to separate themselves. Animals—especially humans—create boundaries. Although we like to think that only humans create and appreciate boundaries, it has been recorded 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 but 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.

Field examinations and studies by naturalists have revealed that most animals really don't create boundaries per se, but it has been identified that they usually create the terminal points (corners) and then identify the boundaries between these points. Although lower forms of animals may create boundaries that may not be 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.
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.
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, which 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 to which he or she has title.
- PRINCIPLE 5. In most instances there are no federal laws describing real property rights.
- PRINCIPLE 6. 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 7. Once boundary lines are created, the lines may, by law or by the actions of landowners who have vested rights, be changed.
- PRINCIPLE 8. Law does not provide for two original descriptions of the same parcel.
- PRINCIPLE 9. Multiple boundary descriptions may exist for the same parcel, but only one is controlling.
- PRINCIPLE 10. There can be only one original boundary survey and description, all subsequent ones are retracements.

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 pre-Colonial 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 we adopted English common law as the basis of our 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 inherited in the United States, and these distinctions exist today as a result of this historical 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 determine such political ramifications as citizenship and jurisdiction in legal matters. A tale related 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. It was. 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” but continued on the Canadian side. At the stroke of midnight and on Sundays, all drinks were served on the Canadian side. The people 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 the parishioner to give birth to her child in his parish. The line between the parishes was witnessed 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 proper 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 boundaries 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.*

Over the years, historic English language developed certain terms that depict and/or identify 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 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. There are many place names that indicate evidence of boundaries. In England the Old English term *maere* translates to *boundary*. An examination of modern British Ordnance Survey maps indicate such names as Merebrook and Merebeck, indicating that certain streams were boundaries.

Once a boundary or boundaries were established and identified, they would be of no value if society could not assure them a degree of certainty. Once again the gods and society were called on for guidance and help. The ancient Greeks assured that boundaries would be sacrosanct. They “appointed” the goddess Terminus to be the protector of these 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 was composed of the ritual of selecting children of the locality, usually boys, and then, accompanied by a member of the town, a clergyman, and the parties to the land transfer, this group would walk, or perambulate, the boundaries, and 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 and point out its location.

For centuries, surveyors have marked boundary stones (corners) by cutting crosses into rock monuments (see Figure 1.1). This practice was probably brought to America by early English surveyors, who used the same practice in England. 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 protected Greek boundary stones had done.



Figure 1.1 Boundary stone marked with a +; of medieval origin. (Courtesy of Prof. Angus Winchester.)

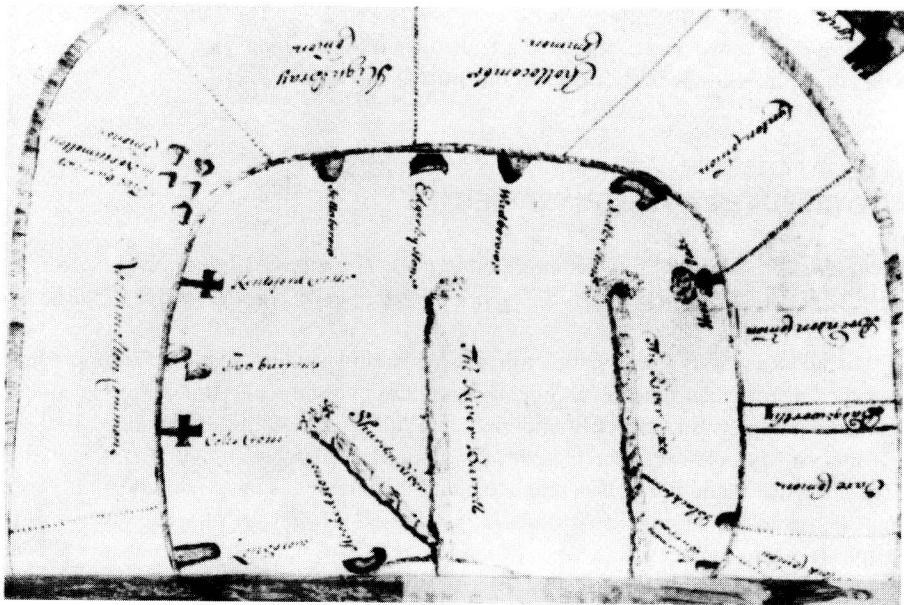


Figure 1.2 1675 Map of Exmoor Forest, Devon. Note crosses at some corners. (Courtesy of Public Records Office, London.)

1.4 TERMINUS: THE GOD (OR GODDESS) OF BOUNDARIES

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."¹

To show faith in such a god and with the hopes that a favorable response from the god would bring peace to a community and stability to its boundaries, a festival was held in Terminalia on February 23. During this annual festival, landowners would meet at their common boundary stones. Each would place a garland of flowers and the ceremony would culminate with a minor feast of cakes and honey and the toasting with wine. Then an animal, usually a pig or a lamb, would be sacrificed and the bones and blood deposited near the site.

Titus Livy wrote in his *History of Rome* that the Romans showed such favor to Terminus that at Rome's founding a temple was erected to Terminus on one of the seven hills, and his domain was never questioned. To show that all of the gods of Rome looked to Terminus, Livy wrote: "The gods are said to have exerted their power to show the magnitude of this mighty empire. . . . The fact that the seat of Terminus was not moved, and that of all the gods he alone was not called away from that place consecrated to him, meant that the whole kingdom would be firm and steadfast."²

1.5 DISPUTES AND BOUNDARIES

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.*

Disputes as to boundary location and/or boundary line identification predate recorded history. Until the development of modern maps at scales that permit adequate and positive identification of boundaries, individuals and communities depended on the spoken word to "seal" the location of boundaries and possession to maintain them. One historical method that was practiced, and in some areas is still practiced, is beating the bounds. This practice was possibly a vestigial reminder of what was a quasi-religious practice first used to identify parish boundaries between religious orders (see Figure 1.3). Today, this historical practice is still referred to as beating the bounds and is still practiced on a very limited scale in a few states.

Disputes over boundaries were frequent between communities and between church lands. This ancient ritual was usually carried out during Rogation Week,



Figure 1.3 Beating the bounds of Edgmond Parish, Shropshire, about 1933. (Courtesy of Local Studies Department, Shropshire County Library.)

the period between the fifth Sunday after Easter and Ascension Sunday. On the day selected, the parson, the constable of the townships, and the steward of the court (clerk) of the manors, accompanied by townspeople, both young and old, would take ample supplies of food and drink and would perambulate (walk) the boundaries to be identified. It was in this manner that they sealed in the memories of the townspeople boundaries that had never been reduced to writing or placed on a map. To make the occasion more memorable, young boys were selected and given a memorable experience at each of the beacons (corner monuments). Trials over disputed boundaries and depositions in many shire (county) courts have left us with excellent accounts of some of the rituals that helped the young people remember the disputed boundaries. Some are related in the following experiences.

In 1687, an elderly William Gregory testified in a boundary dispute of a line in Exmore (Somerset) how, as a child of seven in 1601, he assisted in a perambulation of Exford Parish. As the group passed one of the boundary stones, one of the older gentlemen called to the boy, "William, put your finger on the meere stone, for it is soe hot it would scald him." William related "that in doing so he layd hold on my hand and did wring one of my fingers sorely so that for the present it did greive me very much." William then remembered the person stating: "Remember that this is a boundary stone and it is a boundary to the parish of Exford."

Not to be outdone, in 1635, Robert Fidler testified in the matter of a boundary dispute that as a boy he "had his eares pulled and was set on his head upon a meare stone neere to a newe ditch of Ormisirke Moore and had his head knocked to the said stone to the end to make him better remember that the same stone was a boundary stone."

The ritual of perambulation or beating the bounds can still be found in some communities. Although historical, it still has sound legal purposes and principles. During

Colonial times, it was required that adjoining landowners walk and inspect their common boundaries yearly. The law also provided a penalty for those who failed to comply. More recently, at least in New England, municipalities are required to inspect and renew their bounds periodically. This remains the law in several states, although most do not carry out the “letter of the law.” Some towns still undertake this job faithfully by surveying and marking their boundaries, and with new technology they are placing coordinates and global positioning system (GPS) values on monuments and corners. This ancient practice ensures landowners and others of the “true and correct” bounds and helps relieve surveyors of possible future surveying costs that are necessary to determine such lines when they are coincident with private boundaries. Yet, disputes still arise when surveyors apply modern technology to ancient boundary descriptions.

An examination of many early English maps and names reveals that some disputes were centuries old when William the Conqueror arrived to turn the Anglo-Saxon world into turmoil. A selection of some of the names on present-day maps in the United Kingdom are as follows:

- *calenge* (Middle English): challenge, dispute
- *ceast* (Old English): strife, contention
- *erioch* (Gaelic): boundary
- *devise* (Old French): division, boundary
- *flit* (Old English): strife, dispute
- *fyn* (Welsh): end, boundary
- *grima* (Old Norse): marker boundary blaze on a tree
- *ra'* (Old Norse): landmark boundary, settlement on a boundary
- *skial* (Old Danish): boundary, boundary creek
- *terfyn* (Welsh): boundary
- *threap* (Old English): dispute

Few of these names were adopted in the United States or carried into our American language when English common law was accepted, but we have developed our own words to describe the problems that result from boundaries.

The historical result of this ancient practice is that today in England the number of land surveyors who practice land boundary surveys on boundary disputes is probably less than 100 for the entire country.

1.6 ROLE OF THE SURVEYOR IN BOUNDARIES

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.*

The surveyor should be able to make a distinction between the types or classes of boundaries that may be encountered. There are boundaries—and then there are boundaries. One will find both macro and micro boundaries. *Macro boundaries* range from international boundaries between nations and between subdivisions of nations, and a *micro boundary* is a boundary on a local level, such as a boundary between land grants and possibly between individual parcels of land. Surveyors can become involved with boundaries in two separate and distinct ways: those that represent major proportions or areas, *macro boundaries*, and others that are smaller and parochial in nature, *micro boundaries* (Section 3.2). Few surveyors have to make distinctions creating or retracing macro boundaries, but most surveyors are intimately involved with micro boundaries. Few retracing surveyors are asked to create or retrace international boundaries, state boundaries, or country boundaries, yet many of the boundaries created and retraced will be of small parcels of a single lot or subdivision. Seldom will a surveyor be asked to retrace an international boundary, much less a boundary between two states or even a county boundary in dispute. A list of possible distinctions between such macro boundaries and micro boundaries is identified in Section 3.2.

The methodology of creating macro and micro boundaries may be similar, yet the application of law may be entirely different in its application in retracing these boundaries. The surveyor creates these invisible boundaries, which are a product of work predicated on instruments used and the capabilities of the surveyor and methods employed.

Usually the original surveyor creates the boundaries of land parcels through actions and/or words and according to the law. Once an original boundary is created and described, that description remains in effect forever, legally. According to federal statutes as well as common/case law, those lines remain fixed in perpetuity, from the time when the first property rights are conveyed in reliance on the lines and corners described. Subsequently the same surveyor or other surveyor or surveyors are the individuals who retrace the boundaries originally created and who may create new evidence for future surveyors to search for.

The first belief that any surveyor should have when entering the area of boundaries is that any boundary dispute can be resolved with the help of knowledgeable experts and with reasonable people as clients. The only problem one may encounter is that some disputes may take longer to resolve than others. One person stated that it required the death of the original parties to solve the boundary dispute. Some disputes may be prolonged for generations, even to the point that they become identified on maps and become sealed in history. It is at this point in time that the origins of disputes become lost in history.

In examining British Ordnance Survey maps, one can see such names as Threapwood and Threapmuir. One can find Threapwood in Wales near Wrexham, a tract of disputed land that belonged to no county, parish, or township. The residents were found to be paying no taxes and subject to no local courts. It was the true no-man's-land. The boundaries had been disputed for centuries and no county had ever gained authority over the people and the land. Similar situations exist in all U.S. states, in both public land surveys and in state-surveyed areas. As recently as 1994, surveyors

in Louisiana discovered a “lost” strip of land between two federal townships, and in 2002, two parishes were disputing their common boundary. Many other macro boundaries are being disputed between countries and counties. Also the states of Connecticut and Rhode Island are disputing a common boundary that was created in the 1700s. Recently what should have been a simple described line between the states of Georgia and South Carolina was settled by the United States Supreme Court when it determined the original definitive boundary, namely the center of the river, with all of the islands belonging to Georgia, had been changed by estoppel. The most recent boundary problem faced by Georgia is the north boundary with the state of Tennessee. The original charter calls for the “parallel 35 degrees.” In 1811 the creating surveyor told the commissioners that his equipment could only obtain a precision of plus or minus one mile. The line was run and monumented. Recent precise measurements place the run boundary one mile south of the parallel. Now Georgia, facing a serious water shortage, wants to change the boundary one mile north so that it hits the Tennessee River which would give them the ability to extract water from the river.

In a major dispute between England and Scotland, the dispute over the Threpe-lands was settled in 1552 by digging a ditch and giving half to each of the disputing parties. The ditch, called Scots Dyke, is still in existence. Here in the United States we do not have that flexibility.

The British left us with a legacy of boundary disputes but also with one of attempting to make permanent those important boundary markers that identify land boundaries. A reference to today’s Ordnance Survey maps will indicate such boundary landmarks as the Navelin Stone, which was established in 1200. This stone, also called the Avellan Stone, is identified in the charter established in 1210 depicting the boundaries of Cumberland in England (see Figures 1.4 and 1.5)



Figure 1.4 The Navelin Stone, marking the boundary between Brisco and Cleator, Cumberland, established in 1200. (Courtesy of Prof. Angus Winchester.)