COMMENTS

Boundary Law: The Rule of Monument Control in Washington

I. INTRODUCTION

The rule of monument control in boundary law provides that visible "monuments" or landmarks on the ground will control over the courses and distances in the deed.[1] This rule is often applied so stringently that it becomes more than a rule of construction; it becomes a rule of law which conflicts with the Statute of Frauds.[2] Furthermore, the rule assumes that the monuments will remain visible to subsequent purchasers of the land, but as land is developed, the monuments are often destroyed or moved.

To solve the problems caused by the disappearance or displacement of monuments, Washington courts have promulgated an unusual set of rules concerning the admissibility of evidence to prove a disputed monument. These rules of admissibility are based upon certain policies inherent in the rule of monument control. Unfortunately, the courts sometime assume that since the monuments will have controlling weight in a boundary dispute these rules of evidence must be viewed with suspicion, an approach which can lead to unsettling results. A prime example is the case of *San Juan County v. Ayer*,[3] wherein the court of

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1. Boyd & Uelman, *Re-Surveys and Metes and Bounds Descriptions*, 1953 WIS. L. REV. 657, 677; Browder, *Boundaries: Description v. Survey*, 53 MICH. L. REV. 647, 647-48 (1955) [hereinafter cited as *Description v. Survey*].

2. WASH. REV. CODE §§ 64.04.010-.020 (1981).

3. 24 Wash. App. 852, 604 P.2d 1304 (1979). A major aim of this paper is to demonstrate that there is danger in a sweeping, overly broad use of rules in interpreting real property conveyances. *San Juan County v. Ayer* represents a modern culmination of the inconsistencies that can result from applying rules to deeds without a proper analysis of the reasons behind the rules. One commentator offers the following warning:

> Limitations.—The only purpose of the foregoing rules of construction is to enable us to reach the probable intent of the parties in order that we may give it effect; and if these rules were not somewhat flexible and capable of modification by the circumstances of any particular case, they would in many instances

appeals attempted to voice a bright line evidentiary standard for the authenticity of a monument, but merely confused the issue by declaring a standard unsupported by the history of boundary law.

The rule of monument control has developed as a necessary corollary to the Statute of Frauds as applied to land conveyances. Confusion in the application of the two rules can be avoided by examining their underlying equitable policies. A consideration of these policies is necessary for a reasoned approach to judging the admissibility and weight of evidence needed to prove a boundary monument. *San Juan* illustrates the confusion which can result when a court attempts to apply these rules in a technical manner divorced from their historical background. Many boundary disputes could properly be resolved by using the rule of monument control as a rule of construction, thereby allowing the court to weigh the equities of the dispute before it, rather than as a rule of law to be contrasted with the Statute of Frauds.

II. The Rule of Monument Control and Its Applications

Practically all boundary surveys are dependent in whole or in part on monuments or points previously established on the earth.[4] Monuments are tangible landmarks such as points left by a previous surveyor[5] or barriers such as fences or walls which landowners customarily use to mark their boundaries.[6] Monuments link the abstract words of the description to the visible boundary on the ground.[7] Disputes arise when the surveyor finds

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defeat the actual intent . . . .

R. Skelton, The Legal Elements of Boundaries and Adjacent Properties § 73 (3) (1930).

4. C. Brown, Boundary Control and Legal Principles § 1.4 (2d ed. 1969).

5. 1 R. Patton & C. Patton, Patton on Land Titles § 125, at 317 (2d ed. 1957) [hereinafter cited as Patton].

6. *Id.* at 319.

7. Muncipal Research and Services Center of Washington, Surveys, Subdivisions and Platting, and Boundaries, Report No. 4, at 102 (1977). Some authorities consider the side lines of streets to be monuments. Most consider natural features to also be monuments. *Id.* at 102. The principles relating to monuments, other than artificial monuments, are beyond the scope of this Comment.

In reference to state regulations concerning the removal or destruction of survey monuments, the following definition is offered:

> Monument: Any physical object or structure of record which marks or accurately references a corner or other survey point established by or under the supervision of a qualified party, including any corner or natural monument

monuments on the ground in locations which do not match the courses and distances in the description he is following, or when he finds that necessary monuments are missing.[8] In such instances, the rule of monument control requires that the original locations of monuments control over courses and distances on the deed if the two are in conflict.[9] The original monuments must be found, or replaced in their original position, despite the words of the description.[10]

The rule of monument control is based upon an inherent presumption that people actually transfer land by reference to monuments rather than by relying on the words of the deed description. Monuments, however, are impermanent. If they disappear, they must be replaced in their original, even if incorrect, position to protect the rights of the parties.[11]

This reliance upon the protection of monuments raises serious questions concerning the rule's pervasiveness in our modern land conveyancing system, a system dependent upon the Statute

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> established by the General Land Office and its successor, the Bureau of Land Management . . . .

WASH. ADMIN. CODE § 332-120-010 (1980).

8. The problems caused by the disappearance of monuments have plagued jurists since monuments were first relied upon for boundary identification. Many of the problems encountered in today's practice concern the disappearance of government survey corners, which were causing the very same problems in the early parts of this century and before. See J. JOHNSON, THE THEORY AND PRACTICE OF SURVEYING 635 (16th ed. 1906) (quoting Cooley, J., *The Judicial Function of Surveyors*); *see also* H.R. REP. No. 1954, 53d Cong.; 3d Sess. 22 (1895), which complained that the system of setting stakes for survey monuments was largely unavailing of permanency.

9. *See supra* note 1.

10. The courts often state the rule of monument control in the form of general guidelines for surveyors. The purpose of a survey, it is said, is to ascertain the original boundaries, rather than to locate where a modern, more accurate survey would place them. Thein v. Burrows, 13 Wash. App. 761, 763, 537 P.2d 1064, 1066 (1975). *See also* Staaf v. Bilder, 68 Wash. 2d 800, 803, 415 P.2d 650, 652 (1966), which concerns a property dispute that arose from mathematical errors in the original plat by which the property in dispute was originally described. The court stated a requirement that such a dispute was to be settled by a relocation of the original monuments of the plat, rather than by any attempt to correct the errors in the original plat.

11. *See* Rippey v. Harrison, 66 Wash. 109, 110, 119 P. 178, 178 (1911), which concerns a fence allegedly built upon the monumented line of an early survey. The monuments had disappeared and the correctness of the original survey was in dispute, which led the court to say:

> We may admit the general rule that monuments control courses and distances; but there are no original monuments discovered in this case, and the object of a survey when a line is in dispute is, not to determine where the original location ought to have been, but where it actually was; because a purchaser has a right to be protected in the land which he buys with reference to the original monuments or locations, whether they were right or wrong.

of Frauds[12] and the Recording Act.[13] These acts are designed to protect the purchaser of land by requiring that evidence of all prior transfers of or encumbrances upon the land be put into a form which is permanent and open to public inspection.[14] Any reliance on perishable monuments would seem to weaken the Statute of Frauds.[15] However, the use of monuments is justifiable as long as the rule of monument control is viewed in a proper perspective. An explanation requires that the policies behind the rule be clearly enunciated. Similarly, the rules of evidence which affect the practical application of the rule must be explained and clarified.

The Washington courts have applied the rule of monument

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12. WASH. REV. CODE §§ 64.04.010-.020 (1981).

13. WASH. REV. CODE § 65.08.070 (1981) provides:

> **Real property conveyances to be recorded.** A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

14. The recording system provides a permanent, written record of every conveyance of land. Proof of title in the United States is almost entirely from public records, and the recording system is so strongly a part of our conveyancing system that a purchaser will seldom accept title not based upon recorded evidence. PATTON, *supra* note 5, § 6.

> Our present method for marketing land is dependent upon two institutions, the Statute of Frauds and the recording system. The former requires written evidence of certain transactions concerning land. The latter says that even written transactions may be void or insufficient to preserve benefits unless placed of record. . . .
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> The recording system establishes a public depository of records reflecting transcriptions of original documents having a bearing upon land titles. Thus it preserves evidence of ownership, gives notice to all persons who may wish to acquire an interest in particular property, and specifies priorities as between conflicting interests.

P. GOLDSTEIN, REAL ESTATE TRANSACTIONS 201 (1980) (quoting P. BAYES, CLEARING LAND TITLES 6-8 (2d ed. 1970)).

15. Professor Browder has pointed out four problems in the use of the rule of monument control. First, it is perhaps unrealistic to assume that the intention of the original parties is in fact better shown by the monuments than by the deed. Second, the rule contains no safeguards against the possibility that the monuments were placed unilaterally. Third, the rule is inconsistent with the principle that preliminary acts and negotiations of the parties should be merged into the solemn consummation of the deed. Finally, the rule does not contain safeguards for the innocent purchaser who buys the property long after the original party monuments the ground and who may not know of the location or importance of the monuments. *Description v. Survey*, *supra* note 1, at 651-52.

control differently depending on the type of legal description contained in the deed. The rule is applied most stringently to deeds describing land according to federal government General Land Office surveys. Other deeds call both courses and distances and monuments, and the rule of monument control is applied according to certain presumptions of notice and intent. Descriptions according to recorded plats often appear to use the rule to promote equitable principles, and the rule is strictly a rule of equity when it controls deeds that describe the land with courses and distances with no reference to monuments.

A. The Rule's Application to Boundaries Set by Federal Surveys

A line of Washington cases holds that the boundaries of private lands described in reference to federal government section corners will be controlled by the actual location of the original monuments, rather than the words of the description.[16] Washington was created out of the public domain.[17] Originally, all lands patented in the state were controlled by federal statutes that required a government survey before the patent could be issued.[18] General Land Office surveys followed a theoretically simple pattern of monumenting the corners of squares of approximately one mile on a side in lands that were to be opened for settlement.[19] The land was patented with reference

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16. *E.g.* Murray v. Bousquet, 154 Wash. 42, 46, 280 P. 935, 937 (1929); Greer v. Squire, 9 Wash. 359, 363, 37 P. 545, 547 (1894); Cadeau v. Elliott, 7 Wash. 205, 205, 34 P. 916, 917 (1893).

17. BUREAU OF LAND MANAGEMENT, U. S. DEPT. OF THE INTERIOR, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES, TECHNICAL BULLETIN 6, §§ 1-23 (1973) [hereinafter cited as MANUAL].

18. Act of Feb. 14, 1853, ch. 69, 10 Stat. 158, § 2, *repealed by* Act of March 3, 1933, ch. 202, 47 Stat. 1429 (stated that patents for land in Oregon territory were to be issued after a survey was available); Act of July 17, 1854, ch. 84, 10 Stat. 305, § 6, *repealed by* Act of March 3, 1933, ch. 202, 47 Stat. 1429 (extended the Oregon Act to Washington Territory). "A patent is a government conveyance just the same as a deed is a private conveyance." 2 R. PATTON & C. PATTON, PATTON ON LAND TITLES § 292 (2d ed. 1957).

19. 43 U.S.C. § 751 (1976). The text of the pertinent part of the statute reads as follows:

> Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running parallel lines through the same from east to west and from south to north at the distance of one mile from each other, and marking corners at the distance of each half mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers, until the thirty-six be completed.

to the sections so laid out. By statute,[20] the monuments set at the corners and on the lines of the sections controlled the boundaries of the patent.

The federal government surveying manual, which controlled the survey of most of the lands of the State of Washington, specified that stakes or stones, witnessed by blazes on trees, be used to monument the boundaries of sections.[21] The manual did not require any great accuracy in placing the stakes,[22] so it was never safe to assume that a monumented section would really ever be exactly one square mile. "In fact, the carelessness and inattention marking the original government surveys in this part

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An excellent, simplified description of the process and methods of General Land Office surveys is found in Harrington, *Cadastral Surveys for the Public Lands of the United States*, in THE PUBLIC LANDS 35-41 (V. Carstensen ed. 1968).

20. 43 U.S.C. § 752 (1976). The text of the statute reads as follows:

> The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:
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> First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half- and quarter-sections, not marked on the surveys, shall be placed as nearly as possible equidistant from the two corners which stand on the same line.
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> Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.
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> Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

21. L. STEWART, PUBLIC LAND SURVEYS 73 (1935) (noting that surveys in Washington began in 1854); *see also Id.* at 124 (requirements for monumentation set forth in the surveying instructions of 1855).

22. *Id.* at 110 (surveyor allowed an error of sixty-six feet (one chain) for section lines). *See also* Harrington, *Cadastral Surveys for the Public Lands of the United States*, in THE PUBLIC LANDS 37-39 (V. Carstensen ed. 1968).

of the country have led the courts to say of their own judicial knowledge that a survey is seldom correct."[23]

The United States Supreme Court has held that "[a] survey of public lands does not *ascertain* boundaries; it *creates* them."[24] General Land Office decisions were not assailable by the courts as long as the land was in the public domain.[25] The Supreme Court's deference to this position dates back to its decision that vexatious litigation would result if the courts attempted to correct the field work of the government surveys.[26] Therefore, the Court would not direct the General Land Office to move erroneously placed monuments into their theoretically correct position. Such deference could be explained as a recognition of the obvious difficulty in disposing of vast tracts of land in a reasonably expeditious manner, and a recognition that directing such a task is probably beyond the expertise of the courts. The federal government has since maintained the position that the boundaries of sections are unchangeable and controlled by the physical evidence of the monuments.[27]

The government's position is reasonable in light of its role as common grantor to parties who patented land in Washington. The uniform application of one set of rules to all original grants preserves fairness. Washington courts, however, have applied the federal statutes to subsequent private grants as well,[28] even though the presumption of fairness is certainly weaker for remote grants. The courts are perhaps assuming that a person who purchases land from a private party knows the federal laws concerning the public lands[29] and should expect to be governed by them in his private purchase. Such an assumption, however, is unwarranted.

The Washington courts' adoption of the federal statutes creates a level of certainty in dealing with disputes. Perhaps certainty alone is enough to justify the courts' position, at least when the party is selling exactly the same land that was originally patented by the government. A person may, however, sell a parcel that was subdivided out of a larger government patent by

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23. Hale v. Ball, 70 Wash. 435, 439, 126 P. 942, 944 (1912).
24. Cox v. Hart, 260 U.S. 427, 436 (1922) (emphasis by the court).
25. Cragin v. Powell, 128 U.S. 691, 699 (1888).
26. *Id.*
27. MANUAL, *supra* note 17, § 1-20.
28. *See supra* note 16.
29. *See supra* note 20.

a party who did not know of the federal rules or the location of the monuments. The case of *Town v. Greer*,[30] represents the culmination of a lengthy boundary dispute which arose from such a sale, and raises serious questions of the wisdom of presuming that the federal rules should control private land sales.

In 1882, George H. Greer owned the west half of a particular section. He sold to Squire the land described as the southwest one-quarter of the section.[31] A reasonable reading of the deed would indicate that Greer was selling the south one-half of his land, but if the federal government rules were applied the deed land would have been bounded on the north by a line constructed between the east and west quarter corners of the section, wherever they may have been.[32] The parties did not know of the location of the west quarter corner, and a surveyor, unable to find it, set a new monument creating a boundary enclosing approximately the amount of land the grantee expected to receive. A fence was built according to the survey.[33] Then, four or five years after the sale, evidence of the government quarter corner was discovered approximately one thousand feet north of the fence.[34]

An equitable solution to the ensuing dispute would be to hold both parties to the boundary marked by the fence. They did not know of the quarter corner when they transferred the land, and their action would at least evidence acquiescence in the fenced line. But Squire initiated the dispute, and in 1891, the state supreme court remanded it back to trial.[35] The supreme court stated that the trial court must presume that the deed embraced land up to the line between the original quarter corners, but that since the government survey in this instance seemed "misleading" the parties would be allowed to prove, with extrinsic evidence, that the "intention" of the deed was best shown by the fence.[36] The same dispute reached the state supreme court again in 1894 where it was still not conclusively settled.[37] *Town v. Greer*[38] represents the third attempt at resolu-

30. 53 Wash. 350, 102 P. 239 (1909).
31. *Id.* at 351, 102 P. at 240.
32. 43 U.S.C. § 752 (1976) (quoted in full, *supra* note 20).
33. Town v. Greer, 53 Wash. 350, 353-54, 102 P. 239, 241 (1909).
34. *Id.* at 355, 102 P. at 241.
35. Squire v. Greer, 2 Wash. 209, 26 P. 222 (1891).
36. *Id.* at 215, 26 P. at 223.
37. Greer v. Squire, 9 Wash. 359, 37 P. 545 (1894).
38. 53 Wash. 350, 102 P. 239 (1909).

tion, twenty-seven years after the original conveyance. Only in that latter case did the court finally come to the equitable conclusion it could have reached in the first case; it held the parties to the fenced boundary because the totality of the evidence showed that the fence was the "intended" boundary.[39]

The actions of the parties to the first sale evidenced a construction of a boundary line that represented a reasonable interpretation of the deed. Fairness would require adherence to the expectations of the parties to the transaction first creating the boundary. The court's earlier presumption, however, that a deed using such a description would be controlled by the federal government rules, essentially allowed the grantee to attempt a form of "land-grabbing" when the quarter corner was finally discovered. If the court had, in the original case, held the parties to an equitable solution, a wasteful and lengthy dispute would have been avoided.

B. The Rule's Application to Deeds with Express Calls to Monuments

A second form of legal description describes the land with courses and distances and express calls to monuments. If the monument is called in the description, its original location controls the course and distance[40] even if the monument itself is obliterated. The force of the rule is not seriously questioned in the few cases interpreting this type of description.[41] *Fagan v. Walters*[42] seems to qualify the rule in that the monument referred to in the deed was a line of an adjoining property.[43] The *Fagan* court found that a substantial fence, accepted as a boundary fence by abutting property owners, controlled as a monument marking the adjoining property line.[44] The court also found that the fence gave all parties sufficient notice of the

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39. *Id.* at 356-57, 102 P. at 242.

40. C. BROWN, W. ROBILLARD & D. WILSON, EVIDENCE AND PROCEDURES FOR BOUNDARY LOCATION § 2-39 (2d ed. 1981) [hereinafter cited as EVIDENCE].

41. *See, e.g.*, Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 417, 184 P. 641, 642 (1919), *reh'g granted*, 108 Wash. 436, 187 P. 410 (1920). In *Bullock*, a dispute over who was the proper defendant in a personal injury case was decided by applying the rule of monument control to determine whose property the plaintiff was on when he was injured.

42. 115 Wash. 454, 197 P. 635 (1921).

43. *Id.* at 463, 197 P. at 638.

44. *Id.*

boundary before the property was transferred.[45] The court did not indicate whether the rule or the fact of notice was controlling, or whether the line would still control in the future as between different parties if the fence were removed.

The most unsettling aspect of the rule of monument control is the presumption that the parties had notice of the monument's actual location at the time of the conveyance. In *Matthews v. Parker*[46] the court used the rule to change a line by some sixty feet[47] despite the fact that the "monument" was a mathematically ascertainable point that was not in the ground at all.[48] Of course, the parties to the transaction had a form of notice since the point was called in the deed description, but one wonders about the wisdom of a rule granting a call in a deed absolute control over a distance in the same deed by merely assigning the term "monument" to the call even though the point is not visible to the parties. If the distance call in *Matthews* had been for a point sixty feet beyond the edge of the grantor's property, the decision could be explained by the common principle that a person cannot grant what he does not own. But the distance was sixty feet shorter than the true length of the grantor's property line,[49] and the court judicially extended the line to the mathematical point, justifying the extension by noting that the rule of monument control was too well-settled to be questioned.[50] The *Fagan* holding[51] may have been justified

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45. *Id.*

46. 163 Wash. 10, 299 P. 354 (1931).

47. *Id.* at 14, 299 P. at 355.

48. *Id.* at 15, 299 P. at 355.

49. *Id.* at 14, 299 P. at 355.

50. *Id.*

In many states, the outcome of *Matthews* could be explained by a principle based on public policy. If the court had chosen to construe the deed or describe a line which ended sixty feet short of the mathematical point the court chose to call a monument, then there may have been a strip of land along one side of the property of doubtful ownership. The Oregon court in Hurd v. Byrnes, 264 Or. 591, 506 P.2d 686 (1973), determined that when a grantor deeds land in such a way as to create a narrow strip of land which is disputed, the strip of land is presumed to pass to the grantee unless the grantor retains other land bordering the strip in dispute. The *Hurd* court stated:

> This rule of construction is also founded on policy considerations, including the prevention of vexatious litigation and the prevention of the existence of strips of land the title to which would otherwise remain in abeyance for long periods of time. Supporting this conclusion is the general rule that ambiguities in a deed are to be construed against the grantor.

Id. at 598, 506 P.2d at 690 (citations omitted).

Tiffany states that in many jurisdictions, the presumption against narrow strips of land also applies when the strip of land is a vacated street, because "separate ownership

since the parties had notice of the fence line, but *Mathews* was an extremely mechanical application of the rule, without apparent justification.

C. *The Rule's Application to Recorded Plats*

Monuments may also control when the description identifies land by reference to a plat. In an 1892 Washington case, the court stated in dictum that a reference to a plat in a deed incorporates all the lines of the plat into the description on the deed, and that the lines in the plat are themselves controlled by monuments on the ground.[52] The court in *Neely v. Maurer*[53] proffered that the reason for this rule of control is that the plat is only a picture, whereas the true substance of the survey is shown by the monuments.[54] Also, the *Neely* court held that the monu-

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of the highway strip and the abutting property is prolific of private disputes and public disturbances." 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 996, at 216 (3d ed. 1975). As sensible as such a rule may seem, Washington does not seem to use it. In Washington, if a street is vacated and the vacation is of public notice, a subsequent grantee of abutting property is presumed to know of the vacation; if the strip of land is not specifically included in the grant it remains in the ownership of the grantor. Turner v. Davisson, 47 Wash. 2d 375, 386, 287 P.2d 726, 732-33 (1955), and cases cited therein. Thus, a decision such as that in *Matthews* cannot clearly be supported by a policy oriented presumption against creating narrow strips of land.

51. 115 Wash. 454, 197 P. 635 (1921).

52. State v. Board of Tide Land Appraisers, 5 Wash. 425, 426-27, 32 P. 97, 98 (1892), *appeal dismissed*, 163 U.S. 711 (1895). The court stated that as a settled principle, the lines on a plat are "incorporated" into the deed, and that the claimant is entitled to the lands thus incorporated after they have been "run" and "established." "Run" is a term of art referring to an actual ground survey with monumentation. *See* 43 U.S.C. § 752 (1976) (quoted in full, *supra* note 20).

53. 31 Wash. 2d 153, P.2d 628 (1948).

54. *Id.* at 155-56, 195 P.2d at 629.

The court's reliance on the idea that the plat is but a "picture" and the lines marked on the ground are the "substance" of survey is potentially dangerous. The idea is taken from 6 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 3052, at 617 (1962), which cites cases from several jurisdictions. The danger is best explained by a hypothetical. Suppose the present parties transfer with reference to a plat, and no monuments are found on the ground. Suppose further, that the field notes of the original surveyor are available, and a retracement survey made from those notes places monuments in locations which vary from the dimensions on the map. In this situation, the present parties cannot be said to have purchased "in reliance" on the monuments, for they were not visible at the time of purchase. But, if the plat is but a "picture," logically the parties should be bound by the monuments as replaced from the notes of the "substance" of the original survey. This possible outcome appears to conflict with the reasonable expectations of the purchasers. One commentator notes the potential conflict in this manner:

> Where there is a conflict between a plat and the field notes, it is generally held that the plat controls, for the reason that it is not customary for a man

ments best show the intention of the original conveyances.[55] In *Olson v. City of Seattle*,[56] a much older case, the court stated that the intention of the plattor is best shown by the stakes, but seemingly required that the purchasers have actual notice of the stakes before they control.[57]

The rule allowing the monuments to control the lot lines in a plat has a corollary called the rule of proportionate measurement.[58] This rule is based on the principle that all remote grantees of the original plattor should share equally in any excess or deficiency in the overall size of their block.[59] It presumes, often

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buying a property to refer to the field notes, but there is some authority to the contrary on the ground that the plat is a graphical representation of the field notes subject to error in its construction and therefore not as certain and reliable as the field notes on which it is based. (citations omitted)

R. SKELTON, *supra* note 3, § 158 (3).

Washington, under *Neeley*, would appear to be siding with the "authority to the contrary" with its statement that a plat is but a "picture." Yet in the only Washington case to clearly address the potential of a conflict between the field notes and the map of a survey, the court of appeals opted for the opposite conclusion, because the conveyance was made "by reference to the plat," Erickson v. Wick, 22 Wash. App. 433, 436, 591 P.2d 804, 806 (1979), and held that the plat controls. *Erickson* quotes no Washington authority for its conclusion, but it is reasonable to assume that a purchaser or seller of property who acts in reference to a plat should be controlled by the plat rather than by a set of notes of which he has no notice. It is to be hoped that the *Erickson* decision and any that follow it will stand despite any attack based on the *Neeley* principle.

55. Neeley v. Maurer, 31 Wash. 2d 153, 155, 195 P.2d 628, 629 (1948).

56. 30 Wash. 687, 71 P. 201 (1903).

57. *Id.* at 691, 71 P. at 203.

58. C. BROWN, *supra* note 4, explains the rules of proportionate measurement in great detail in §§ 5.27-.32.

59. PATTON, *supra* note 5, § 158, at 424. *See, e.g.*, Booth v. Clark, 59 Wash. 229, 231, 109 P. 805, 806 (1910).

One surveying text explains the rule of proportionate measurements in plats in a way that incorporates mathematical principles with presumptions concerning the plattor's intent:

> Where the excess or deficiency is due to the original chain or tape being too long or too short, rigid mathematics dictate that the error be distributed proportionally among the subdivisions of the line, and where a small discrepancy is due to careless surveying, and there are no circumstances suggesting that there is a gross blunder in any part of the survey, the law of probability supports the rule. But where it can be proved that the error is caused by an erroneous assumption in regard to one terminal of the line or side of an area, then the rule has no rational basis, for an error which is located and explained should not, from a mathematical standpoint, be distributed.
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> However, certain circumstances may justify an apportionment of the excess or deficiency, even where the conditions do not substantiate the mathematical basis for the rule. Thus where a line is supposedly of a certain length, but is in reality a small fraction of the frontage of a lot in excess of this supposed length, and a plat shows it divided into a given number of equal parts, the logical conclusion is that the platter [sic] intended to set down a given

without support, that the monuments were set by the plattor at the time of the original subdivision.[60] This presumption has led to conflicting decisions.

In *Suter v. Campbell*,[61] the court held that a survey could not be based on monuments set by city surveyors without a showing that the monuments were set at the time of the original subdivision. The court in *Aust v. Matson*,[62] however, held that a city survey, obviously done later than the platting, controlled if it proportioned the blocks of the plat according to the dimensions on the original drawing.[63]

The disparity between the decisions in *Suter* and *Aust* focuses on the problem inherent in strictly applying the rule of monument control in cases concerning plats. The requirement in *Suter* that the monuments be proven to relate to the original platting of the land underscores the court's insistence upon a demonstrable relation between the monuments and the acts of the original grantor. One commentator has stated that "[i]n older subdivisions in which all the original stakes are gone as well as the records of any replacement of original stakes the burden of proving that existing city engineers' monuments or tie points are replacements of original stakes is impossible."[64] He then recommended that such points be used only if they match visible improvement lines.[65] If this relation is indeed impossible to prove, perhaps the court should abandon the requirement for a more realistic assessment of modern conditions.

> number of lots of equal frontage, and had he known the correct length of the line he would merely have made each lot of a trifle larger frontage. When the rule is applied in such a case, it prevents the platter's [sic] intention from being overcome by an error or blunder that he did not recognize.

R. SKELTON, *supra* note 3, § 216.

60. The original subdivision act in Washington, enacted in 1881, did not require monumentation of block corners. WASH. CODE §§ 2328-32 (1881) (presently codified as WASH. REV. CODE §§ 58.08.010-.050 (1981)). In 1888, the legislature enacted a law requiring monuments in plats on United States lands. WASH. REV. CODE §§ 58.28.060-.070 (1981). In 1906, Johnson stated that it was customary for surveyors to set monuments in plats, but that often it was done after recording or selling of lots. J. JOHNSON, *supra* note 8, at 430. It was not until 1969 that Washington actually required the monumentation of all subdivisions. WASH. REV. CODE § 58.17.240 (1981).

61. 139 Wash. 44, 245 P. 29 (1926).

62. 128 Wash. 114, 222 P. 225 (1924).

63. *Id.* at 117-18, 222 P. 225 at 226. *But cf.* Waldorf v. Cole, 61 Wash. 2d 251, 257-58, 377 P.2d 862, 866 (1963) (held that proportionate measurement was not proper when some lots were sold by metes-and-bounds descriptions).

64. C. BROWN, *supra* note 4, § 5.10, at 159.

65. *Id.*

Professor Browder recommends that the entire rule of monument control over lines in plats be replaced with a doctrine whereby boundaries long acquiesced to are held controlling.[66] A few Washington cases turn on acquiescence or reliance upon staked lines.[67] The court in *Staaf v. Bilder*[68] appears to rely on acquiescence,[69] but states that it is using the evidence of marked lines to determine the intention of the original plattor.[70] The *Aust* court, while not turning on the principle of acquiescence, at least displayed a willingness to accept a set of monuments purely because they represented an equitable division of the platted lots.

D. The Rule's Application to Deeds with No Reference to Monuments or Plats

Many deeds describe land with no call to monuments or plat lines. One line of cases stands for the proposition that a line marked by monument will control over the courses and distances in the deeds, even though the monuments are extraneous to the deed. These decisions are based upon the equitable principle that visible lines marked by a common grantor of lands, and purchased with reference thereto, will control over the courses in the description.[71] In *Martin v. Hobbs*,[72] the court denied a claim to a line marked by a common grantor for lack of

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66. *Description v. Survey*, *supra* note 1, at 689-90.

67. *See, e.g.*, Stewart v. Hoffman, 64 Wash. 2d 37, 390 P.2d 553 (1964)(acquiescence); Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395, 405, 162 P. 541, 545 (1917)(reliance). *See also supra* note 61 and accompanying text.

68. 68 Wash. 2d 800, 415 P.2d 650 (1966).

69. *Id.* at 802, 415 P.2d at 652.

70. *Id.* at 803, 415 P.2d at 652.

71. Atwell v. Olson, 30 Wash. 2d 179, 190 P.2d 783 (1948); Thompson v. Bain, 28 Wash. 2d 590, 183 P.2d 785 (1947); Samples v. Kergan, 109 Wash. 503, 187 P. 383 (1920); Rose v. Fletcher, 83 Wash. 623, 145 P. 989 (1915); Roe v. Walsh, 76 Wash. 148, 135 P. 1031 (1913); Turner v. Creech, 58 Wash. 439, 108 P. 1084 (1910). EVIDENCE, *supra* note 40, § 8-19, states:

> In locating legal descriptions within the United States there are probably more uncalled-for monuments found on the ground than there are monuments described. Until recently very few states required the surveyor to record what he set in replacement of original monument locations. In those states where widespread loss of evidence of original monument positions exists, the acceptance of monuments that appear to have been set by a surveyor is quite common, although no chain of history of the monument may exist. In some states the reputation of a monument is the best available evidence, and it becomes controlling for that reason alone.

72. 44 Wash. 2d 787, 270 P.2d 1067 (1954).

testimony that the present parties purchased in reliance on the line. In *Fralick v. Clark County*,[73] the court required a "meeting of the minds"[74] over the exact location of the property sold before the common grantor theory can apply to subsequent grantees. In these cases, courts have generally substituted the equitable requirement of reliance for the presumption that the parties acquired their land with reference to the monuments. A requirement of reliance, or some form of acquiescence, seems reasonable when notice is unlikely since the monument is not called in the deed.

There are five ways that property can be transferred in Washington completely extraneously to the deed, and all of them require some well-defined act to mark the boundary in a way that will be visible to subsequent purchasers.[75] Professor Browder indicates that a proper remedy for claims to a marked line when the markings are totally extrinsic to the deed would be reformation for mutual mistake,[76] a solution which has been used in only a few recent Washington cases.[77]

E. The Policy Behind the Rule

In summary, Washington has adopted a rule that the original locations of monuments control over courses and distances in a deed for a variety of reasons. If the description is based upon a government survey, the courts have basically interpreted the deed according to federal public land statutes. If the deed calls both courses and distances and monuments, the courts give weight to the monument both as a rule of construction of the deed and because of a presumption of notice as to the monument's actual location. In the case of recorded plats, the courts

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73. 22 Wash. App. 156, 589 P.2d 273 (1978), *appeal denied*, 92 Wash. 2d 1005 (1979).

74. *Id.* at 159, 589 P.2d at 275.

75. *See* Lamm v. McTighe, 72 Wash. 2d 587, 591, 434 P.2d 565, 568 (1967). The five ways listed are adverse possession, parol agreement, estoppel, location by a common grantor, and mutual recognition and acquiescence in a definite line by the parties for a long period of time. It should be noted that Fralick v. Clark County, 22 Wash. App. 156, 589 P.2d 273 (1978), *appeal denied*, 92 Wash. 2d 1005 (1979), indicates that it is uncertain whether a monumentation of the line is required to make a boundary created by a common grantor binding as between the original grantor and grantee. However, the court requires monumentation to make the line binding between subsequent grantees.

76. *Description v. Survey*, *supra* note 1, at 651-52.

77. Thorsteinson v. Waters, 65 Wash. 2d 739, 744-45, 399 P.2d 510, 513-14 (1965), and cases cited therein.

have varied the rule more toward equitable principles of acquiescence, and if the monumented line is not called in the deed at all it apparently only controls if equitable principles intervene.

The cases show that there are two general policy considerations behind the rule of monument control. The first is that when land is sold according to a government survey, there should be a link between the boundaries of recently created parcels and the original boundaries of the government patents so as to prevent a subsequent grantor of the same land from selling land outside of the patented boundaries. Such a link is certainly needed to define any modern boundary intended to be coincident with a patented line. *Squire v. Greer*[78] and the two subsequent cases over the same land,[79] however, serve to demonstrate that lengthy and unnecessary disputes can arise from applying the rule to boundaries created originally by private parties. The final equitable solution of the Greer controversy leads to the second policy behind the rule.

If the bulk of property sales include an actual inspection of the land by the parties, then a reasonable presumption would be that the parties expect land sold to be bounded by lines that are apparent to all concerned. In such instances, monuments such as the fence in *Town v. Greer*[80] provide evidence of the parties' expectations. If the monuments are visible to the parties before the court, they provide actual notice of the location of boundaries without recourse to the more abstract and technical process of translating the words of the description into surveyed lines on the ground.

When the rule of monument control is used merely as a rule of construction to show the most reasonable reading of the words of the description, it fulfills its equitable policy fairly well. Such a policy, however, begins with a premise that the monuments are visible and were relied upon by the parties. Unfortunately, time will take its toll on any object placed on the ground, and monuments can be expected to disappear. When the courts instruct the surveyor to use whatever evidence he can find to replace the monument in its original, even if erroneous, position, the rule loses its equitable value. It then becomes an arbitrary choice between the conflicting elements of the courses in the

78. 2 Wash. 209, 26 P. 222 (1891).

79. Greer v. Squire, 9 Wash. 359, 37 P. 545 (1894); Town v. Greer, 53 Wash. 350, 102 P. 239 (1909).

80. 53 Wash. at 356-57, 102 P. at 242. *See also* text accompanying note 39.

description and the evidence of the original location of the monument. When the rule is used to set a totally new point at a mathematical position, as in *Matthews v. Parker*,[81] and then to control a conflicting distance in the deed, it certainly cannot be supported by the equitable notions of notice or reliance.

The tendency to apply the rule of monument control even though the monument is not visible is coupled with the problem of formulating the rules the court will use in admitting evidence of an obliterated monument. Inherent in the Recording Act is a policy that purchasers of land are best protected by evidence that appears in the recorded "chain of title."[82] A reasonable presumption would be that the same policy would govern the admissibility of evidence concerning lost or disputed monuments. Surprisingly, the courts have been extremely willing to admit evidence of boundary monuments that may be far removed from the evidence in the public record, and in so doing have developed a policy encouraging the misuse of the rule of monument control.

F. Evidence Admissible to Prove a Monument

If direct testimony concerning the location of a monument is unavailable,[83] a logical source of evidence is public records. Washington, by statute in 1881,[84] specifically legalized defective town plats and allowed for their admission in evidence.[85] Deeds are also admissible.[86] The modern Survey Recording Act[87] ren-

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81. 163 Wash. 10, 15, 299 P. 354, 355 (1931).

82. *See supra* notes 13-14 and accompanying text.

83. Direct testimony is of course admissible; *E.g.*, Cadeau v. Elliott, 7 Wash. 205, 206, 34 P. 916, 917 (1893). *See also* Lappenbusch v. Florkow, 175 Wash. 23, 25-27, 26 P.2d 388, 389-90 (1933), wherein the court indicated a preference for the testimony of an engineer who had worked for the county over that of a private surveyor, partly because the county engineer's testimony was based on his knowledge of a government corner which predated the controversy before the court and was obtained in his official capacity.

84. WASH. REV. CODE § 58.10.010 (1981).

85. WASH. REV. CODE § 58.10.020 (1981).

86. WASH. REV. CODE § 5.44.070 (1981).

87. WASH. REV. CODE § 58.09.040 (1981). The Survey Recording Act, WASH. REV. CODE ch. 58.09 (1981), carries great potential for alleviating many of the problems caused by monuments which are not matters of public record by requiring the recording of all surveys made after 1973. As more surveys are recorded, more monuments will be shown on the recorded maps and will themselves become matters of public record. Therefore, it would be advisable that attorneys familiarize themselves with the survey record index as well as the grantor-grantee index to property titles, so as to be able to inform their clients of potential boundary problems which may be disclosed by surveys already existing at the time of a transfer.

ders recorded private surveys admissible in Washington as recorded documents.[88] The statute allowing admission of recorded documents has also been held to allow admission of certified county engineers' records.[89] The Washington evidence rules admit recorded documents even though the declarant may be available to the court.[90]

The courts have historically admitted recorded plats, even when they are inconsistent with maps alleged to be copies of the original,[91] or are apparently erroneous.[92] A recorded plat has been admitted to prove the location of a section corner monument that had disappeared but was shown on the map.[93] Maps[94] and field notes[95] of official government surveys have been given great weight, even when conflicting with the testimony of the surveyor who did the work.[96]

If no public records are available, the surveyor or property owner may sometimes turn to unrecorded private records. Generally, private survey records are inadmissible in this country[97] because landowners are not held to have any notice of information contained in private files.[98] Washington is an exception to the general rule in that it has allowed evidence of earlier private surveys.[99] In one case, the court qualified that admission by indicating that a present surveyor should check out the old, private records for accuracy.[100] The Washington evidence rules allow an expert to rely on documents which would not otherwise

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88. WASH. REV. CODE § 5.44.040 (1981).

89. White v. Fenner, 16 Wash. 2d 226, 244-45, 133 P.2d 270, 277-78 (1943).

90. WASH. R. EVID. 803(a)(8) incorporates WASH. REV. CODE § 5.44.040 (1981), into the section of hearsay exceptions where the availability of the declarant is immaterial. The statute reads as follows:

> **Certified copies of public records as evidence.** Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

91. *See, e.g.*, Hansen v. Lindstrom, 168 Wash. 130, 138-39, 11 P.2d 232, 235 (1932).

92. *See, e.g.*, Schwede v. Hemrich, 29 Wash. 124, 130, 69 P. 643, 645 (1902).

93. Stokes v. Curtis, 49 Wash. 235, 238, 94 P. 1083, 1084 (1908).

94. Hirt v. Entus, 37 Wash. 2d 418, 420-22, 224 P.2d 620, 622-23 (1950); Ghione v. State, 26 Wash. 2d 635, 653, 175 P.2d 955, 965-66 (1946).

95. Stangair v. Roads, 41 Wash. 583, 84 P. 405 (1906).

96. *Id.* at 585-86, 84 P. at 406.

97. Annot. 46 A.L.R. 2d 1318, 1333, 1338 (1956), and cases cited therein.

98. EVIDENCE, *supra* note 40, § 2-28.

99. Martin v. Hobbs, 44 Wash. 2d 787, 791, 270 P.2d 1067, 1069 (1954).

100. Cabe v. Halverson, 48 Wash. 2d 172, 174-75, 292 P.2d 220, 221-22 (1956).

be admissible, if they are normally used in his profession.[101] Ancient documents,[102] including maps and title documents,[103] are admissible if over twenty years old.

The courts have gone still further in admitting evidence as exceptions to the hearsay rule. Common report or reputation has generally been enough to prove a monument in this country.[104] In *Smith v. Chambers*,[105] a monument was approved by the court because property owners in the community generally recognized it as correct.[106]

In two cases,[107] courts have authenticated a disputed monument because evidence of old fences in the area corresponded to the monument's location and because past surveyors had relied upon it.[108] In *Inmon v. Pearson*,[109] the court held that the deterioration of landmarks necessitated the admissibility of hearsay in general in order to prove matters of private boundaries.[110] This rule was later restricted by requiring that the declarant be unavailable,[111] but the Washington rules of evidence have removed even that barrier.[112]

The policy behind admitting hearsay evidence concerning a monument's general reputation as controlling the boundaries in

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101. WASH. R. EVID. 703.

102. WASH. R. EVID. 803(a)(16).

103. R. ARONSON, RULES OF EVIDENCE FOR THE STATE OF WASHINGTON 133 (1979).

104. F. CLARK, A TREATISE ON THE LAW OF SURVEYING AND BOUNDARIES § 288 (3d ed. 1959); *see also* C. BROWN, *supra* note 4, § 5.16, at 165.

105. 112 Wash. 600, 192 P. 891 (1920).

106. *Id.* at 602, 192 P. at 892. *But see* Hope v. Brown, 74 Wash. 421, 423-24, 133 P. 612, 613 (1913) (testimony by one witness held insufficient to prove that a monument was authentic by reputation).

107. Staaf v. Bilder, 68 Wash. 2d 800, 802, 415 P.2d 650, 652 (1966); Inmon v. Pearson, 47 Wash. 402, 403, 92 P. 279, 280 (1907).

108. The federal government survey rules also approve of the use of old fence lines and roads as evidence to support a monument's authenticity because "[t]hese are matters of particular interest to the adjoining owners. It is reasonable to presume that care and good faith were exercised in placing such improvements with regard to the evidence of the original survey in existence at the time." BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, RESTORATION OF LOST OR OBLITERATED CORNERS AND SUBDIVISION OF SECTIONS 36-37 (1974 ed.) [hereinafter cited as RESTORATION].

109. 47 Wash. 402, 92 P. 279 (1907).

110. *Id.* at 404-05, 92 P. at 280.

111. Kay Corp. v. Anderson, 72 Wash. 2d 879, 885-86, 436 P.2d 459, 463 (1967), and cases cited therein.

112. WASH. R. EVID. 803(a)(20) concerns hearsay exceptions where the declarant's availability is immaterial and reads as follows: "*Reputation Concerning Boundaries or General History*. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located."

a community reinforces the equitable uses of the rule of monument control. A monument would presumably not develop such a reputation unless it is visible and has been reliable in the past. The admission of evidence from maps not part of the chain of title, or from surveyors' files, has a greater potential for inequitable use. If the monument is not visible to the parties, and the evidence determining its location is not found in the records upon which land purchasers customarily rely, there is virtually no reason to believe that the monument bears any relation to their expectations in the transfer. The possibility that the court will admit, and then give controlling weight, to evidence of a monument unknown to the parties of the transfer and not reasonably discoverable in the public records creates the apparent conflict between the rule of monument control and the Statute of Frauds.

III. The Requirements and Underlying Policies of the Statute of Frauds

The Statute of Frauds requires that land be transferred by written deed.[113] The purposes behind this requirement are the prevention of fraud and the protection of the expectations of innocent parties.[114] Land contracts are particularly proper subjects for the Statute of Frauds, because every deed becomes a part of a "chain of title" through the operation of the recording acts.[115] Since the chain often stretches well beyond the memory of living witnesses, the deed must reasonably describe the land it conveys.[116]

It is, however, difficult to determine how definite the description must be to satisfy the requirements of the Statute of Frauds. An indefinite description often nullifies a deed,[117] but a description cannot be perfectly precise. Words are at best slippery tools to describe the exact physical shape of a piece of land.[118]

Faced with the task of reconciling the technical require-

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113. Wash. Rev. Code §§ 64.04.010-.020 (1981). Washington also has a general statute of frauds covering contracts other than deeds. Wash. Rev. Code § 19.36.010 (1981).

114. 2 A. Corbin, Corbin on Contracts § 275, at 12-13 (1950).

115. *See supra* notes 12-14 and accompanying text.

116. O. Browder, R. Cunningham, J. Julin & A. Smith, Basic Property Law 795-97 (3d ed. 1979) [hereinafter cited as Basic Property].

117. 6A R. Powell, The Law of Real Property ¶ 887 [1], at 81-49 (1982).

118. Basic Property, *supra* note 116, at 796.

ments of the Statute of Frauds with the need for equitable treatment of innocent purchasers, courts have struggled with the admissibility of extrinsic evidence. That a deed must have a description sufficiently definite to locate the land without recourse to oral testimony is often stated,[119] but more often breached in boundary disputes. In fact, the courts have sometimes gone so far as to state that parol evidence is always admissible in a boundary dispute.[120]

The closest approach to a clear rule for the minimum requirement of a deed description in Washington was first stated in *Sengfelder v. Hill.*[121] "A description by which the property may be identified by a competent surveyor, with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient . . . ."[122] Of course, a surveyor's work is always extrinsic to the deed, and the surveyor may not be employed until many years after the original writing of the description. This rule not only allows the surveyor to use extrinsic evidence, but also renders his use of that evidence basic to the sufficiency of the deed for effective land conveyances.

The *Sengfelder* rule, when read in conjunction with the rule of monument control, imposes a significant restriction on the Statute of Frauds. A competent surveyor would logically use all the avenues of extrinsic evidence that the court has opened in its development of the rule of monument control. If a poorly written description can be made sufficient by the introduction of hearsay and of other evidence from sources outside of the chain of title, then there is no encouragement to clarify the writings on the deed itself. Any rule which perpetuates ambiguous writings weakens the protection afforded by the Statute of Frauds.

The Statute of Frauds and the rule of monument control can both be justified on equitable principles. If the writings in the deed are clear, the Statute of Frauds undoubtedly protects the parties' expectations by expressing them in a permanent form. If the monuments are clearly visible and agreed upon by

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119. *E.g.*, Bigelow v. Mood, 56 Wash. 2d 340, 341, 353 P.2d 429, 430 (1960), and cases cited therein.

120. Newman v. Buzard, 24 Wash. 225, 230, 64 P. 139, 141 (1901).

121. 21 Wash. 371, 380, 58 P. 250, 253-54 (1899), and later in Booten v. Peterson, 34 Wash. 2d 563, 567, 209 P.2d 349, 352 (1945), *clarified*, 47 Wash. 2d 565, 209 P.2d 384 (1945).

122. Booten, 34 Wash. 2d at 567, 209 P.2d at 352 (quoting R. SKELTON, *supra* note 3, § 2, at 3).

the same parties, then the rule of monument control also protects the parties' expectations. In such instances, the rule of monument control acts as a rule of construction to provide objective proof of the parties' intentions. But in those cases where the court admits evidence unknown to the parties and directs the setting of a monument that was also unknown, the rule of monument control takes on new strength and begins to undermine the protection afforded by the Statute of Frauds. In such cases, the court might be justified in viewing each and every monument with suspicion. In those cases, perhaps the court should require that the monument be proven beyond a reasonable doubt.

IV. The Standard of Proof Required to Authenticate a Disputed Monument as Stated in the San Juan Case

A. San Juan

The Washington Court of Appeals applied the reasonable doubt standard in *San Juan County v. Ayer*,[123] stating that: "We hold that a party seeking to recover the location of an obliterated surveying point must sustain the burden of proving the location of that point beyond a reasonable doubt."[124] In *San Juan*, two surveyors disagreed over the correct location of a government corner. The trial court held that the highest burden of proof should be required to sustain a disputed monument and absent such proof the monument must be considered lost.[125] The trial court then relied upon the method sanctioned by the federal government surveying manual,[126] and directed reestablishment of the lost corner by proportionate measurement between undisputed corners.[127]

The burden of proof required in civil cases in Washington has long been a matter of confusion. Judge Wiehl has stated that five different standards have been used, but the criminal standard, applied in *San Juan*,[128] is not one of the five.[129] Earlier

123. 24 Wash. App. 852, 604 P.2d 1304 (1979).

124. *Id.* at 859, 604 P.2d at 1308.

125. *Id.* at 853-54, 604 P.2d at 1305-06.

126. Manual, *supra* note 17, §§ 5-20 to 5-47.

127. San Juan County v. Ayer, 24 Wash. App. 852, 854-55, 861, 604 P.2d 1304, 1306, 1309 (1979).

128. *Id.* at 858 n. 1, 604 P.2d at 1308 n. 1. *See also* State v. Warriner, 30 Wash. App. 482, 487 n. 2, 635 P.2d 755, 758 n. 1 (1981) (Ringold, J., *dissenting*). Ringold, who also wrote the opinion in *San Juan*, cited that case in disagreeing with the majority that a

Washington decisions were unclear as to the standards of proof they used to find that a monument was or was not authentic. Phrases like "satisfactory and convincing evidence,"[130] "clearly preponderates,"[131] "preponderating to the contrary,"[132] and "preponderantly supports"[133] have all been used in disputes over government monuments. Several courts have required "clear and convincing" proof that a monument is authentic when it is unusually far from the position stated in the government surveyor's notes or plat.[134] Washington's court instructions for proof by clear, cogent, and convincing evidence require a finding that the point asserted be proved by evidence weightier and more convincing than a mere preponderance, but not beyond a reasonable doubt.[135]

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clear and convincing standard should be equated with a standard of beyond a reasonable doubt.

129. Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109 (1966). Wiehl lists the following standards: preponderance; clear, cogent, and convincing; reasonable certainty; clear, unequivocal and decisive evidence; conclusive, definite, certain, and beyond all legitimate controversy. Wiehl states that this latter standard, which may be reasonably interpreted as requiring a higher standard of proof than the criminal standard, is in fact viewed by the courts as requiring "a quantum of evidence less than 'beyond a reasonable doubt.'" *Id.* at 117. He argues that these differing standards are merely confusing, and should be replaced by a more probably true than not true and a highly probable standard.

It should be noted that the Washington Supreme Court in *In re* Levias, 83 Wash. 2d 253, 256, 517 P.2d 588, 590 (1973), held that the "clear and convincing" standard was the equivalent of the criminal law burden of proof when the civil case concerned a commitment for mental illness, due to the similarity between civil and criminal commitment.

130. Thayer v. Spokane County, 36 Wash. 63, 66, 78 P. 200, 201 (1904).

131. Cunningham v. Weedin, 81 Wash. 96, 101, 142 P. 453, 455 (1914).

132. Lappenbusch v. Florkow, 175 Wash. 23, 27, 26 P.2d 388, 390 (1933).

133. State v. Shepardson, 30 Wash. 2d 165, 168, 191 P.2d 286, 288 (1948).

134. Wilson v. Creech Bros. Contracting Co., 159 Wash. 120, 127, 292 P. 109, 111 (1930); Reed v. Firestack, 93 Wash. 148, 151, 160 P. 292, 193 (1916) ("clear and certain"); Strunz v. Hood, 44 Wash. 99, 106, 87 P. 45, 48 (1906); Cadeau v. Elliott, 7 Wash. 205, 206, 34 P. 916, 917 (1893).

135. WASHINGTON SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL, Nos. 160.02-.03 (2d ed. 1980) both say: "Clear, cogent and convincing evidence means evidence which is weightier and more convincing than a preponderance of the evidence. However, it does not mean that you must be convinced beyond a reasonable doubt." *See also* Bland v. Mentor, 63 Wash. 2d 150, 154, 385 P.2d 727, 730 (1963). Washington courts have often used the clear and convincing standard where a party is trying to prove mutual mistake to reform a deed. Thorsteinson v. Waters, 65 Wash. 2d 739, 745, 399 P.2d 510, 514 (1965), and cases cited therein.

B. The Manual of Surveying Instructions and Its Use as a Statement of Evidentiary Standards for Resolving Boundary Disputes

In applying the highest standard of proof, the *San Juan* court deferred to the Manual of Surveying Instructions ("Manual") of the Federal Bureau of Land Management. The court felt that its reliance was justified because of the experience and expertise of the Bureau.[136] The Manual instructs surveyors to reset a corner by proportionate measurement if the corner's original location cannot be verified beyond reasonable doubt by acceptable evidence.[137] The court's deference to the Manual, however, is misplaced.

The Department of Interior's original instructions on lost or obliterated corners were first published in 1883 and made no mention of the reasonable doubt standard.[138] They left the corner's classification to the judgment of the individual surveyor.[139] The Department's next set of rules, published in 1897, defined a lost corner as "one whose position cannot be determined, beyond reasonable doubt, either from original marks or reliable external evidence."[140] The Department's caution is understandable when examined in the context of the frontier settlement era.

During the settlement era, all public land surveys were performed by contractors[141] interested in doing the work as rapidly as possible.[142] Many of the surveys were so defective as to be

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136. There are strong policy considerations favoring the retention of a corner once marked on the ground by the government surveyor even though that is a point other surveyors, upon resurvey, might agree is in error. The directive of the Manual [of Surveying Instructions] reflects experiences accumulated over the years by those who surveyed the continental United States and anticipated the problems of ascertaining obliterated corners. Their considered judgment that the establishment of an "obliterated corner" should require the highest degree of proof reflects an acknowledgement that error was bound to be made by surveyors subject to human frailties. Thus the GLO prefers the reestablishment of a lost corner by the proportionate method rather than reliance upon evidence of its original location that is open to doubt.

San Juan County v. Ayer, 24 Wash. App. 852, 857-58, 604 P.2d 1304, 1307-08 (1979).

137. MANUAL, *supra* note 17, § 5-9, requires the beyond reasonable doubt standard, and §§ 5-20 to 5-47 detail the rules of proportionate measurement for monuments that cannot meet the test.

138. 1 Pub. Lands Dec. 671 (1887).

139. *Id.* at 676.

140. 23 Pub. Lands Dec. 361 (1897).

141. L. STEWART, *supra* note 21, at 33.

142. F. Yonce, Public Land Disposal in Washington 82 (unpublished doctoral dissertation on file at the University of Washington, 1969).

declared fraudulent,[143] but were accepted to prevent inconvenience to settlers[144] who needed the survey before they could obtain their patents.[145] Indians were noted for moving or removing monuments,[146] and settlers would move monuments to reshape their claims to include desirable land.[147] Such problems prompted urgings that the system of relying on monuments be abolished.[148] In response, there was an unsuccessful attempt in 1895 to reform the entire system of public surveys.[149] Given the historical problems, it is not surprising that the government's advice at that time to local surveyors included a recommendation that corners be verified by "unquestioned" acts or testimony from memory by people who saw the corner in its original location.[150] It is doubtful that today such a requirement is necessary, or even possible, after the land has been long held by private owners.

As a judicial standard of proof, the reasonable doubt standard contradicts the general view of the profession and even the Manual itself. Modern property surveyors feel that it is far better to accept a point, if it is commonly accepted in the community as being the location of the original government corner, than to set a new point by proportionate measurement.[151] The most recent guide for local surveyors published by the Bureau of Land Management dictates that "[i]f there is some acceptable

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143. *Id.* at 83. *See also* 2 H. COPP, PUBLIC LAND LAWS 1419-34 (1883), for a series of circulars and letters concerning problems with fraudulent surveys.

144. F. Yonce, *supra* note 142, at 83.

145. *See supra* note 18 and accompanying text.

146. F. Yonce, *supra* note 142, at 54.

147. *Id.* at 55.

148. *Id.*

149. H.R. REP. No. 1954, 53d Cong., 3d Sess. 16-22 (1895), which accompanies A Bill to Improve the Public Surveys, H.R. 8504, 53d Cong., 3d Sess., 27 CONG. REC. 961 (1895) (text of bill not published).

150. 23 Pub. Lands Dec. 361 (1897).

151. One surveying text states that:

> Lost corners are restored by proportionate measure so that all interested parties receive an equitable share of existing excess or deficiency. Restoring a corner by proportionate methods should be regarded as the last resort; all other evidence that might prove the original location must be exhausted. It is far better to accept a longstanding fence corner commonly accepted as the section corner than to try to establish a new corner by proportionate measure.

C. BROWN, *supra* note 4, § 6.21.

Another commentator makes this statement: "**Determining lost corners.**—A corner should not be regarded as lost until all means of fixing its original location have been exhausted. It is so much more satisfictory to so locate the corner than regard it as 'lost' and locate it by 'proportionate' measurement." F. CLARK, *supra* note 104, § 335.

evidence of the original location of the corner, that position will be employed."[152] Also, the guide states that any "[d]ecision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position."[153]

The Manual relied on in *San Juan*, however, clearly states that it describes how cadastral surveys of the *public lands* are made.[154] As such, in reference to the surveyors' act of weighing evidence in deciding whether a corner is obliterated or lost, it offers the following warning:

> One additional caution, addressed especially to the surveyor employed by the Bureau of Land Management, is to bear in mind that his professional work is technical in character, not legal or judicial. The surveyor is not a referee as to the justice or injustice of a situation, nor is he qualified to act judicially upon the equities or inequities that may appear to be involved.[155]

The above quote alone indicates that a court hearing a private land dispute should be extremely wary of adopting the Manual as legal authority as the court did in *San Juan*.[156] Furthermore,

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152. RESTORATION, *supra* note 108, at 10.

153. *Id.*

154. MANUAL, *supra* note 17, § 1-1.

155. *Id.* § 5-13.

156. 24 Wash. App. 852, 857, 604 P.2d 1304, 1307 (1979).

The Washington State Legislature formed, before the decision in *San Juan County v. Ayer*, a state agency for surveys and maps. That agency was given the power to "advise" land surveyors, WASH. REV. CODE § 58.24.030 (1981), and to "[s]et up standards of accuracy and methods of procedure." WASH. REV. CODE § 58.24.040 (1981). Under authority of the latter section, the agency promulgated the following rule: "The subdivision of a section shall conform to the rules prescribed for official U.S. Government Surveys of the public lands and instructions relating thereto, and/or applicable federal or state court decisions relating thereto. . . ." WASH. ADMIN. CODE § 332-130-030 (1) (1980). The *San Juan* court did not refer to this rule in its decision, even though it could be read as an endorsement of the court's use of the MANUAL. Unfortunately, the MANUAL itself states that the fundamental provisions for "subdivision of sections" are stated in 43 U.S.C. § 752 (1976) (quoted in full in *supra* note 20), and in 43 U.S.C. § 753 (1976) (concerning subdivision of sections into smaller units than those stated in § 752). MANUAL, *supra* note 17, § 3-74. Neither statute contains the beyond reasonable doubt rule. The MANUAL further states that sections are not normally subdivided in the field by the official government surveyors who are bound by the MANUAL, *Id.* § 3-74, and immediately states its warning that its own rules are to be taken by all other surveyors as merely advisory. *Id.* § 3-76. Federal court decisions, which could be used in interpreting WASH. ADMIN. CODE § 332-130-030 (1) (1980), are discussed later in this paper, *infra* notes 159-67, insofar as they affect the determination of the authenticity of a disputed government corner. No federal cases were found taking a stand comparable to the Washington Court

the Manual states that "[t]he Bureau desires that the rules controlling the acts of its own cadastral surveying service be considered by all other surveyors as merely advisory. . . ."[157]

The court should be careful of transforming the advice of a technical bulletin concerning the public lands into a rule of private property law without some clear policy favoring that transformation. The *San Juan* court's policy statement[158] is merely a restatement of the rule of monument control. The General Land Office may indeed prefer the restoration of a corner by proportionate means before relying on a point which is open to doubt, but it has no power to interfere with bona fide private property rights,[159] historically governed by equitable rather than strictly technical principles.

C. *The Evidentiary Standards Used by Other Courts in Resolving Disputes Over Monuments*

The federal courts have faced boundary disputes between private property owners and the Department of the Interior and have taken a decidedly different approach than the *San Juan* court. The United States Supreme Court long ago stated that courts may protect private rights against corrective resurveys by the Department.[160] More recently, in *United States v. Doyle*,[161] the Court of Appeals for the Tenth Circuit was faced with the issue of whether a government corner was lost or obliterated. It

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of Appeals in *San Juan County v. Ayer*.

WASH. ADMIN. CODE § 332-130-030 (1) (1980), is not worded in the form of an absolute directive, but appears to require the use of federal rules in the absence of applicable federal or state court decisions on the issue in question. The federal decisions discussed in the notes 157-65, *infra*, and the Washington cases discussed in note 166, *infra*, are all applicable to the issue of a disputed government corner and all run directly counter to the decision in *San Juan County v. Ayer*.

157. MANUAL, *supra* note 17, § 3-76.

158. *See* quote in *supra* note 136.

159. 43 U.S.C. § 772 (1976), reads as follows:

> The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

(Emphasis in original).

160. Cragin v. Powell, 128 U.S. 691, 699-700 (1888).

161. 468 F.2d 633 (10th Cir. 1972).

interpreted state law which, like Washington, incorporated the federal statutes for determining section boundaries and held that "for corners to be lost '[t]hey must be so completely lost that they cannot be replaced by reference to any existing data or other sources of information.' "[162] In *United States v. Citko*,[163] a federal district court in Wisconsin relied in part on *Doyle*[164] and in part on the words of the Bureau's pamphlet, *Restoration of Lost or Obliterated Corners and Subdivision of Sections*,[165] to hold that the government must sustain the burden of proving a corner lost before it resorts to proportionate methods when that method impairs a private boundary.[166] The court in *Citko* quoted the same "beyond reasonable doubt" phrase from the Manual[167] as did the *San Juan* court, but held that "the Government has failed to carry its burden of showing by a preponderance of the evidence that it could not establish the location of the original quarter corner by reference to any existing data or other sources of information."[168]

Granted that the Washington courts did not have the benefit of a later federal court decision like *Citko*, there has nevertheless been ample showing in Washington that the "reasonable doubt" standard of *San Juan* misplaced the burden of proof. Just as the accused must be presumed innocent and the state must have the burden of proving otherwise, requiring a surveyor or property owner to prove the authenticity of a monument beyond reasonable doubt before accepting it necessarily forces him to presume all monuments are lost. He then must satisfy the burden of proving otherwise. At least three earlier Washington cases have held the opposite—that monuments or traces of it, if found, are presumed valid unless proven invalid by the party asserting that the monument should be replaced by proportionate methods.[169] Also, the application of the reasonable

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162. *Id.* at 637 (quoting Mason v. Braught, 33 S.D. 559, 569, 146 N.W. 687, 689-90 (1914)).

163. 517 F. Supp. 233 (E. D. Wis. 1981).

164. *Id.* at 237.

165. *Id.*

166. *Id.* at 242.

167. *Id.* at 236. (The court quotes from RESTORATION, *supra* note 107, but the instruction is the same as that in the MANUAL.)

168. *Id.* at 242.

169. Martin v. Neeley, 55 Wash. 2d 219, 224, 347 P.2d 529, 531-32 (1959); State v. Shepardson, 30 Wash. 2d 165, 167, 191 P.2d 286, 288 (1948); Lappenbusch v. Florkow, 175 Wash. 23, 27, 26 P.2d 388, 390 (1933).

The following quote from Martin v. Neeley, 55 Wash. 2d 219, 224, 347 P.2d 529, 531-

doubt standard cannot be reconciled with the long history in Washington of admitting the weakest forms of evidence, hearsay and reputation, on the theory that such evidence may well be necessary to resolve a boundary dispute in an equitable manner. Undoubtedly, the acceptance of *San Juan's* bright line rule would require a considerable rethinking of the policies shown by past boundary decisions.

The *San Juan* holding is reminiscent of that in *Matthews v. Parker*,[170] in that both cases show technical and unreasoned uses of the rule of monument control. In *Matthews*, the court invented a fictional monument in order to use the rule to justify its holding, even though deference to a monument over a distance in a deed is historically and most reasonably based on the certainty and notice provided by the monument's visibility. The *San Juan* court held that any disputed monument must be rejected, unless it can meet a rigorous standard of proof taken from a technical manual, in favor of a new point set by proportionate measurement, without regard to the unlikelihood of the new point's matching any visible lines of reliance and occupation.[171]

D. How a Proper Treatment Would Help

San Juan represents a classic misuse of the rule of monument control. For the rule to properly protect the expectations of the parties to a conveyance, the monuments must bear some visible relation to the boundaries of the land conveyed. Any time the court directs the setting of a new monument which has never been seen by the parties, and allows that monument to control their deed, the rule defeats its equitable justifications.

San Juan and *Town v. Greer*[172] both concerned land con-

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32 (1954), is illustrative:

> Regardless of how the evidence may be characterized, the burden of proof was upon appellants to establish that the government corner was lost before they were entitled to apply the rule by which their engineer, Mr. Gibbs, located the corner, halfway between the southeast corner and the southwest corner of section 12. *Hale v. Ball, supra* [70 Wash. 435, 126 P. 942 (1912)]. The trial court having found that appellants had failed to meet that burden, and this court being unable to say that the evidence preponderates to the contrary, they cannot prevail upon [the issue of whether a disputed corner should be replaced by proportionate methods].

170. *See supra* notes 46-50 and accompanying text.

171. 24 Wash. App. 852, 857-59, 604 P.2d 1304, 1307-08 (1979).

172. 53 Wash. 350, 102 P. 239 (1909).

trolled by government sections. *Town v. Greer* represented the culmination of a lengthy and unnecessary dispute made possible by the court's presumption that federal rules should control private property lines. The decision in *San Juan* is also the result of a presumption in favor of federal surveying rules. The *Town v. Greer* court finally reached an equitable solution by abandoning the federal rules after deciding that they were not applicable to the dispute before the court.[173] The *San Juan* decision, however, virtually precludes equitable solutions because it insists that the evidence to support a boundary monument be abandoned unless it meets the highest burden of proof. Once such evidence is found lacking, the *San Juan* decision directs the placement of a new monument according to rigid mathematical principles that preclude any consideration of the expectations of the parties before the court. Historically, courts have relied on monuments to protect the parties' expectations; the *San Juan* decision uses monuments to defeat them.

V. Conclusion

The presumption that parties transfer land in reference to physical marks on the ground is reasonable. Unfortunately, those marks will probably disappear with time, and yet the original grant of land must control all future grants, to prevent a party from inadvertently or purposefully contracting to sell property that he does not own. The technical words of the description of the property found in the deed are seldom adequate to guarantee exact relocation of lines; hence the courts are frequently the arbiters of boundary disputes. The rule that the monument's location controls the words of the deed is an attempt to solve the problems of boundary disputes in ways presumed to match the expectations of the parties. The rule may be given authority by an implied acceptance of statutory principles, or as a rule of construction, or as a rule which seems to be a guise for what is really an attempt by the court to reach an equitable solution in a particular circumstance. In some cases, the courts have been willing to admit evidence of any nature in an attempt to find the monument, because the results seem to reasonably match the general needs of social utility to promote stable boundaries and to protect the contracting parties. However,

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173. *Id.* at 357, 102 P. at 242.

when applied mechanically, the rule can only lead to incongruous decisions such as *San Juan*, and may only serve to defeat rather than enforce the expectations of the parties involved.

Such perplexing results could best be avoided by viewing the rule of monument control in its proper perspective. In all cases, it should be considered only a rule of construction, to aid in interpreting the language of the deed. Under such a system, the court may view all the evidence before it in an objective manner in an attempt to reach an equitable solution.

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