

Plaintiff's Deed

Dated and Recorded
May 2015

KNOW ALL MEN BY THESE PRESENTS, that I, CHARLES L. GUEST, (hereinafter whether singular or plural the "Grantor") in the State aforesaid, for and in consideration of the sum of FIFTY-EIGHT THOUSAND AND NO/100 DOLLARS (\$58,000.00), and subject to the restrictions, exceptions and limitations as hereinafter set forth, to the Grantor paid by RENATA XAVIER DE ASSIS, (hereinafter whether singular or plural the "Grantee") has granted, bargained, sold and released, and, by these presents, does grant, bargain, sell and release unto the said RENATA XAVIER DE ASSIS, her Heirs and Assigns, forever, in fee simple, the following described real property, to-wit:

ALL that certain piece, parcel or lot of land, situate, lying and being in Dorchester County, South Carolina, and shown and designated as Ranch Number 66-A on a plat entitled "Showing Portion of Greenwood Ranches With Dimensions Changed to Show the Relocation of and Widening of Sinclair Road" by J. O'Hear Sanders, Jr., dated March 23, 1971, revised March 24, 1971, and recorded in Plat Book 18 at Page 204 in the RMC Office for Dorchester County, reference to which plat is hereby made for a more complete description.

This being the same property conveyed to Charles L. Guest by deed of Estate of Patricia Gail Guest, said deed dated 9/25/00 and recorded 12/21/00 in Book 2575 page 95, Dorchester County RMC Office.

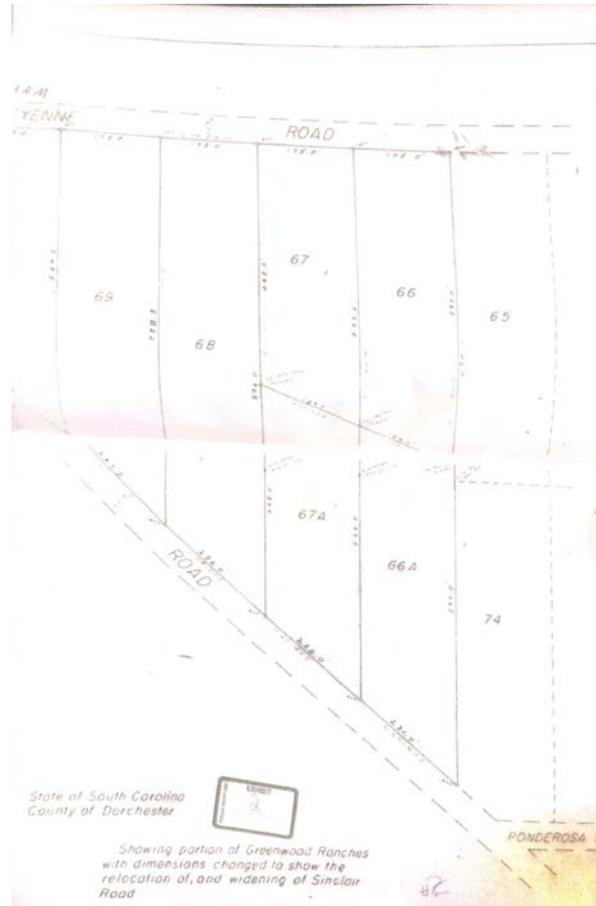
TMS No.: 128-03-03-011

GRANTEE'S ADDRESS: 204 Sinclair Drive
Summerville, SC 29483

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Grantee RENATA XAVIER DE ASSIS, and her Heirs and Assigns forever.

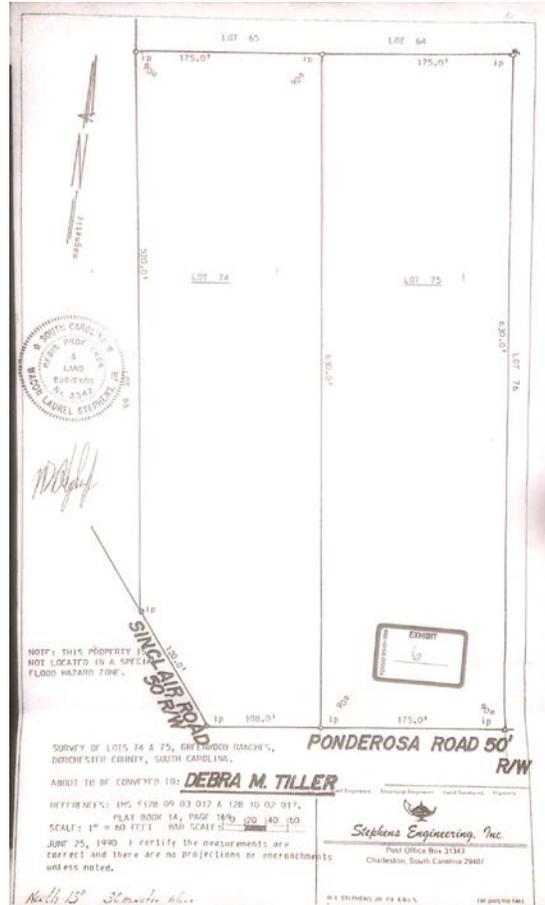
Plaintiff's Incorporated Plat in Property Description



Plaintiff's Expert's Boundary of Ranch 66A



Defendant's Closing Survey



Ways to Litigate Boundary Dispute

- “Generally speaking, there are several ways a disputed boundary line may be judicially *67 determined. It may be determined incidentally by an action in ejectment where the plaintiff is out of possession of property, or in trespass to try title where the plaintiff is in possession and believes the defendant has trespassed on his property. Additionally, disputed boundary lines may either be directly or indirectly judicially settled in actions to quiet title, actions for injunctions and declaratory judgment actions. Finally, the leading case of *Uxbridge Co. v. Poppenheim*, 135 S.C. 26, 133 S.E. 461 (1926) recognized an action in equity to settle or fix a boundary. A fair reading of the Knoxes' complaint shows they claim ownership and possession of the tracts in question and trespass thereon by Bogan. Under the case of *Beaufort Land & Inv. Co. v. New River Lumber Co.*, 86 S.C. 358, 68 S.E. 637 (1910), allegations of title and possession are sufficient to recover damages without proof of a “perfect title” in the plaintiff; such allegations support an action in the nature of *trespass quare clausum Fregit*. *Id.* at 362, 68 S.E. at 638. On the other hand, the purpose of an action in trespass to try title is to establish the plaintiff's title to the land. *Warren v. Wilson*, 89 S.C. 420, 71 S.E. 818 (1911). In such an action, the plaintiff must show title in himself and recover, if at all, upon the strength of his own title and not the weakness of his adversary's title. *Douglass v. Perry*, 245 S.C. 486, 141 S.E.2d 348 (1965). In an action of trespass to try title, one in actual possession, not obtained by tortious eviction, is regarded as the rightful owner until proven otherwise. *Cummings v. Varn*, 307 S.C. at 41, 413 S.E.2d at 831; see also *Beaufort Land*, 86 S.C. 358, 68 S.E. 637 (in a trespass to real property case, the court stated possession not obtained by a tortious act is prima facie evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself or a license to enter from the true owner).” *Knox v. Bogan*, 322 S.C. 64, 66–67, 472 S.E.2d 43, 45–46, 1996 WL 288451 (Ct. App. 1996)

Footnote 4 my order

- incidentally by an action in ejectment where the plaintiff is out of possession of property
- in trespass to try title where the plaintiff is in possession and believes the defendant has trespassed on his property.
- directly or indirectly judicially settled in actions to quiet title,
- actions for injunctions and
- declaratory judgment actions
- an action in equity to settle or fix a boundary

Quick Review: Damages or Title?

- Does your client seek to recover Damages?

Under the case of *Beaufort Land & Inv. Co. v. New River Lumber Co.*, 86 S.C. 358, 68 S.E. 637 (1910), allegations of title and possession are sufficient to recover damages without proof of a “perfect title” in the plaintiff; such allegations support an action in the nature of *trespass quare clausum Fregit*. *Id.* at 362, 68 S.E. at 638.

founded on possession

actual or constructive possession

actual occupancy is *possessio pedis*

constructive possession is *locus in quo* (showing title in the land)

actual occupancy of part of a tract of land



constructive possession extends to the whole

Does Your client seek to establish title in the land?

On the other hand, the purpose of an action in trespass to try title is to establish the plaintiff's title to the land. *Warren v. Wilson*, 89 S.C. 420, 71 S.E. 818 (1911). In such an action, the plaintiff must show title in himself and recover, if at all, upon the strength of his own title and not the weakness of his adversary's title. *Douglass v. Perry*, 245 S.C. 486, 141 S.E.2d 348 (1965).

In an action of trespass to try title, one in actual possession, not obtained by tortious eviction, is regarded as the rightful owner until proven otherwise. *Cummings v. Varn*, 307 S.C. at 41, 413 S.E.2d at 831; *see also Beaufort Land*, 86 S.C. 358, 68 S.E. 637 (in a trespass to real property case, the court stated possession not obtained by a tortious act is prima facie evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself or a license to enter from the true owner).”

Knox v. Bogan, 322 S.C. 64, 66–67, 472 S.E.2d 43, 45–46, 1996 WL 288451 (Ct. App. 1996)

Why Equity vs. Case at Law?

- Jury Trial
- Non-Jury
- Equity

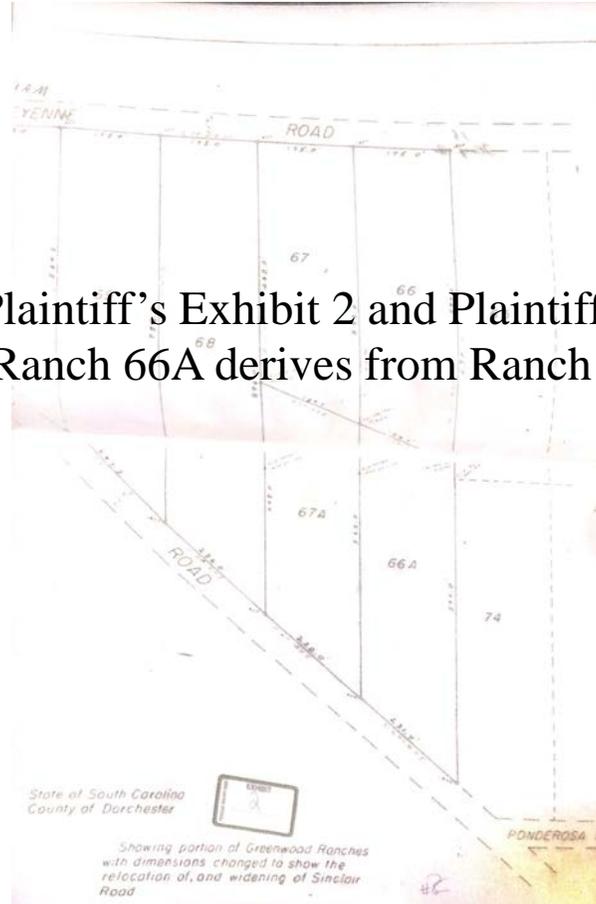
- Appellate

At Law: fact findings are final

In Equity: appellate court can take its own view of the facts

Exhibit 2: Carefully examine this exhibit:

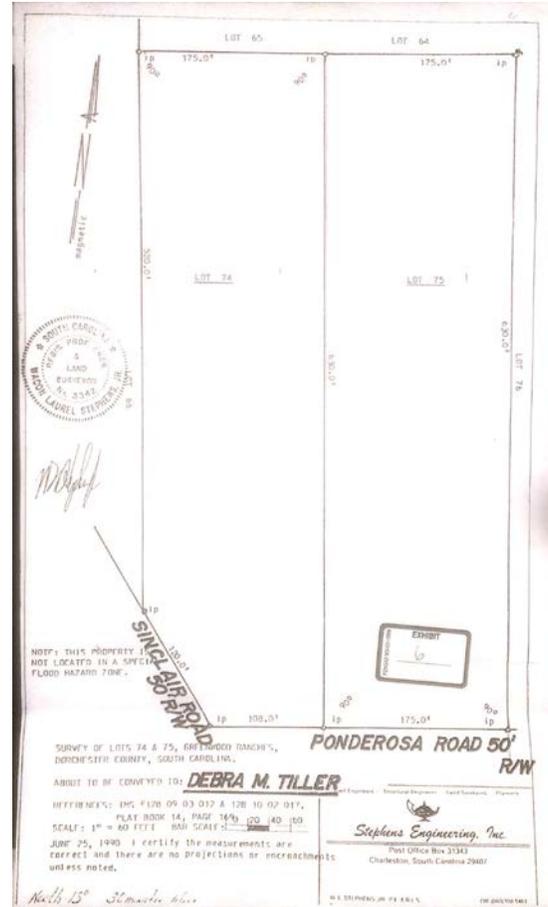
By comparing Plaintiff's Exhibit 2 and Plaintiff's Exhibit 5, the Court sees that Ranch 66A derives from Ranch 66

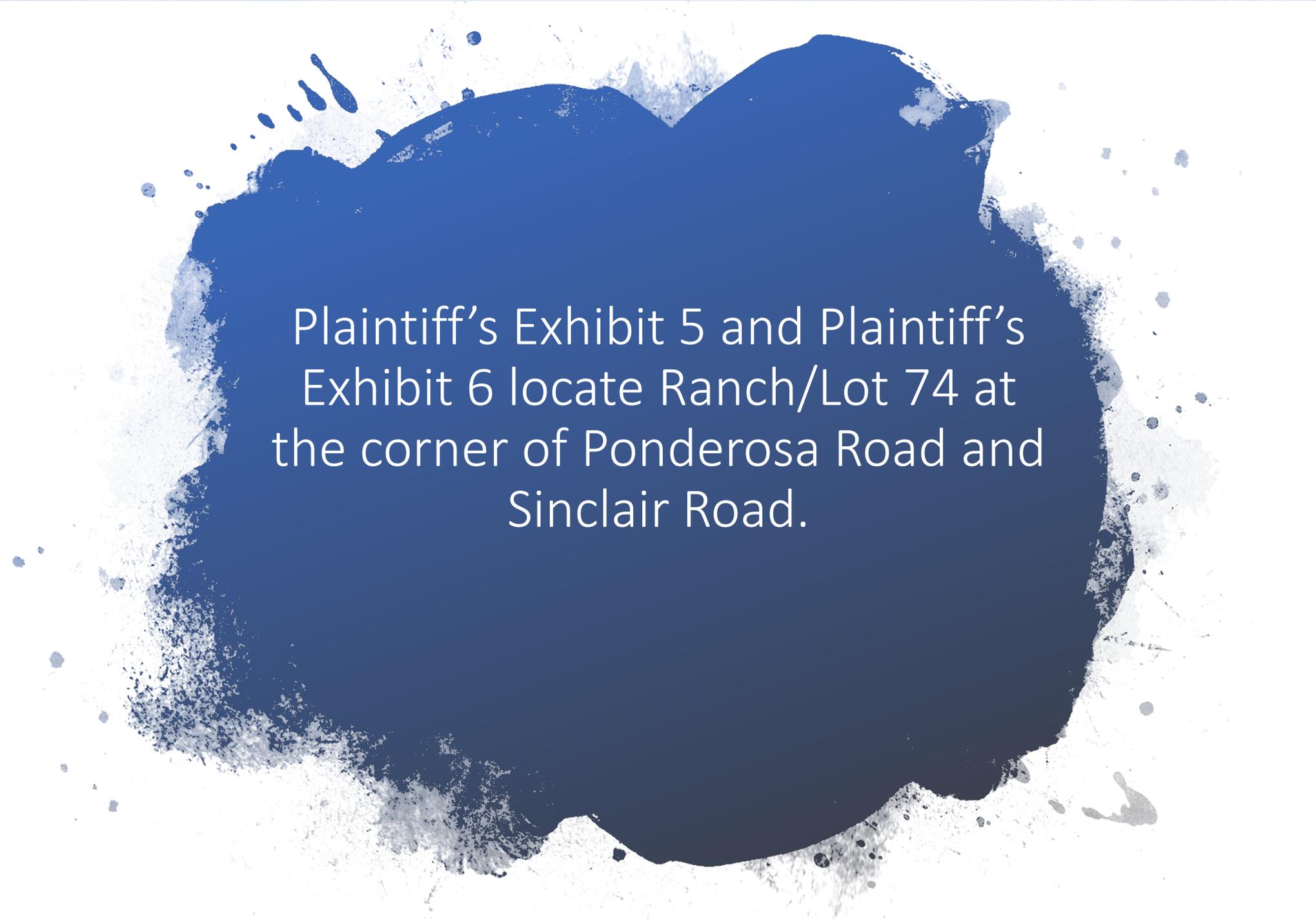


- By comparing Plaintiff's Exhibit 2 and Plaintiff's Exhibit 5, the Court sees that Ranch 66A derives from Ranch 66
- The property description in Defendant's deed refers to Plaintiff's Exhibit 5 by reference.
- Defendant's Ranch 74 identified on Plaintiff's Exhibit 5 shows that Ranch 74 is at the corner of the intersection of Ponderosa Road and the faintly depicted road previously identified as Sinclair Road

Comparisons: Now look at Plaintiff's Exhibit 6, dated June 25, 1990

-





Plaintiff's Exhibit 5 and Plaintiff's
Exhibit 6 locate Ranch/Lot 74 at
the corner of Ponderosa Road and
Sinclair Road.

- Plaintiff's Exhibit 6 fails to reference Plaintiff's Exhibit 2, which was recorded at the time Plaintiff's Exhibit 6 was made. Plaintiff's Exhibit 6 fails to note the iron shown on Plaintiff's Exhibit 2.

- Comparing Plaintiff Exhibit 2 and Plaintiff's Exhibit 6, the difference in the length of the common boundary of Ranch 66A and Ranch 74 is 77 feet. Comparing Plaintiff Exhibit 6 and Plaintiff's Exhibit 5, the difference in the length of the common boundary of Ranch 66A and Ranch 74 is 110 feet, i.e., Plaintiff's Exhibit 6 has a common boundary that is 110 feet short.

- Comparing Plaintiff Exhibit 2 and Plaintiff's Exhibit 6, the difference in the length of the boundary along Ponderosa is 67 feet short
- The Common boundary line of Ranch 66A and Ranch 74 on the 1970 Surveyor Sanders plat is 597 feet, a difference of 33 feet from the original subdivision map showing the common boundary line as 630 feet.
- Notably, the 1963 plat does state all Ranches are subject to roadway rights of way.

Let's Look at the Testimony

- The Plaintiff's description of the encounter on direct examination is: "We -- first time, before we bought it, we walked it, the property, and then Ms. Tiller showed up, and we were in the back of the property where it does not have any fence on the back, and she said that was part of her property, and then we were talking to her and said we were going to have a survey. See Page 10, lines 6 through 11."

Similarly, when cross examined by Mr. Brush the Plaintiff responded:

- Like I said, we were in the back of the property where there is no fence on the back, and she came and said, "Oh, you are on my property." And we just said, "Oh, we apologize." And we decided to have a survey done. See, Page 20, lines 13 through 17

- Plaintiff also testified that when she closed on her property, the closing attorney gave her a copy ... the Sanders plat of survey showing the revision of lots because of the widening of Sinclair Road.
- The Plaintiff also testified that she commissioned the Bass survey (Plaintiff's Exhibit 3).

Plaintiff's Expert testifies:

Question:

Does Defendant's Expert's Survey comport with the pins, and the lines, and the measurements that you found on yours?

Answer:

Yes.

- Mr. Bass' testimony concerning the Stephens plat (Exhibit 6), which he did not reference in his survey, suggests that the survey is correct as to the north line of Lot 74, and its angles at the northern corners. However, concerning the distance of the common property line between Lots 66A and 74, Mr. Bass testifies the Stephens survey is not correct. Mr. Bass found that the right of way of Sinclair Road is further to the southwest and the angle along Sinclair Road less acute. See, page 36, lines 13 – 25, page 37, line 1. In short, on the critical location of the southwestern corner of Lot 74, Mr. Bass testifies the Stephens plat is not correct. Mr. Bass furthermore testified, without objection, that his plat (Exhibit 3) "to a reasonable degree of certainty, as a [sic] field of surveying, that the boundaries shown on [his] plat for Lot 66 A, are the correct boundaries" Page 41, lines 11-15.

- The Defendant's testimony describes her history of owning lots 74 and 75.
- Her testimony is consistent with Defendant's Exhibit 1 and Plaintiff's Exhibit 5.
- Her testimony further reveals that she had the additional Stephens survey done at the time she purchased her property.
- Defendant further testified that she lived on Lot 75 at first.
- She testified Lot 74 when she bought it was raw land, and that she cleared it.

Defendant's view:

- She further testified it was growing up so fast that she put 125 to 150 goats on her lots.
- After two or three years owning the property she testified she erected the fence described above in 1992 or 1993.

- On further cross examination the Defendant admitted the first time she saw Plaintiff's Exhibit 2 was the day she saw Mr. Bass conducting his survey of the land of the Plaintiff.
- She admitted that, after that, she hired Ashley Engineering to survey her property.
- She further admits on cross examination that it is not her position that Exhibit 4 is incorrect (i.e., she admits it is correct) but that it is "very different from what she had." See Page 59, Line 5.

State of Mind: Defendant's Intent!

- Defendant's intent in building the fence:
her intention was not to take property from Lot 66:
- Plaintiff's Cross:
"you didn't do that with the intent of taking property from Lot 66, am I correct?"
- Defendant's Answer: No.

The Kicker:

- On cross examination the Defendant admitted that when she built the fence and her shed that she believed she was building it on her property.
- She admitted that when she built these she assisted in the installation,
- that she walked the line along Sinclair Road and found the corner pin. She stated, “It was very visible” See, Page 57, line 4.
- She further stated on cross examination “there was an iron offset from where the pine tree is.” See Page 57, lines 6-7.

Let's Pause Here:

- The Question:

“you didn't do that with the intent of taking property from Lot 66, am I correct?”

Consider this question:

- “you didn't do that with the intent of taking property from Lot 66, am I correct?”
- How about a simpler, more easily understood Question:
- Did you intend to take any of Lot 66?
- Use the simplest question. Avoids the Court’s consideration:

Simple Questions:

- Here I had to pause,.
- Did the double negative equal a positive statement?
- My answer, . . . the Defendant says: you are correct counselor, I did not intend to take any of Lot 66A.
- It's simply a confusing question; one that requires mental gymnastics by the fact finder.

Wigfall v. Fobbs, 295 S.C. 59, 367 S.E.2d 156, 1988 WL 36232 (1988),

- *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156, 1988 WL 36232 (1988), presented the question of whether the Master erred in determining the Defendant did not establish title to a tract of land through adverse possession.

Judge Condon's ruling;

- Since their possession was based on a mistaken belief of ownership, the master concluded they lacked the intention to dispossess the true owner, and therefore, their possession was not hostile.
- Judge Condon relied on cases holding the possession of land by an encroaching land owner beyond the true boundary under a mistaken belief regarding the location of the boundary is not hostile, citing *Brown and Lynch*.

Justice Ness:

Because this case does not involve a boundary dispute between adjoining landowners, the rule in *Brown* and *Lynch* is inapplicable. Further, we decline to extend the rule to cases involving adverse possession of a tract of land.

The Law of Acquiescence

- and
- **RECOGNITION!!!!!!**

The Summary:

- A summary of the boundary line by adverse possession and acquisition through adverse possession of an “entire tract” of land is as follows:
- In *Lusk*, which involved a boundary line dispute, the Court of Appeals noted that in South Carolina, unlike in most jurisdictions, possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession. Citing *Brown v. Clemens*, 287 S.C. 328, 338 S.E.2d 338 (1985). However, in *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (1988), this Court held that this rule is applicable only to cases involving boundary disputes between adjoining landowners. Here, this case involves a dispute over an entire tract of land; therefore, the mistaken belief rule set forth in *Lusk* is inapplicable. *Perry v. Heirs at Law & Distributees of Gadsden*, 316 S.C. 224, 225–26, 449 S.E.2d 250, 251, 1994 WL 487265 (1994); see also, *Clark v. Hargrave*, 323 S.C. 84, 89, 473 S.E.2d 474, 478, 1996 WL 393477 (Ct. App. 1996)
-

Moving On: Acquiescence (and recognotiton)

- Let's examine the case law

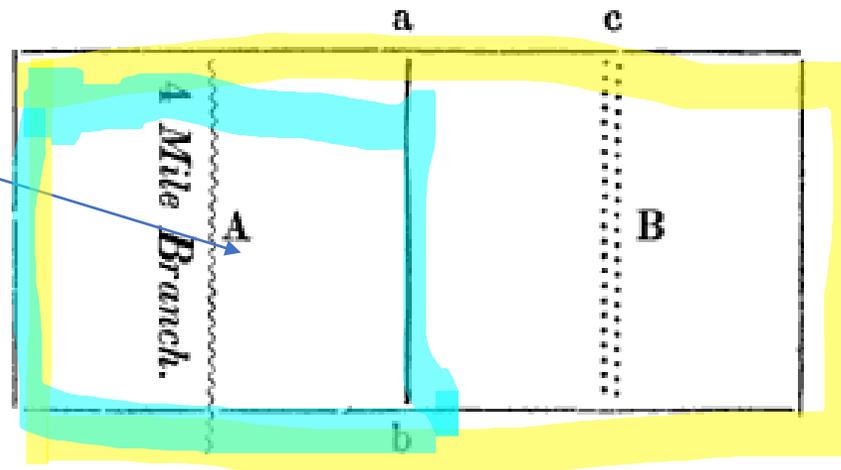
Jarrot v. McIlvaine, 30 S.C.L. 14, 1 Rich. 14, 1844 WL 2536 (S.C. App. L. 1844),

- https://books.google.com/books/content?id=on40AQAAMAAJ&pg=PA14&img=1&zoom=3&hl=en&sig=ACfU3U3rzH2cVOCVDs-J_alb8SQR6_X5NA&ci=104%2C952%2C826%2C523&edge=0

The Facts: whole diagram represents the M'Lendon grant (Common source).

This was an action of trespass to try titles.
Both parties claimed under one Dennis M'Lendon, to whom a grant of 263 acres had been made, in the year 1791. It appeared, also, that a part of the same land had been granted to Arthur Cobb, (one hundred acres,) in the year 1767. The accompanying diagram will explain these grants, and the controversy of the parties.

Cobb Grant
100 acres
1767



whole diagram represents the M'Lendon grant 1791 263 acres

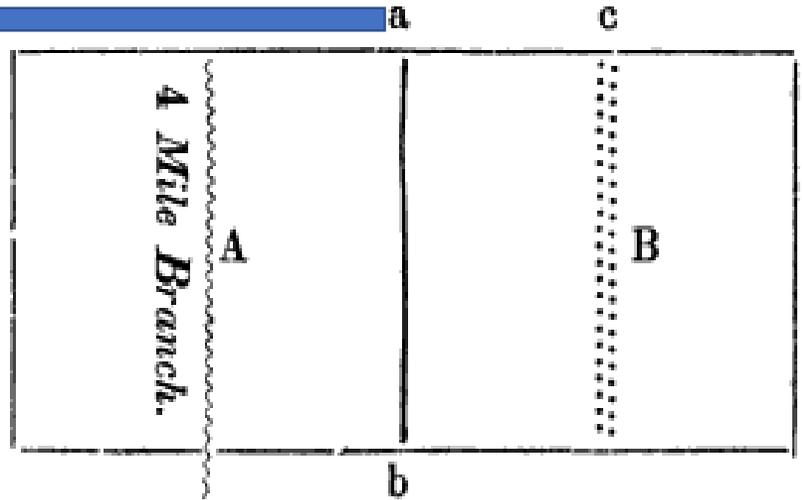
1819 Conn Survey

Plaintiff's Chain	Defendant's Chain
Jarrot	Mcilvane, (a gift, 1811) who married McCall's daughter
Hunter (1819)	McCall (1795)
McNeese (1772) 100 acres	Turner (1774) = 163 acres less 100 acres to McNeese
McLendon	McLendan (1771) ---



1819 Conn survey line *ab*

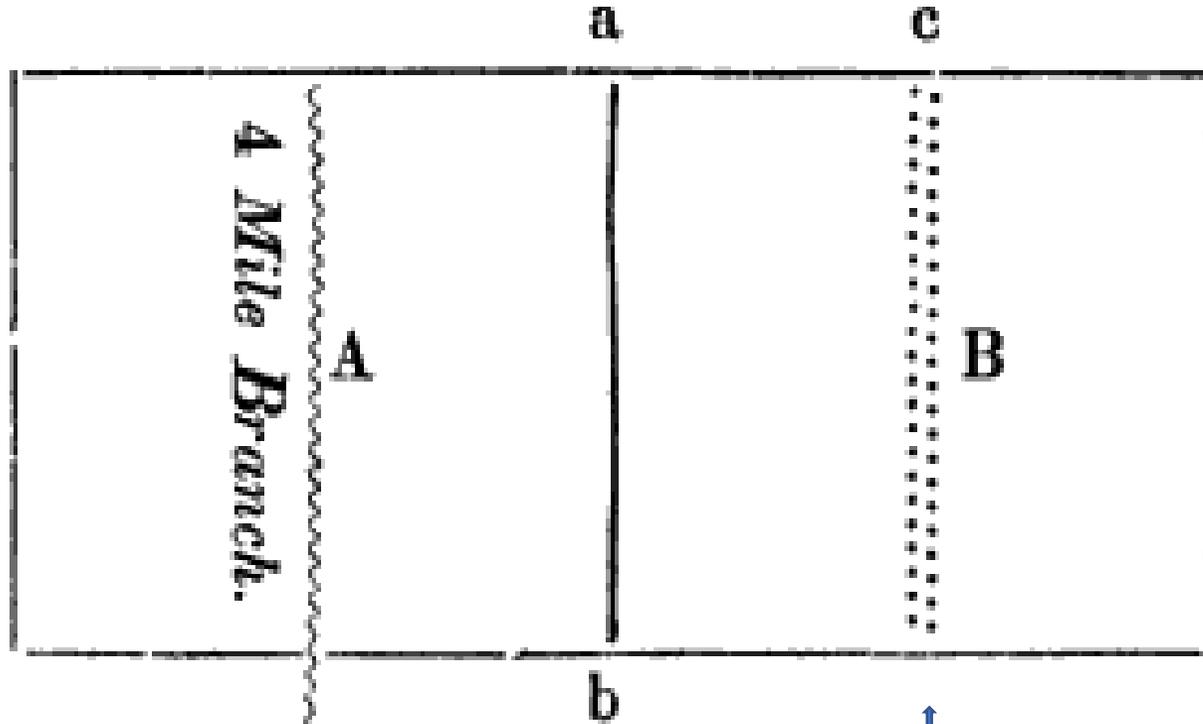
- M'ilvaine, was present and did not object.



Mcilvane was in possession but had no deed; and

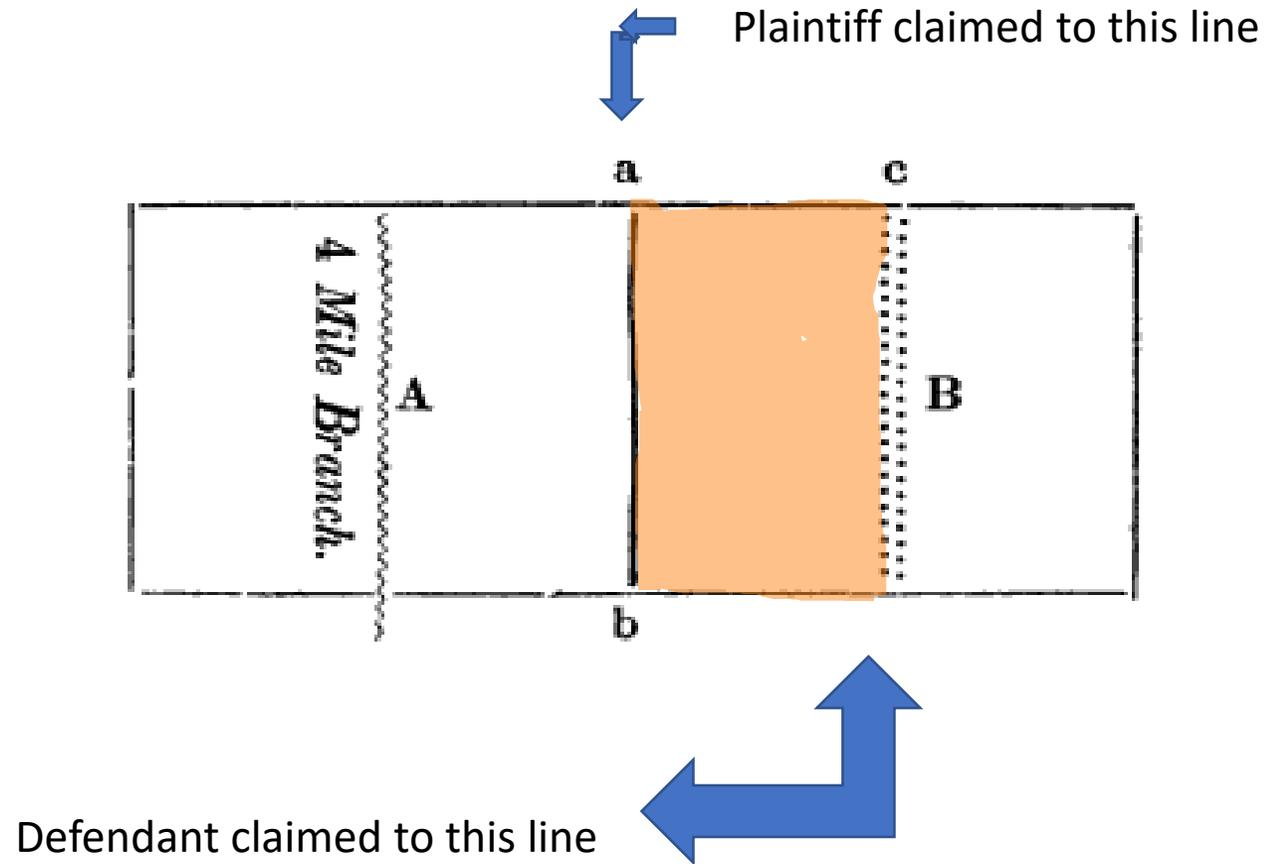
- in this way it was attempted to account for M'ilvaine's *apparent acquiescence*, when Hunter run *ab*, as the line between Hunter & Mcilvane.

Hunter Estate Survey (few years before trial)



- McIlvane was present
- contended that the line **ab**, was not the true line, but
- it was 10 or 12 yards to the east; (cf., 200 yds next slide)
- the line c

Disputed Area

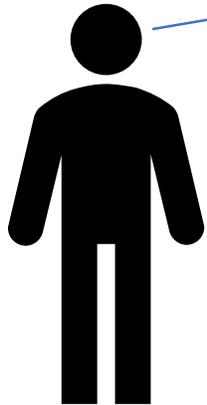


Witnesses: two sons of M'Call

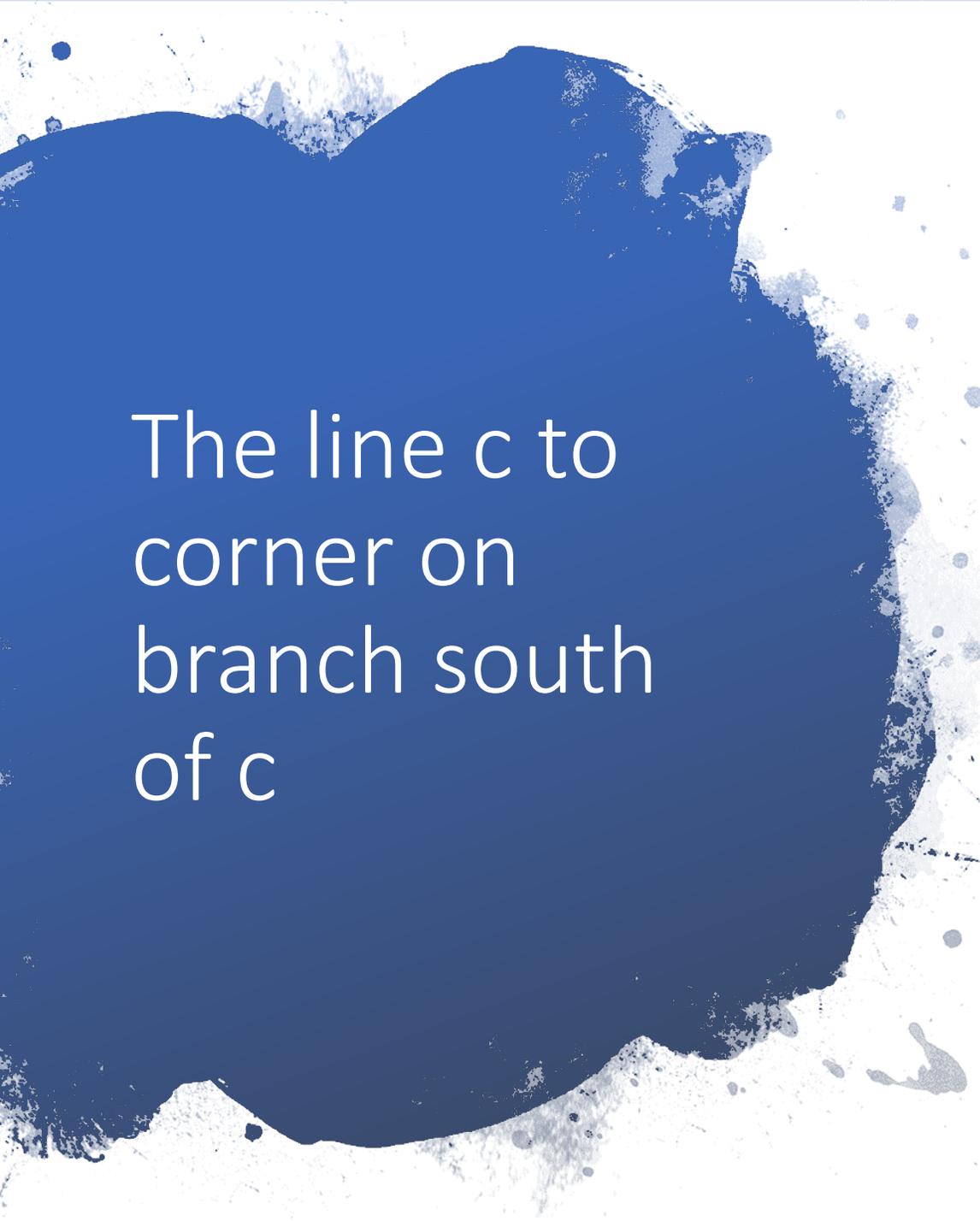
- a blackjack corner about 200 yards to the east of a,
at a point which is designated on the plat as c;
- from thence there was a line running to the south;
the line run to a corner on a branch;
- from some of the plats exhibited, there was a branch to the south of
the point c.
- .;

Parol evidence of acquiescence & recognition

“father claimed to c --- to corner on the branch south of c ”



whilst father owned the land, he was with his father, Hunter, and **Muldrow**, at the blackjack at c.



The line c to
corner on
branch south
of c

No evidence;

This line was not represented by
the surveyors; nor had any search been
made for it

The presiding Judge thought the evidence satisfactory, (though it might admit of doubt,) that ***ab*** was the east line of the Cobb grant, and in his charge to the jury assumed that as sufficiently proved

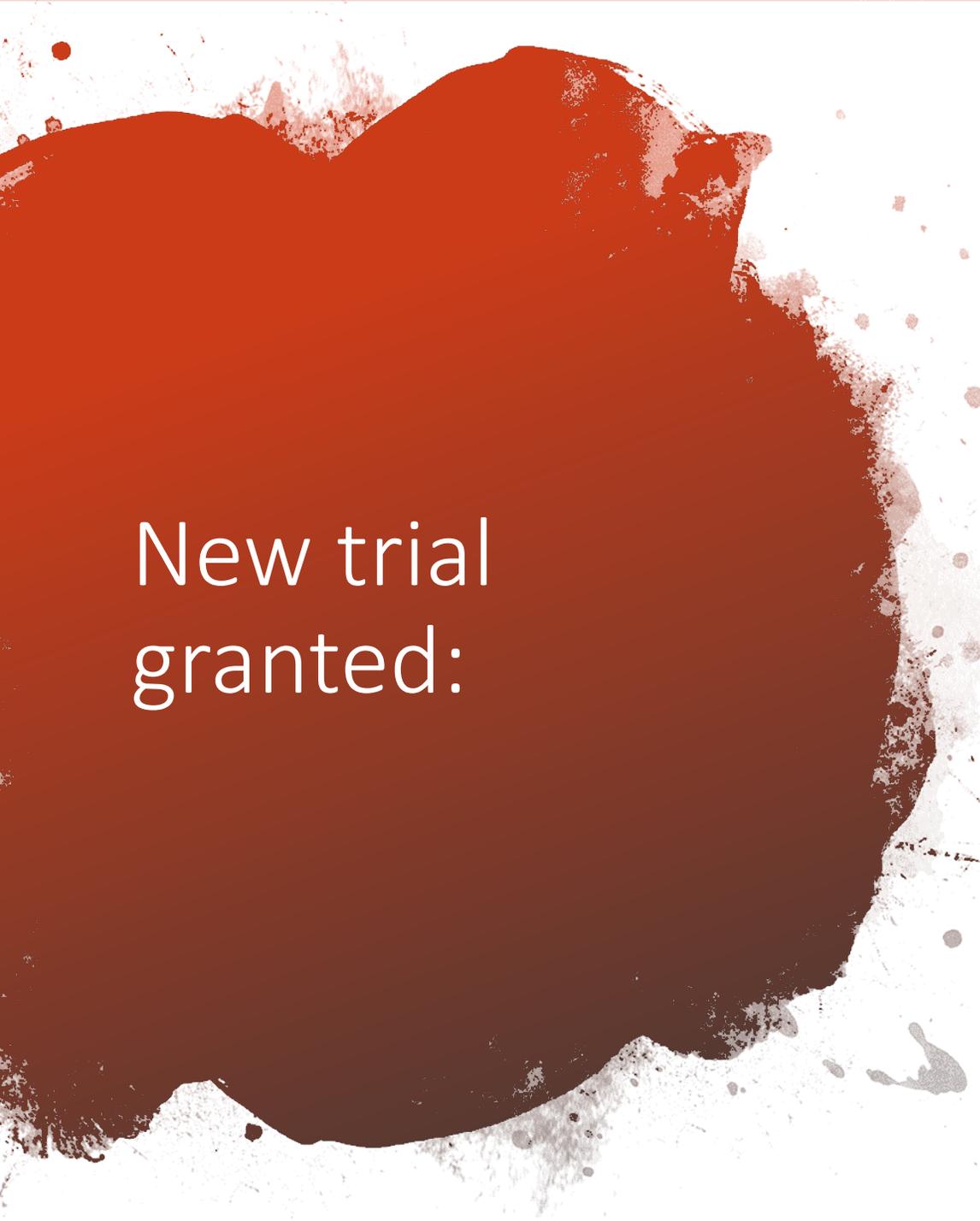
JURY INSTRUCTED:

The plaintiff had a right to go to ***ab*** line, unless

- controlled by some higher evidence of location.
- highest evidence of boundary was what had been done on the land; and where a line had been actually run by the parties, as the boundary line between them, this would control a call for another tract of land as the boundary;
- thus, although in the deed from M'Lendon to M'Neese, the Cobb land is called for as a boundary, which is found at ***ab***, yet, if they did, in fact, run a line from c, where the M'Calls say there was a line, then this line would be the boundary, although it should afterwards turn out that it was not the line of the Cobb land, as called for. That mere acquiescence in a line, or an admission as to the true line, are not binding on the parties; and that, therefore, M'ilvaine's acquiescence when Hunter run the line ***ab***, and Hunter's admission that the corner at c was the corner of the line between him and M'Call, were not binding on them, if the jury were satisfied the true line was elsewhere.

Plaintiff Appeals

1. That the deed of D. M'Lendon to John M'Neese called for the line of the grant to Arthur Cobb, which was clearly proved and located, and the plaintiff was entitled to recover to that line.
2. Because no other line but the Cobb line could be found by the surveyors, or shown by the defendant.
3. Because the presiding Judge erroneously charged the jury on the law as follows; that the boundary called for by M'Lendon's deed to John M'Neese, must prevail, unless a line has been agreed on by the parties. And although the deed of M'Lendon calls for the line of Cobb's grant, yet if it is proved that the parties have agreed upon another line, short of the Cobb line, the plaintiff must be restricted to the line agreed upon, although the agreement was by parol.



New trial
granted:

- *Curia, per* EVANS, J.

Assuming, as I did on the circuit, that a b on the plat was the line of the Cobb grant, the plaintiff had a right to locate his land so as to make that line his western boundary. This is the general rule, but it may be controlled by clear evidence that the parties actually run the dividing line at, or before, the execution of the deed, of which long acquiescence and acknowledgements would be evidence. If such a line as was proved by the two M'Calls had been found by the surveyors, and the jury were satisfied it was cotemporaneous with the deed to M'Neese, then I think the verdict should be supported; for it is clear that a line actually run will control a boundary called for in a grant, and the same rule should govern in a deed. But parol evidence that such a line had existed, without any search for it, or its location represented on the plat, is too vague and uncertain. A new trial must therefore be had, and the motion is granted.



This is the
general rule

- A party has a right to extend a party's boundary to the boundary called for in the deed.

The Cobb grant --
part A -- extends
to *ab*, Plaintiff had
a right to locate his
land so as to make
ab line his western
boundary.

The Exception:

but

- the general rule may be controlled
- by clear evidence
- that the parties actually run the dividing line at, or before, the execution of the deed,
- of which long acquiescence and acknowledgements would be evidence.

*No objective/
corroborating
evidence of the
line c to corner of
branch*

If such a line as was proved by the two
M'Calls had been found by the surveyors,
and

the jury were satisfied it was
cotemporaneous with the deed to
M'Neese,

then the verdict should be supported

for it is clear that a line actually run will
control a boundary

Parol evidence

But parol evidence that such a line had existed, **without any search for it**, or **its location represented on the plat**,

VAGUE AND UNCERTAIN!