

## **Land Boundary**

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### **Module 5**

Following the footsteps of the original surveyor is an idea that is frequently quoted in the context of resurveys- in fact, resolution of the contention between the Sellmans and the Schaafs, hinged on consideration of that very concept. Here is the case.

SELLMAN et. al.

(Grace, Reuben, George, and Marjorie, and Marilyn Snyder)

Appellants

versus

SCHAAF et al.,

(Charles L. and Dorothy E)

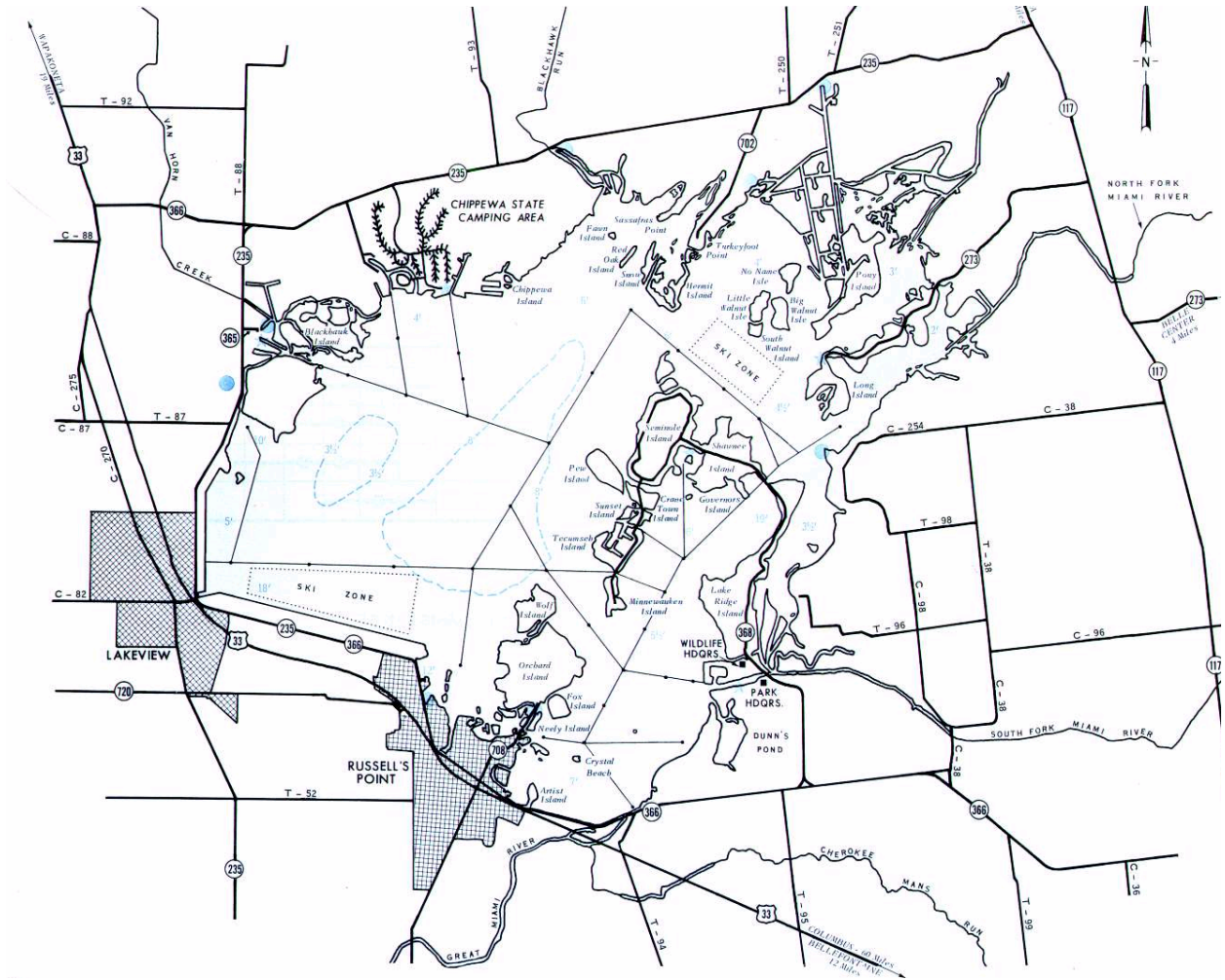
Appellees

Court of Appeals of Ohio,

Logan County

April 7, 1971

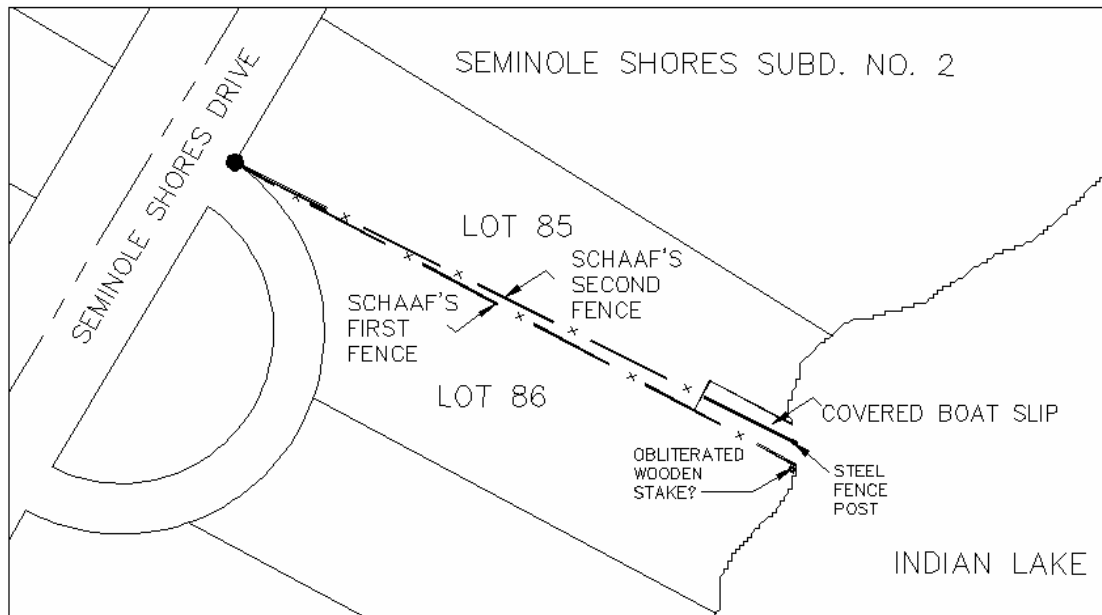
Ohio's Indian Lake is in Logan County. It has nearly 30 miles of shoreline and covers about 5,800 acres. Boating and water skiing are popular there and on its shores are resort homes, condominiums and residences. The villages of Lakeview, Russell's Point, Huntsville, Belle Center and Roundhead are nearby.



There are numerous islands on the lake; Orchard, Tecumseh, Shawnee and Seminole are among the largest. It was on Seminole Island, near the center of the lake, that this case arose.



In late 1944 Walter Toy, a surveyor laid out Seminole Shores Subdivision No. 2 on the island. The plat was approved and subsequently recorded in Logan County on December 20, 1944 in Book C at page 34. Even though a notation on the plat mentioned that all the lots had been staked, monumented with galvanized pipes, they were not all actually in place when the plat was recorded.



Sketch

Harry E. Johnson and John P. Schooley owned the land at the time the plat was recorded, but Mr. Johnson eventually became the sole owner. On August 26, 1950 Mr. Johnson sold Lot 86 of the subdivision to Mr. And Mrs. Leatherman and he also sold Lot 85 to Mr. And Mrs. Grafelman. The deeds were recorded later. The Leatherman deed, Lot 86, was recorded September 12, 1950 and the Grafelman deed, Lot 85, July 26, 1951.

Over the following year the Grafelmans began building a house on Lot 85 and built a boat slip with a roof over it near the southeast corner their property. Then on September 1, 1951 Mr. Grafelman sold the lot to Grace Sellman, Reuben Sellman, George Sellman, Marjorie Sellman, and Marilyn Snyder, known here as simply "Sellman". The Sellmans completed the house that the Grafelmans had started and used the property over the following years.

Later the Schaafs, Charles and Dorothy, acquired Lot 86 from the Leathermans on May 10, 1956. They recorded their deed on the same day. It seems that they were unusual in getting their deed recorded so quickly. The others in the chain of title on the subject properties seemed to have had delays in getting to the Logan County recorder. Nevertheless, "It is apparent from the testimony that possession was actually transferred in each case at the date on the deed or shortly thereafter." (*Sellman v. Schaaf*, 269 N.E.2d 60, 26 Ohio App.2d 35, page 63).

Sometime in the next three years, that is between 1956 and 1959, the Schaafs built the fence illustrated in the sketch and labeled, "Schaaf's First Fence." It was an extension of the south line of the boat slip and apparently both parties presumed that to be the line between the two lots, at least at that stage. "At some point in the ownership of the Sellmans and the Schaafs a fence was erected by Schaaf essentially continuing the south line of the boat slip, a line then assumed to be the dividing boundary between the two lots." (*Sellman v. Schaaf*, page 63).

Then something happened. In 1959 the Schaafs hired a surveyor, Mr. Lewis, to determine the line between the two lots. Apparently, Mr. Lewis found monumentation at the southwest corner of Lot 85 but none at the southeast corner. However, he did find stakes at other lot corners and using those as control determined the location of the southeast corner and subsequently the line between the lots. "He says only that he found no stake or monument," (*at the southeast corner of Lot 85*), "and proceeded to establish the line by reference to other discovered stakes in somewhat distant lots." (*Sellman v. Schaaf*, page 67).

Following the lot line that Mr. Lewis monumented the Schaafs moved their fence to the middle of the boat slip. This fence is shown in the sketch and is labeled, "Schaaf's Second Fence."

On October 17, 1960 Sellman recorded the deed to Lot 85 with the Logan County recorder and two days later on October 19, 1960 filed a petition against the Schaafs. "Sellman on October 19, 1960, filed a petition against the Schaafs, praying for a temporary and permanent injunction enjoining Schaafs from interfering with their possession to this, the defendant Schaafs filed an answer and cross-petition setting forth four causes of action:

1. In ejectment for recovery of real estate.
2. For damages for wrongful use of real estate
3. For prospective damage for continued use.
4. To quiet title, and also for a mandatory injunction to require plaintiffs to remove the boat slip from their premises.

Thereafter, the plaintiffs (*Sellman*) filed an amended petition joining as defendants their predecessors in title, the Grafelmans and the original dedicators, John P. Schooley and Harry E. Johnson; also joined were Mrs. Leatherman (Mr. Leatherman being deceased), and a Mr. Cary owning Lots 87 and 88 to the south of Lot 86. They then prayed for a temporary and permanent injunction against Schaafs (*defendant*) from interfering with the plaintiff Sellmans' use of the boat dock, a mandatory injunction to remove the steel fence erected by defendant Schaafs, for a determination of the true boundary line of the premises.” (*Sellman v. Schaaf*, page 63).

The Sellman’s lost this initial suit. The court denied their petition for injunction. It decided that the boundary between Lot 85 and Lot 86 did indeed bisect the boat slip. In fact, the Schaafs were awarded \$450 damages from the Sellmans for wrongful use of part of the Schaaf’s lot - though the court did award the Sellmans a judgment of \$450 against Grafelman, one of their predecessors in title. In fact, the Sellmans were required by mandatory injunction to remove the boat slip.

The Sellmans appealed the decision.

The Ohio Court of Appeals determined that the issue was not the mandatory injunctions that both the Sellmans and the Schaafs sought. In other words, the solution was not to be found in just forcing the Schaafs to remove the fence or forcing the Sellmans to remove the alleged encroaching boat slip. The court took the point of view that primary relief requested by both parties was actually the quieting of title to real estate and that the only real way to do that was to determine where the common boundary line between Lot 85 and Lot 86.

Both lots are on the Shore of Seminole Island and they both have their eastern dimension on Indian Lake. The western boundary of Lot 85 is on Seminole Shore Drive. The western boundary of Lot 86 is on a circular drive which comes off of Seminole Shore Drive. The common border between Lot 85 and Lot 86 is the subject of the dispute. More correctly the ownership of the narrow strip of land roughly represented by Schaaf’s first and second fences is the subject of the dispute. Therefore, since there is agreement on the southwest corner of Lot 85 the issue is narrowly defined around the position of the southeast corner of Lot 85. “However, the plaintiffs and defendants claim differing location for the southeast corner of Lot 85 which should be identical with the northeast corner of Lot 86. The plaintiff contends this corner lies to the south a short distance from the boat dock. The defendants, Schaafs, place the corner some distance north in

the middle of the boat dock. To determine the ownership of this pie shaped wedge it is necessary to analyze the law pertaining to descriptions, boundaries and surveys to place in proper perspective the evidence here presented.” (*Sellman v. Schaaf*, page 64)

One of the important facts the court mentioned in this deliberation was that the Seminole Shores Subdivision was created by survey with the plat following. “Thus, the subdivision is first done by the survey of the premises, establishing monuments, corner posts, etc, so that a physical or semi-physical dividing of the land with the attendant markings takes place. Then a ‘plat is made.’ The symbolic representation of what was done on the premises becomes the recorded documentation of the action taken and provision is made for the dedication and acceptance of public streets and ways. Today there are more regulations than existed at the time the plat here involved was made but the essential sequence of events remains the same.” (*Sellman v. Schaaf*, page 64). The essential fact here is that this was a subdivision by survey not by protraction meaning that retracement surveys must begin from the presumption that the lots created and monumented by original survey take precedence over the plat. As Brown writes:

“Lots within a subdivision have been created by an original survey with monuments. Some subdivision lots were created (created on paper without a field survey). These two different methods of originally creating lots result in different procedures used to determine a lot's location.

Principle. If interior lots of a subdivision were originally created by protraction, the lots are located by measurements from the subdivision boundaries; if interior lots of a subdivision were originally created by survey with monumentation then the original survey and monuments control lot locations.

Prior to the conduct of a lot survey the surveyor must determine whether the subdivision resulted from performance of a field survey in which the lots were created and monumented or whether the lots were created by protraction. The approach in a retracement is different for each situation.” [Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3<sup>rd</sup> edn, New York: John Wiley and Sons, Page 121]

The deeds for Lots 85 and 86 incorporated the information noted on the plat by reference. That information included measurements, courses, distances and monuments. In other words the plat is a symbolic representation of the actual physical marks on the Earth. The court concluded,

“The actual physical markings and location by monument or otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located.” (*Sellman v. Schaaf*, page 64).

“Principle. Original monuments set upon the ground, except where the intent is clearly otherwise, control facts given upon a plat.

The lines marked upon the earth represent the true full-scale map of the subdivision; the lines as marked upon paper are a shorthand representation of what the surveyor purported to do. When there is an inconsistency between the map and the facts on the ground, the map must yield to the facts on the ground. When facts cannot be established on the ground, that is, the lines were never run on the ground or are completely lost, the data on the map are the best available evidence (*Heaton v. Hodges*, 14 Me. 66).”

[Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3<sup>rd</sup> edn, New York: John Wiley and Sons, Page 125]

On the plat of Seminole Shores Subdivision there is a black dot at the eastern end of the line dividing Lots 85 and 86, there is no contention between the parties about the west end of that line. The legend stated that the dot meant that the surveyor, Mr. Toy, had set a galvanized iron pipe at that corner. Also the plat explicitly stated, “All lots have been staked.” However, “Whether the pipe was so placed is doubtful according to the testimony. . .” (*Sellman v. Schaaf*, page 65). Nevertheless, from the testimony during the appeal does establish that Mr. Toy had, in fact, set a wooden stake at the Southeast corner of Lot 85 during his original survey in 1944. It was also established that the wooden stake was no longer there.

“It will be noted the evidence itself, as presented by the two sides, basically does not contradict, but travels or points in these different directions. The defendants, the Schaafs, did not testify as to the position or identity of any original stake but predicated their claim on a new or resurvey from certain surviving monuments. Mrs. Leatherman called by Schaafs, testified first that she and her husband were shown corners of the lot and stakes on the ground when they bought . . . The basic



witness for the Schaafs is Lewis, the surveyor, who in 1959 surveyed the line for the Schaafs. He says only that he found no stake or monument and proceeded to establish the line by reference to other discovered stakes in somewhat distant lots. . . The defendants, Schaafs, contend this monument is utterly lost and resort must be had to the plat, to courses and distances and other monuments from which their surveyor (*Mr. Lewis*) relocates the point and hence the line. . . On the other hand, the testimony of the Sellmans does not in effect dispute the accuracy of this survey. These witnesses all testify as to the location of what they contend was the original monument placed by the original surveyor, Toy, and dispute the necessity for establishing the line by reference to any other monuments.” (*Sellman v. Schaaf*, page 67)

Therefore, the contention between the Sellmans and the Schaafs does not hinge on where or not Mr. Toy set a wooden stake at the Southeast corner of Lot 85, nor do they disagree that the wooden stake is no longer there. The contention between them comes down to whether or not evidence can establish where it once stood as the Sellmans believed or a resurvey based on the courses and distances from the plat is the correct recourse as the Schaafs believed.

As you recall the Schaafs had a resurvey done by Mr., Lewis. His determination of the Southeast corner of Lot 85 seemed to place it in a substantially different spot than Mr. Toy’s wooden stake. This leads to the question, “If the original wooden stake were still in place would there be a conflict between the courses and distances noted on the plat and the stake?” And if that were true then which should determine the boundary? Or said another way, “When corner established by a surveyor in setting up a subdivision differs from the description or plat what is to be done?”

On this question the court clearly came down on the side of the physical monument over the plat. “Although much discussion is set forth in the briefs dealing with the priority of calls and whether monuments govern courses and distances, it would appear the actual question is not initially this order of precedence but what was actually done by the original surveyor. It is inherent in the relationship between the survey on the land and the plat; the survey as actually made on the land must govern. It is Lot 85 as originally surveyed which we are trying to find, and by this we mean is original location on the ground. If this can in fact be found, it is that land that was sold, not the symbolic plat, and it is the land as marked out by the original surveyor that constitutes Lot 85; and likewise with Lot 86.

“We therefore conclude that the original survey by Toy in 1944 made on the 1944 established the monuments and lines by which the boundaries of the two lots here involved were delineated. If the original monuments can be established by parol or other evidence, they may be relocated upon the land irrespective of any deviation in courses and distances from other monuments as shown on the plat. The monuments the original surveyor established on the land govern and establish the line. Here, only one monument is in question and is determinative of the line. It is the stake placed by Toy at the time of the original survey and constituted the intersection of a north-south line (a measurement or traverse line) near the lake front with the east-west line between Lots 85 and 86. The plat designates that such a monument, artificial in character but nevertheless a monument, was placed by Toy, the original surveyor. This court is in essence doing that which a second surveyor would do. It is attempting to follow Toy's footsteps and establish what he actually did on the land itself. If this can be established, it takes priority; if not, then we must turn to the use of the plat and courses and distances from other monuments actually located.

Essentially, the evidence in this case is predicated upon each of the two routes to the establishment of a boundary line. The Plaintiffs, Sellmans, contend that, although the stake is gone, its actual location may, by evidence, be established sufficiently to define the line. The defendants, Schaafs, contend this monument is utterly lost and resort must be had to the plat, to courses and distances and other monuments from which their surveyor relocates the point and hence the line. As we have seen, the establishment of the position of the original stake as placed in November, 1944, by Toy, the surveyor, takes precedence. If the evidence can establish this location, then the steps of the original surveyor having been followed, the case is ended. The original position so established, governs. (*Sellman v. Schaaf*, page 67)

In other words, the two theories of the case never collide. If the proof establishes the position of the corner (actually a stake placed to mark the intersection of a traverse line and the line between Lots 86 and 85) with reasonable accuracy and this is, in fact, the position of the stake as placed by Toy, then under the law as we have analyzed it, this must govern even if Toy was in error in the original placement. On the other hand, if this location is not established, then the monument is lost completely. Then, the resurvey as made Lewis based upon courses and distances shown on the plat as run from found and established monuments must govern and there is no expert testimony contradicting him. The issue then boils down to the evidence of the

location of the stake. If this is established by the appropriate degree of proof, then the line must be so established. If it is not established by the appropriate degree of proof, the survey by Lewis replacing the lines by the next best method must govern. In a word the issue depends upon the case made by the plaintiffs, Sellmans, for if their proof fails, the Lewis survey must prevail.

As indicated in prior paragraphs, we consider the basic issue here to be a mutual action to quiet title and the balance of the relief requested by both parties is ancillary and subsidiary to this question and this basic issue must therefore be governed by the preponderance of the evidence.

Do the Sellmans and their witness establish the location of the original traverse point as marked by a stake set by the original surveyor, Toy, and do they establish this by a preponderance of the evidence?" (*Sellman v. Schaaf*, page 68)

The court's answer to this question was, yes.

"Without analyzing in detail the testimony of the various plaintiffs who are the owners in common of Lot 85, and of the others called by them we arrive at certain basic conclusions of fact.

The original surveyor, Toy, did mark the various corners of the lots including the intersection of the traverse line and the common boundary of Lots 85 and 86 by wooden stakes in 1944

When the Sellmans purchased Lot 85 in 1951, there was a wooden stake about a foot or foot and one-half south of the southeast corner of the boat slip The position of this stake may be located within practical limits necessary to establish a common boundary between Lots 85 and 86 since there is no issue as to the location of the west terminus of the line.

There is now no stake at this position at the corner of the boat slip.

In the survey of federal lands, many special rules appear to govern but one distinction made in these rules appears to be reasonable and applicable to the present situation. This is the distinction made between an 'obliterated' corner and a 'lost' corner. Thus the stake if 1951 is not lost - its position can be shown by competent testimony which is undisputed and

which is reasonably the same from a substantial number of witnesses. Mrs. Leatherman, called by the defendants, Schaafs, in her first recollection, so located this stake, although in cross-examination her answers are vague and less definite. However, the question narrows to the problem of the identity of the stake of 1951 and the stake of 1944. If the stakes are identical, then the monument placed by the original surveyor Toy is not lost simply obliterated and its position is established. If the proof fails as to identity, the monument is lost and the point and thus the line must be considered lost and relocated by the Lewis survey.” (*Sellman v. Schaaf*, page 69-70)

Here it might be appropriate to point out the difference between a lost and an obliterated corner. The distinction is an essential principle of the Public Lands Rectangular system, but the court has seen fit to mention it in the context of this case. An obliterated corner is a corner at which “there are no remaining traces of the monument or its accessories, but whose location has been perpetuated or may be recovered beyond reasonable doubt, by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, witnesses, or by some acceptable record evidence.” (Definitions of Surveying and Associated Terms, American Congress of Surveying and Mapping and the American Society of Civil Engineers, 1972, Page 43).

A lost corner is a corner which “cannot be recovered beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears on the original position, and whose location can be restored only by reference to one or more interdependent corners.” (Definitions of Surveying and Associated Terms, American Congress of Surveying and Mapping and the American Society of Civil Engineers, 1972, Page 42)

“It is our conclusion that the identity is established by a preponderance of the evidence and that the stake of 1951 is the same stake placed by the original surveyor, Toy.

Although there is a period of six years between the sale of the lot to Graefelman by Johnson in 1950 and the placing of the stake by Toy in 1944 there is no evidence the original stake was moved or replaced during the period. There was some testimony by Lewis that dredging operations had occurred near other lots but at no time was it indicated nor was it testified to that Lots 85 and 86 were specifically affected. Johnson the then owner establishes the identity of these stakes of 1944 and 1950.

The identity of the 1951 stake with the stake pointed out by Johnson to Graefelman in 1951 is established by Grafelman.

The actions of Toy, the surveyor, in 1951, at the Labor Day Conference on the site are consistent only with the conclusion that he recognized the stake as his and as located by him, Toy, it is testified, explicitly identified the stakes then on the premises as his.

The testimony indicates that measurements made in 1951 were exactly as shown on the plat as to the distance between the two stakes on the traverse line- a highly unlikely result if either of the stakes was different.

Although this testimony is made by interested parties they are parties in a position to observe: their testimony is uncontradicted and there is substantial mutual corroboration.

Concluding then that the stake of 1944 is the stake of 1950 and that the stake of 1950 is the stake of 1951, we find that the stake marking the intersection of the traverse line with the common boundary of Lots 85 and 86 as placed by Toy the original surveyors not lost, but, being merely an obliterated monument, its position for all practical purposes is established and must govern the location of the boundary.

The witnesses differ slightly as to their distance from the boat dock wall, varying from 'just south (of) the boat slip' to one and one-half feet south. The plat made by Lewis and marked Exhibit D locates this line by reference to the fence that had been in place for many years. Extending this fence line establishes the boundary line at 54 feet from the edge of the boat slip roof and for practical purposes represents the boundary as originally surveyed by Toy.

This, then, we determine to be the line between Lots 85 and 86 and title to the disputed land north of the line as so located is quieted in the plaintiffs, Sellmans, et al. Title to the disputed land south of the line as so located is quieted in the defendants, Schaafs.

Turning to the prayer of the petition and cross-petition supplemental and ancillary relief prayed for:

1. The defendants Schaafs' prayer for recovery of the triangular parcel as established by the survey of Lewis is denied.
2. The defendants Schaafs' prayer for damages is denied.
3. The defendants Schaafs' title is quieted as above set forth.
4. The defendants Schaafs' prayer for a mandatory injunction is denied.
5. The plaintiffs Sellmans' prayer for an injunction is granted to the extent that defendants Schaafs are enjoined from interfering with the use by Sellmans of the land north of the boundary so established and are directed to remove the steel fence from the Sellman premises as herein determined and are further directed to remove the steel pipe placed by them or caused to be placed by them in the boat slip area of Lot 85.
6. The plaintiffs' prayer that the true boundary line be determined is granted as aforesaid.
7. The plaintiffs' prayer for alternative relief against their predecessors in title is denied.

Costs are assessed against defendants Schaafs and the cause is remanded to the Court of Common Pleas for execution and enforcement of the judgment.

Judgment accordingly

Younger P. J., and GUERNSEY, J, concur.” (*Sellman v. Schaaf*, page 69-70)

Simply put the Schaafs won the initial petition and the Sellmans won on appeal. The principle of “following in the footsteps of the original surveyor” was firmly established in this case. As the court wrote, “This line of reasoning is buttressed by the concept governing all resurveys. When an original survey has been made, it is not the plat or the metes and bounds description that is primary. The primary function of the second surveyor is to find first where the first surveyor established the boundaries. Only where this becomes impossible of accomplishment does the second survey turn to the courses, distances and still existent monuments to determine the boundaries. The essential rule governing the resurvey is to follow the steps of the first surveyor.” (*Sellman v. Schaaf*, page 65)

The case of *Sellman v. Schaaf* is well known for its reinforcement of the that the primary duty of a surveyor making a resurvey of a parcel is to first discover the boundaries and corners as established by the original surveyor on the land itself regardless of deviation from the course and distance indicated on the plat.

However, there were at least two other interesting issues that came up along the way.

### **The Standing of a Plat in a Subdivision by Survey**

Where a plat that subdivides land into lots is derived from a survey, the plat is secondary. In a conflict between the plat and a monumented survey is made after the survey from which it is derived the plat yields. The monuments placed and the boundary lines established on the ground by the monument are primary.

### **The Standing of Original Monuments**

Where original monument monuments as located surveyor still exist or where an obliterated monument's position can be ascertainable by parol or other evidence boundary lines determined by such monuments will determine boundaries of lots regardless of deviation from courses or distances as set forth in plat. In this case a wooden stake marking intersection of traverse line with common boundary of lots was a sufficient verified monument placed by the original surveyor during the original survey of the parcels. In answer to the question of whether the wooden stake was a sufficient monument in view of the fact that it was not the iron pipe called for on the plat the court responded.

"Although monuments set at the time of an original survey on the ground and named or referred to in the plat are the best evidence of the true line, if there are none such, then stakes actually set by the surveyor to indicate corners of lots or blocks or the lines of streets, at the time or soon thereafter, are the next best evidence."

It was determined by the court that even though it was obliterated, it was not lost because its position could be established by a preponderance of evidence. As the court pointed out, “In the discussion of the relocation or re-establishment of government corners, a distinction is frequently drawn between “obliterated” corners and “lost” corners, the importance being that in the case of an obliterated corner the investigation is directed toward the determination of its original location while in the case of a lost corner the question is one of relocating the corner by a new survey. For the purpose of this distinction an obliterated corner may be defined as one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence. A lost corner is one, which cannot be replaced by reference to any existing data or sources of information.” Ultimately this wooden stake governed location of boundary between lots even though it deviated from course and distance on plat.

### **Summary**

Perhaps the best summary of this case is from Clark:

“Theory of the following surveyor.-The cardinal principle guiding a surveyor who is running the lines of a previous survey is to follow in the footsteps of the previous surveyor. The essential rule of a resurvey is to follow the steps of the first survey. Where a survey is once made and parties have acted on the strength of the surveyor's lines, property rights have arisen which cannot be taken away without the consent of the owners, regardless of the errors committed by the original surveyor. It is the extensive duty of the retracing surveyor to see what the first surveyor did, not what he should have done. No matter how inaccurate the original survey may have been, it will be conclusively presumed to be correct and, if there is error in the measurements or otherwise, such error is the error of the last surveyor. Hence the surveyor will at all times, keep this presumption in mind and conform his acts thereto.” [Grimes, J.S. (1976) *Clark on Surveying and Boundaries*, 4<sup>th</sup> edn, New York: Bobbs-Merrill, Page 339-340]