28 Mass. Prac., Real Estate Law § 4:37 (4th ed.)

Massachusetts Practice Series TM | December 2017 Update
Real Estate Law
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Part I. Treatise
Chapter 4. Types and Elements of Deeds

§ 4:37. Elements of deeds—Descriptions—Boundary on a public or private way, watercourse, wall, fence, railroad right of way, or other similar linear monument

West's Key Number Digest
- West's Key Number Digest, Boundaries 11 to 23

Legal Encyclopedias
- C.J.S., Boundaries § 14
- C.J.S., Boundaries §§ 25 to 45

Prior to January 1, 1972, a grant "by" or "on" a private way carried title to the center line of the way assuming the grantor's ownership extended thereto; a grant "by the line of" a private way only extended to the sideline.[1]

Today, under the so-called "derelict fee statute" (M.G.L. c. 183, § 58) any grant of land abutting a public or private way includes the grantor's fee interest therein, "unless

(a) the grantor retains other real estate abutting such way, watercourse or monument, in which case,

(i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or

(ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or

(b) the instrument evidences a different intent by an express exception or reservation and not alone

by bounding by a side line."[2]

This statute applies to most public ways, because a public way is presumed to be only an easement for public travel, with the fee ownership of the underlying land remaining in the abutting landowners.[3]

A series of uncodified legislative enactments all provide that the derelict fee statute applies retroactively to instruments executed prior to the effective date of the original legislation (January 1, 1972) and subsequent amendments, except where land was "registered and confirmed" under M.G.L. c. 185 "before said effective date or to the extent that any person or his predecessor in title has changed his position as a result of a decision of a court of competent jurisdiction."[4]

Moreover, every instrument passing title to real estate abutting public or private watercourse, wall, fence or other similar linear monument includes any fee interest of the grantor in the real estate, with the same qualifications as to ways for retained real estate and express exceptions or reservations.[5] However, land bounded "by" or "on" the ocean only goes to the mean low water, or 1,650 feet from mean high water, whichever distance is shorter.[6]

This statute, called by conveyancers the "derelict fee statute," does not apply If land bounded by a lot that looks like a road or way but is not labeled "proposed road" or "proposed way" on any recorded plan or deed.[7]

A lot bounded by the end of a way is not an "abutting" lot.[8]

A description of land as bounded "by land of" another is a reference to a monument, even though there is no visible evidence of such line upon the land.[9] Where a monument is stated to be land formerly belonging to A, and additionally described as now or lately of B, the identity of the monument does not change.[10]

The true boundary line of the adjoining owner governs, even though this may be different from the conventional line considered by the parties.[11] Even where the adjoining owner has set up and maintained a fence under a mistaken belief that the boundary was the true line, the line of the fence does not govern.[12]

Footnotes

a0 Of the Massachusetts Bar.

1 Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 205 N.E.2d 222 (1965); Daviau v. Detourney, 325 Mass. 1, 88 N.E.2d 541 (1949); Erickson v. Ames, 264 Mass. 436, 163 N.E. 70 (1928). Prior to the adoption of the statutory presumption, it had been held that, when a description measures a distance from a boundary such as a way or a stream, there is a presumption that the measurement is made from the side line thereof,

rather than from the center. This is a reasonable presumption, unless something appears affirmatively in the deed to show that the measurement began at the center line. See Smith v. Hadad, 1 Mass.App.Ct. 637, 305 N.E.2d 515 (1973), aff'd 366 Mass. 106, 314 N.E.2d 435 (1974).

[2] M.G.L. c. 183 § 58. The statute "establishes an authoritative rule of construction for all instruments passing title to real estate abutting a way, either public or private and whether in existence or merely contemplated (so long as it is sufficiently designated …)." Tattan v. Kurlan, 32 Mass.App.Ct. 239, 242–243, 588 N.E.2d 699, 702 (1992). In addition, the legislation "is stricter than the common rule which it codified and superseded. The statutory presumption is conclusive when the statute applies, unless … [the instrument passing title contains the express reservation required by M.G.L. c. 183 § 58(b)]. Other 'attendant' evidence of the parties intent is no longer probative." 32 Mass.App.Ct. at 243–244, 588 N.E.2d at 703.

The court did not reach the merits of a constitutional challenge to retroactive application of the statute in Zora Enterprises, Inc. v. Burnett, 61 Mass.App.Ct. 341, 345, 810 N.E.2d 835, 839 (2004), cert. denied 543 U.S. 1150, 125 S.Ct. 1322, 161 L.Ed.2d 112 (2005).

[3] City of Boston v. Richardson, 95 Mass. (13 Allen), 146, 159 (1866) ("The right of the public in a highway, even when so ancient that its origin is unknown, is ordinarily limited to an easement for the purposes of travel; and upon the taking of land for a highway by authority of the legislature very clear words are necessary in order to vest in the public the fee in the soil.")

Opinion of the Justices, 297 Mass. 559, 561-562, 8 N.E.2d 179, 181 (1937):

> Highways and other public ways commonly have been laid out and established by the Commonwealth, counties, towns, cities or districts. The public acquire by the location of such ways a right of passage for the purpose of travel over the land taken with all the powers and privileges necessarily implied as incidental to the exercise of that right. The easement of travel is coextensive with the limits of the highway, and includes every reasonable means of passage and transportation for persons and commodities and of transmission of intelligence. Commonwealth v. Morrison, 197 Mass. 199, 203, 83 N.E. 415, 14 L.R.A.(N.S.) 194, 125 Am.St.Rep. 338. It has always been held with respect to land included within the limits of the public way "to be clear that the public have no other right, but that of passing and repassing; and that the title to the land, and all the profits to be derived from it, consistently with, and subject to, the right of way, remain in the owner of the soil." Stackpole v. Healy, 16 Mass. 33, 34, 8 Am.Dec. 121; New England

> Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835; Sears v. Crocker, 184 Mass. 586, 69 N.E. 327, 100 Am.St.Rep. 577; Opinion of the Justices, 208 Mass. 603, 94 N.E. 849; General Outdoor Advertising Co., Inc. v. Department of Public Works, 289 Mass. 149, 190, 193 N.E. 799.

Dellert v. Geryk, 1995 Misc. 218065, "Decision," 13 Land Ct. Rptr. 37, 40, 2005 WL 5454304 (2005) (Lombardi, J.), ("The law is well-established in this Commonwealth that a public way is presumed to be limited to an easement unless shown otherwise. [Citations omitted.]"), *affirmed as modified,* 66 Mass. App. Ct. 11117, 850 N.E.2d 620 (Table), 2006 WL 1975436 (2006) ("[T]he judgment is amended to delete the following words: 'the fee to the easterly half of the Layout opposite the Dellert parcel, as well as the entirety of the Layout south of the Dellert parcel to the land of Fowles, remains in the Conners or their heirs or assigns.' As so amended, the judgment is affirmed."), *review denied,* 447 Mass. 1110, 854 N.E.2d (Table) (2006).

Nylander v. Potter, 423 Mass. 158, 161, 667 N.E.2d 244, 246 (1996) ("When the town of Warwick discontinued Bachellor Road as a town road, the landowners abutting the road had full ownership interest in the roadbed. [Citations omitted.]").

[4] St. 1971, c. 674, § 2; St. 1973, c. 185, § 2; St. 1990, c. 378, § 2. Text of these legislative enactments will be found in the "Historical and Statutory Notes" for M.G.L. c. 183, § 58. The court did not reach the merits of a constitutional challenge to retroactive application of the statute in Zora Enterprises, Inc. v. Burnett, 61 Mass.App.Ct. 341, 345, 810 N.E.2d 835, 839 (2004), cert. denied 543 U.S. 1150, 125 S.Ct. 1322, 161 L.Ed.2d 112 (2005).

Retroactive application of the statute was expressly upheld in Buteau v. Hebard, 11 Land Ct.Rptr. 267, 269, 2003 WL _ at *_ (2003) (Sands, J.), citing Nantucket Conservation Foundation, Inc. v. Russell Management, Inc., 380 Mass. 212, 402 N.E.2d 501 (1980).

[5] Moreover a railroad right of way is considered a linear monument. Rowley v. Massachusetts Electric Co., 438 Mass. 798, 784 N.E.2d 1085 (2003).

[6] The Colonial Ordinance of 1641-1647, available on line at the Massachusetts Trial Court Law Libraries internet web site http://www.lawlib.state.ma.us/docs/colonialordinancesof1651.pdf, states as follows in the second paragraph under the heading "Liberties Common":

> [I]t is declared, that in all creeks, coves and other places, about and upon Saltwater, where the Sea ebbs and flows, the Proprietor of the land adjoyning, shall have proprietie to the low water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebs

> farther. Provided that such proprietor shall not by this libertie have power to s top or hinder the passage of boats or other vessels in, or through any Sea, creeks, or coves, to other mens houses or lands.

The form of citation to the Colonial Ordinance varies. It may be cited as "the colonial ordinance of 1647 … See The Book of General Lawes and Libertyes at 50 (1649). The ordinance is sometimes referred to in the books as the 'Colonial ordinance of 1641' (*Mayhew v. Norton,* 17 Pick. 357, 359 [1835]) or the 'Colony Ordinance of 1641-1647' (Whittlesley, Law of the Seashore, Tidewaters & Great Ponds in Massachusetts & Maine xxv [1932])." Lebel v. Nelson, 29 Mass. App. Ct. 300, 302 & n. 1, 560 N.E.2d 135, 137 & n. 1 (1990).

Ownership of tidal flats is still governed by the common law presumption that the flats are included in a conveyance of abutting upland. A challenger must present evidence demonstrating that title to tidal flats was "effectively severed from the upland portion." Scioletti v. Thomas, 18 Land Ct. Rptr. 782, 797, 2008 WL 5115230 at page *21 (2008) (Grossman, J.); see also Spillane v. Ervin, 16 Land Ct. Rptr. 546, 548-549, 2008 WL 3117702 at page *5 (2008) (Scheier, C.J.) ("In the absence of evidence that the Town alienated or lost title to the Upland or the Flats, there is a legal inference that title continues in the Town.").

By the late twentieth century, the presumption and the need for proof to overcome it were summarized as follows in Lebel v. Nelson, 29 Mass. App. Ct. 300, 303, 560 N.E.2d 135, 137 (1990):

> Although an owner of tidal flats and adjoining upland may convey one without the other, *Mayhew v. Norton,* 17 Pick. at 360, the "presumption of law is, that the title to the flats follows that of the upland on which they lie, and proof of title to the upland establishes a title to the flats." *Porter v. Sullivan,* 7 Gray 441, 445 (1856). Separation of the upland and tidal flat was to be proved, not presumed. *Valentine v. Piper,* 22 Pick. 85, 94 (1839). Proof of title in the upland, including title acquired by disseisin, carries with it title in the flats unless there is evidence from which an affirmative intent to separate the two may be inferred. *Id.* at 93-94. The record contains no evidence that at some earlier time the tidal flats bordering on the disputed upland area had been separately conveyed.

In Pazolt v. Director of Division of Marine Fisheries, 417 Mass. 565, 570, 631 N.E.2d 547, 550 (1994), conflicting deed descriptions contributed to the conclusion that a reference to "highwater mark-Provincetown Harbor" did not exclude the flats where earlier deeds referred to the same boundary as "running by the sea:." This conflict in deed descriptions was the basis for distinguishing *Pazolt* in Massari v. Mindrebo, 55

Mass. App. Ct. 1108, 2002 WL[WestLaw] 1477637 at *_ (2002) (unpublished decision), *review denied,* 437 Mass. 1111, 776 N.E.2d 454 (2002), where the Appeals Court held the flats were excluded because "Here, there is no ambiguity in the 1957 Land Court registration decree plan, in the decree description of the property, or in the quitclaim deeds. The descriptions, with excluding words, are therefore conclusive."

In Commonwealth v. Roxbury, 9 Gray 451, 524 (1857), the court made it clear that extrinsic evidence can be considered in determing ownership of tidal flats: "In the construction of a grant, the court will take into consideration the circumstances attending the transaction, the situation of the parties, the state of the country, and of the thing granted, at the time, in order to ascertain the intent of the parties." 75 Mass. (9 Gray) at 493, citing Adams v. Frothingham, 3 Mass. 352 (1807). The modern formulation of the rule is in these words: "The basic principle governing the interpretation of deeds is that their meaning, derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances. [Citations omitted.]" Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179, _ N.E.2d _, _ (1998).

[7] Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497, 502, 848 N.E.2d 1240, 1244–1245 (2006) ("[T]he documents of record here (deeds and plan) designate no proposed way. They do not indicate that lot A was intended as anything other than a small lot retained by the developer for any number of possible purposes such as open land, additional parking, a road, or other permissible use. Thus at the time of the deeds to the plaintiffs, there was neither any suggestion of record nor any indication on the ground to support the claim that lot A was intended as a street or that the plaintiffs had 'any interest in (lot A).' ").

[8] Emery v. Crowley, 371 Mass. 489, 359 N.E.2d 1256 (1976).

[9] Hews v. Troiani, 278 Mass. 224, 179 N.E. 622 (1932); Holmes v. Barrett, 269 Mass. 497, 500, 169 N.E. 509, 510–511 (1930); Temple v. Benson, 213 Mass. 128, 100 N.E. 63 (1912); Pickman v. Trinity Church, 123 Mass. 1 (1877); Flagg v. Thurston, 30 Mass. (13 Pick.) 145 (1832).

In a situation in which a deed conveyed to William Wiley "so much of Lot No. Four as is not hereinafter partitioned and set off to Sally L. Wiley", it was held that the western boundary of Sally Wiley's property was to serve as a monument that fixed the easterly boundary of the remainder of the westerly part of Lot No. Four. These partition deeds were made and recorded in September of 1849. In a Land Court case concerning the northerly boundary, a different partition line was found, but held not binding on the parties who were not joined. Kuklinska v. Planning Board of Wakefield, 357 Mass. 123,

256 N.E.2d 601 (1970).

10 Goyette v. Keenan, 196 Mass. 416, 82 N.E. 427 (1907).

11 This rule was first established in Crosby v. Parker, 4 Mass. 110 (1808), in which the land conveyed was described as bounded on land of B, who, at the time of the conveyance, owned a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance of it, and it was held that the land conveyed was bounded by the land owned by B, and not by that occupied by him. The next case on the point, Cornell v. Jackson, 50 Mass. (9 Metc.) 150 (1845), decided that the true dividing line between adjoining lots is the boundary, even though the grantor and the adjoining owner had agreed by parol on a different line.

12 Cleaveland v. Flagg, 58 Mass. (4 Cush.) 76 (1849).

In Sparhawk v. Bagg, 82 Mass. (16 Gray) 583 (1860), the court suggests a different rule would apply if a description were "by Tuckerman's fence." Land held in adverse possession may be validly conveyed.

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