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"Merely a question of boundaries Part two – a consensus reached?"

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Merely a question of boundaries
Part two – a consensus reached?

David EM Andrews

In part one,[1] I wrote on the subject of whether the position of an administrative boundary on a large scale Ordnance Survey map could be used as evidence of the position of the boundaries of the private properties on both sides of the administrative boundary.

I asked for expressions of opinion on the subject, and I have received responses from John Cole, Richard Porter and Pete Bland.

John Cole provided me with an extract from *Notes on CB, Parish and other boundaries*, (Ordnance Survey, 1934), which is included at Appendix 1 below.

Richard Porter tracked down a record of the Coleman v. Kirkaldy case referred to in my original article. The *Weekly Notes* of cases dated 1 July 1882 contains a very short summary of the case. I have reproduced the summary at Appendix 2. It is interesting that Coleman v. Kirkaldy was a "light and air" case. The relevance of the case to the property boundaries is unclear, and there is no reference to the private property boundaries being anywhere near to an administrative boundary. This only deepens the mystery of why the case is cited in the way that it is.

Richard also pointed out that the decision by OS not to mere new administrative boundaries to private property boundaries was commented upon by Chris Simmons in *Sheetlines* in 1988.[2]

Pete Bland provided an extract from Halsbury's *Laws of England* which I have reproduced at Appendix 3. It would appear that Halsbury has fallen into the trap of using the citation of the Coleman v. Kirkaldy case as a catch-all, and not recognising the exception when an administrative boundary has been mered to coincide with a private property boundary.

Since writing the original item I have delved into the website of Jon Maynard,[3] a retired OS employee who is now a self-employed boundary surveyor with an enviable reputation. With his permission, an edited extract is at Appendix 4.

To summarise, nothing that I have read in these documents leads me to change the opinion I expressed in the original article.

In fact Jon Maynard's website content positively reinforces my opinion.

It would seem that citing Coleman v. Kirkaldy as evidence that "*Ordnance Survey maps are not evidence as to the boundaries……between private owners……"* is a little flawed.

What chance is there of revising this example of case law to include an exception to the generally cited rule when an administrative boundary has been mered in the past to coincide with a private property boundary?

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[1] *Sheetlines* 103, 31-39.

[2] *Sheetlines* 22, 2-3.

[3] *http://www.boundary-problems.co.uk/Jon-Maynard-Boundaries/jmb-about.html*

Appendix 1
Extract from* Notes on CB, Parish and other boundaries, *OS, 1934

PROPERTY RIGHT.

80. The O.S. does not generally concern itself with property rights further than is necessary for ascertaining parish and other public boundaries, which, usually, follow property boundaries. Property rights extend three, four, or five feet, &c., beyond the fence into the adjoining land, according to the custom of the county or district, or special circumstances, and in most cases of ditched-fences are defined by the outer edges of the ditches. Exceptions, however, exist, *e.g.*, free-boards are sometimes ditched on the contrary side of the fence.

The owners of property right can, as a rule, appropriate this space for any purpose they choose.

Occasionally, local authorities object to the insertion of property-right to new boundaries fixed by reference to Deposit maps; deeming the outer edge of the colour band on the map the true legal boundary line. Such cases are, in the first instance, reported by the Reviser on the ground to the Division Officer, who refers them to the D.G., through O.C., for decision as regards the course to be taken on the O.S. map concerned.

In the case of boundary alterations under the London Government Act, 1899, and in connection with which the deposit maps were prepared on O.S. 5 ft. impressions, the Local Government Board considered that the edge of the colouring thereon definitely determined the limits of the transferred areas, and no property-right beyond that is admissible.

Where there are two adjacent fields separated by a hedge and ditch, the ditch *primâ facie* belongs to the owner of the field in which the hedge is, and if there are two ditches—one on each side of the hedge—then the ownership of the hedge must be ascertained. The rule about ditching is this: "No man making a ditch can cut into his neighbour's soil," but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out

upon his own land, and often, if he likes it, he plants a hedge upon the top if it; therefore, if he cuts afterwards beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser.

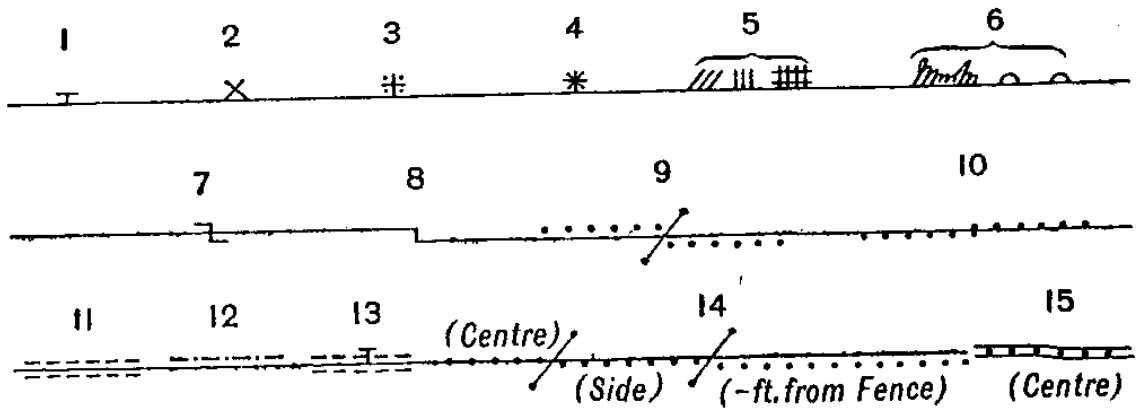
Where an inclosure adjoins the public highway and a ditch is made outside the inclosure, and between it and the highway, the ditch is parcel of the inclosure. On the other hand, where the highway is, or was, a turnpike road, and the soil thereof was originally vested in the road trustees, it may be that the ditch has been constructed by them, and that it remains parcel of the road, and is not parcel of the adjoining inclosure at all.

Mereings on O.S. maps show to which field or inclosure the boundary fence (with or without a property-right, as enquiries may decide) belongs, whether or not the land on both sides is owned or occupied by one and the same person.

Fences to woods, especially old woods, are, as a rule, maintained by the owner or occupier of the wood, rather than by the owner or occupier of the adjoining lands, and are, therefore, mered accordingly on Ordnance maps, unless it is known that the repairing and the property-right boundaries differ, in which case the latter is adopted.

When the property on both sides of a feature that is not ditched belongs to one and the same person, the owner, tenant, or agent, as a rule, can decide as to which side of the feature the boundary should be drawn. If, however, no such decision can be obtained, and neither the inclosure award nor estate map affords the necessary information, the mereing "C.H." or "C.F." is adopted for Ordnance Survey purposes.

Inclosure Awards usually contain special provisions as to the ownership and maintenance of boundary fences, and, also, specify the dimensions of ditches and spaces allowed for ditching and banking of new inclosures. Many Tithe and Estate maps also indicate the ownership of fences either by colour edgings or by symbols placed on or against the feature, as illustrated in the following examples:—



Nos. 1, 2, 3, 4, 5, and 6 of the above examples, also colour edgings, usually denote that the fence belongs to and is repairable by the owner of the property in which the symbol is shown.

The real significance of No. 11 can, however, only be ascertained by inspection of the boundaries generally on the map on which it is used, for although ordinarily the symbol denotes that the fence is the joint property of the adjoining owners, yet, on many maps, it is used merely to indicate that the fence is a boundary fence. In No. 13 the addition of the T makes it clear that the boundary fence belongs entirely to the property in which it is placed.

Nos. 7, 8, 9, and 10 show different methods of marking the precise point at which ownership of the fence changes from one side to the other.

On all modern Ordnance large scale maps the boundary character . . . (or — — —) (Nos. 9, 10, 12, 14, and 15), are invariably drawn on the boundary itself, following accurately any property-right appertaining to the fence (*e.g.*, 4 ft. or 20 ft.), and the field computations of acreages are prepared accordingly.

Appendix 2
Extract from Weekly Notes of cases Heard and Determined July 1, 1882

Kay, J., **COLEMAN *v.* KIRKALDY.** **June 26.**

Evidence—Ordnance Map not admissible to shew Boundary of Premises.

This was a light and air action, with witnesses. The premises of both parties had been rebuilt. The plaintiff complained that the new building of the defendant infringed upon his right to access of light. The defendant denied that the plaintiff's windows were ancient.

W. Pearson, Q.C., and *D. Alexander*, for the plaintiff.

Hastings, Q.C. (with him *E. Cooper Willis, Q.C.*), for the defendant, during the examination of a witness on his behalf, proposed to put in as evidence a copy of the ordnance map to shew the boundary of the premises of the parties, and he re-

ferred to the dictum of Lord Justice Blackburn in the case of *Spike* v. *Thompson*, tried at the Winchester Assizes in July, 1875, to the effect that the ordnance map was *primâ facie* evidence.

KAY, J., after referring to Stephen's Digest on the Law of Evidence, 3rd Edition, article 30, and to the cases of *Wilberforce* v. *Hearfield* (5 Ch. D. 709), and *Hammond* v. *Bradstreet* (10 Ex. 390) said he thought that an ordnance map did not stand any higher as evidence than a tithe commutation map, which in the former case was held not to be admissible in evidence as shewing the boundary of land in a case of disputed title, and therefore he should hold in this case that the ordnance map was not admissible as evidence.

Held also, that as upon the evidence the plaintiff had failed to shew that any portion of his ancient windows corresponded with the windows in the new building, the action must be dismissed with costs.

Solicitors: *Ralph Watson*; *Keene, Marsland & Bryden.*

Appendix 3
Halsbury's* Laws of England */ Boundaries (volume 4 (2011))/2. evidence of boundaries/(2)

Particular kinds of evidence/(ii) Hearsay Evidence/337. Published works.

337. Published works.

Under the preserved common law rule,[1] published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible in civil proceedings[2] as evidence of facts of a public nature stated in them.[3] Thus standard atlases and maps may be used to prove facts of public knowledge.[4]

An Ordnance Survey map to which no reference is made in the title deeds[5] is not admissible[6] to show the boundary of a parish[7] or the boundary between the lands of adjoining owners,[8] because when power was conferred to complete the Ordnance Survey of Great Britain it was expressly provided that this power was not to extend to the ascertaining or alteration of local or private boundaries and that titles to land were not to be affected.[9] However, an Ordnance Survey map may be received in evidence[10] to show the position of the median line of a river[11]

or of some physical object existing at the time the map was made,[12] such as the existence or otherwise of a track across land.[13]

A county history giving the boundaries of a county was not admissible under the common law rule as evidence of the boundaries of a manor even though they were admittedly coterminous in part with the boundaries of the county.[14]

A book of general history may be given in evidence to ascertain ancient facts of a public nature[15] but not particular customs or private rights.[16]

1 As to the preservation of the common law rule see note 3; and PARA 336.

2 As to the meaning of 'civil proceedings' see PARA 335 note 1.

3 See the Civil Evidence Act 1995 s 7(2)(a); and *Civil Procedure* vol 11 (2009) PARA 820. Section 7(2)(a) provides that the common law rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(b) (repealed) is to continue to have effect after the repeal of that Act. See also PARA 336; and *Civil Procedure.*

4 In *R v Orton* (1874) Stephen's Digest of the Law of Evidence (12th Edn) p 56, maps of Australia were given in evidence to show the situation of places where the defendant said he had lived. In *Birrell v Dryer* (1884) 9 App Cas 345 at 352, HL, per Lord Blackburn, the court accepted an Admiralty chart as evidence. As to maps and plans as evidence see further PARA 342.

5 See *Wakeman v West* (1836) 7 C & P 479 (old leases produced from bishop's registry read in evidence but an old map produced from the same custody but not referred to therein was not admissible under the common law rule). See, however, PARA 335. See also *Plaxton v Dare* (1829) 10 B & C 17 (ancient leases admissible as evidence of a parish boundary).

6 Ie under the preserved common law rule: see the text and notes 1-3. Nor is it admissible under the preserved common law rules relating to public documents (see PARA 338) or evidence of reputation (see PARA 340). See, however, PARA 335.

7 *Bidder v Bridges* (1885) 54 LT 529.

8 *Tisdall v Parnell* (1863) 14 ICLR 1 at 27-28; *Coleman v Kirkaldy* [1882] WN 103. See *Swift v M'Tiernan* (1848) 11 I Eq R 602; *Mercer v Denne* [1905] 2 Ch 538, CA.

9 See the Ordnance Survey Act 1841 s 12; PARA 308; and *National Cultural Heritage* vol 77 (2010) PARA 1117. As to Ordnance Survey maps as evidence see further *National Cultural Heritage* vol 77 (2010) PARA 1111.

10 Ie under the Civil Evidence Act 1995 s 7(2)(a): see the text and note 3.

11 *Great Torrington Commons Conservators v Moore Stevens* [1904] 1 Ch 347.

12 *A-G and Croydon RDC v Moorsom-Roberts* (1908) 72 JP 123; *Caton v Hamilton* (1889) 53 JP 504.

13 *A-G v Antrobus* [1905] 2 Ch 188 at 203; *A-G v Meyrick and Jones* (1915) 79 JP 515; *Minting v Ramage* [1991] EGCS 12, CA (1838 tithe map admitted to determine whether a highway then existed across a common).

14 *Evans v Getting* (1834) 6 C & P 586; *White and Jackson v Beard* (1839) 2 Curt 480 at 487, 492.

15 *Read v Bishop of Lincoln* [1892] AC 644, PC. See also *White and Jackson v Beard* (1839) 2 Curt 480 at 492 (boundaries of a parish).

16 *Evans v Getting* (1834) 6 C & P 586 at 587n. See also *Civil Procedure* vol 11 (2009) PARA 941.

Appendix 4 – taken from Jon Maynard's website
Administrative boundaries and property boundaries

The Ordnance Survey Act 1841 instructed

"*that the Boundaries of the several Counties in England and Scotland, and of Berwick upon Tweed and of the Isle of Man, should be ascertained and marked out*".

A book, now out of print, that is the modern authority on administrative boundaries is JRS Booth, *Public Boundaries and Ordnance Survey 1840 - 1980*, Ordnance Survey, Southampton 1980. In it, Booth tells us that

"*Ordnance Survey does not concern itself with property boundary as such and no such boundary is marked on plans. However, much public boundary was defined by the property boundary existing at the time of the order making new boundary*".

In amplification of the process Booth writes:

"*The O.S. does not concern itself with property right further than is necessary to obtain the mereing for a public boundary. It frequently happens that an administrative boundary follows a feature which defines a boundary between privately owned properties. Where this is the case it is necessary to ascertain a 'property right' in order to position the public boundary which for reasons of administrative convenience should be made to coincide with the private property boundary.*"

Booth then states, seemingly illogically,

"*Public boundaries shown on OS maps are not evidence of the position of private property limits*"

and he cites Section 12 of the Ordnance Survey Act 1841 as his authority for this statement.

"*XII. And be it enacted, That this present Act, or any Clause, Matter, or Thing herein contained, shall not extend, or be deemed or be construed to extend, to ascertain, define, alter, enlarge, increase or decrease, nor in any way to affect, any Boundary or Boundaries of any County, City, Borough, Town, Parish, Burghs Royal, Parliamentary Burghs, Burghs of Regality and Barony, extra-parochial and other Places, Districts, and Divisions, by whatsoever Denomination the same shall be respectively known or called, nor the Boundary or Boundaries of any Land or Property, with relation to any Owner or Owners, or Claimant or Claimants of any such Land respectively, nor to affect the Title of any such Owner or Owners, or Claimant or Claimants respectively, in or to or with respect to any such Lands or Property, but that all Right and Title of any Owner or Claimant of any Land or Property whatever within any Hundred, Parish, or other Division or Place whatever, shall remain to all Intents and Purposes in like State and Condition as if this Act had not been passed ; any Description of any such Land, with*

reference to any such Hundred, Parish, or other Division or Place whatever, or otherwise, or any thing in this Act contained, or any Law, Custom, or Usage, to the contrary in anywise notwithstanding."

Clearly, no survey made by Ordnance Survey can alter the boundaries of privately owned land. But was Booth really correct in claiming that - even in those cases where public boundaries coincide with the private property boundary - "*OS maps are not evidence of the position of private property limits*"?

In another book, also out of print, JB Harley, *Ordnance Survey Maps: a descriptive manual*, Ordnance Survey, Southampton, 1975, we learn:

"*The legal status of boundaries on Ordnance Survey maps is a matter of practical importance. The basic position is that the publication of such administrative boundaries on various map series has never invested them with any common law or statutory significance in evidence ... The development of case law * has, however, altered the situation ... and the 1:1250 and 1:2500 maps carry a* prima facie *indication to a Court of Law that a boundary existed at the map position shown, at the time of survey or revision.*"

* Especially Fisher v Winch 2 All ER 144 (Ct. of App. 1939 1 KB 666) and Davey v Harrow Corporation, 1957 2 All ER 305.

Harley goes on to explain the process.

"*Because* [administrative] *boundaries are invisible and cannot be surveyed by direct methods, their precise location in relation to visible ground features is recorded by perambulating the boundary line and 'mereing' it to those features ... The term mereing has also been extended to apply to the written statement indicating the precise relationship of a boundary to the adjacent detail (for example, 4 ft RH = 4 ft from root of hedge).*"

It follows that where a dispute arises as to the true position of a property boundary that has also been used to define an administrative boundary, the mereing recorded on the Ordnance Survey map for the administrative boundary is also evidence as to the position of the property boundary at the date at which the administrative boundary order was made. For convenience this is taken as the date of publication or of revision of a published County Series or National Grid map, but that date may be less easy to establish for a post-1990 digital map.

And what are the mereings that may apply as evidence of the position of a property boundary?

CH = Centre of Hedge	0.91m RH = 0.91m from Root of Hedge
CW = Centre of Wall	FF = Face of Fence
FW = Face of Wall	BB - Base of Bank
TB = Top of Bank	EK = Edge of Kerb

A range of distances from a linear feature such as a Root of Hedge or Top of Bank may be applied, 0.91 m (3 ft), 1.22m (4 ft) and 1.52 m (5 ft) being the most common.