

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 704-9-08 Rdcv

LARRY SUDLOW and MARCIA SUDLOW,
Plaintiffs

v.

FLOYD COREY, JANICE COREY,
DAVID AUBREY, ROXANNE AUBREY,
RALPH STONE and GLORIA STONE,
Defendants

CONFORMED COPY
VERMONT SUPERIOR COURT

SEP 25 2012

RUTLAND

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All parties seek a declaration of the common boundaries and easement interests between Plaintiffs and the various Defendants. All are owners of parcels that were once part of a farm that was subdivided. For 33 years, there were no problems, but in 2006, all parties became aware that they had unresolvable disputes over the location of common boundaries and a right of way that crosses Plaintiffs' land. There are also damage claims for trespass.

A court trial was held on eleven days beginning January 9, 2012 and ending July 25, 2012. Plaintiffs were represented by Attorneys Rodney E. McPhee and Michelle Kenny. Defendants were represented by Attorney John Bloomer. Defendant Floyd Corey died before the final hearing, but Janice Corey as his surviving spouse became sole owner of the property interests previously held by both.

After the hearing was complete, the undersigned reviewed the notes of testimony, arranged and reviewed all photographic evidence and all deeds in chronological order, and considered the conflicting evidence carefully. This is a case in which parties and witnesses testified about events and circumstances as long ago as 50 years, and many pieces of evidence that could have been helpful are gone—particularly witnesses and boundary markers that have disappeared with the passage of time. It is clear that no witness had a perfect memory, and there were many discrepancies in the testimony. The Court has been called upon to resolve many conflicts in the evidence on numerous facts on the basis of evaluating credibility on each statement of each witness and attempting to reconcile conflicting testimony with other evidence, resolving conflicts where necessary. Based on the evaluation of evidence in this manner, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

George and Violet Stone operated a dairy farm on a large parcel they acquired in 1951 (though farmed beginning in 1939) on the Scottsville Road in Danby, but portions of it are or may be also in Wallingford and Tinmouth. The three towns converge at an unknown spot somewhere on the farm. They had nine children. Sometime in the mid-1950's, the very large multi-story barn on their property was damaged by wind but was rebuilt by George Stone on the old foundation. Beginning in 1961, they began to transfer parcels of land to their children. They set out boundary markers themselves and created their own deed descriptions; the descriptions are not based on the work of surveyors. The descriptions often refer to property characteristics at the time of conveyance that are now difficult to locate or understand.

The portion of the farm at issue in this case is located on the east side of Scottsville Road, which leads from Danby to Tinmouth Pond. On the east side of Scottsville Road were the barn, milkhouse, and outbuildings as well as pasture land and hayfields. The main farmhouse in which George and Violet Stone lived was on the west side of Scottsville Road, directly opposite. The land on the east side slopes uphill away from Scottsville Road.

The Plaintiffs' property is a 2.6 acre parcel on the east side of Scottsville Road, directly opposite the old farmhouse. Except for the road frontage, it is surrounded on all sides by properties of the Defendants, all of whom are descendants (and their spouses) of George and Violet Stone. The Plaintiffs themselves are not.

In 1961, George and Violet Stone deeded a parcel on the east side (south of Plaintiffs' parcel) to their daughter Lucille Edmunds and her husband. It was a small lot for a house, and was located directly on Scottsville Road, between the road and the barn and outbuildings. The deed included a right of way for access to the lot over an existing driveway located north of the lot conveyed. In 1963, the Edmunds deeded it to Janice Corey, another daughter of George and Violet, and her husband Floyd. They lived in the house on that parcel and farmed on the larger farm property of George and Violet (some of which later became theirs) from 1963 until Floyd had an accident in 1976. He died in 2009. Janice Corey continues to occupy the house on that lot. The driveway to the house has never been directly from Scottsville Road, but has always made use of the easement, involving a right turn off Scottsville Road onto the easement, and then a right turn again into the lot. The boundary pipes are gone, and the locations of the corners of this lot are uncertain and disputed.

In 1965, George and Violet conveyed to their son Ralph and his wife Gloria a parcel up the hill on the east side of Scottsville Road, set back a significant distance from the road. The deed included "a right of way for ordinary purposes of ingress and egress running Easterly from the road leading from Scottsville to Tinmouth Pond; said right of way being fifty (50) feet wide and marked by iron pins." Ralph and Gloria Stone lived on this parcel and continue to occupy it as their home (having reserved a life estate and conveyed the remainder), and have always used and maintained the road on this easement as their access. It was originally called the Ralph Stone Road, but has more recently been

called Stone Road. It continues to be a private road. The course of the right of way, while not described in the deed, has not changed since Ralph Stone began using it. A portion of it crosses Plaintiffs' property.

Where it leaves Scottsville Road, it overlaps with Janice Corey's easement to her house lot. In 1961 and 1965, when the two easements were created, the actual road was 10-14 feet wide, as it crossed a 14 foot culvert in the ditch next to Scottsville Road. It has since been widened as noted later in this account. From Scottsville Road, the road curves first to the left and then to the right. From the beginning, the traveled portion ran extremely close to the barn and outbuildings, both ends of the large old barn nearly touching the road as it arced around the barn.

The parcel conveyed to Ralph and Gloria Stone does not abut the Plaintiffs' land. When George and Violet conveyed the parcel to Ralph and Gloria, the parents retained land between the conveyed parcel and Scottsville Road, a portion of which was conveyed as described below and later become Plaintiffs' land. Ralph Stone began a maple sugaring operation on his parents' land in the mid-60's, and he has continued sugaring to the present.

George Stone died in 1965. In 1968, Violet Stone conveyed the next parcel to her son Maurice Stone and his wife Margo. This is the parcel now owned by Plaintiffs, and is a 2.6 acre parcel with road frontage on Scottsville Road located directly across from the original farmhouse and north of the parcel acquired by Janice Corey. At the time of the conveyance to Maurice and Margo Stone, iron pins were set in the ground, but they are no longer there. There is one corner of this irregularly shaped parcel that is undisputed, and there is apparently no dispute about the point of beginning (and ending), but both the north and south boundaries of this parcel are disputed. The description in the deed is difficult to follow on the ground at the present time.

Plaintiffs hired a surveyor, Robert Tinker, to do a professional survey of their property after the boundary dispute developed between the parties. He had quite a difficult time ascertaining the location of the northwest corner, the southeast corner, the entire course of the southern line, and the location of rights of way affecting the parcel. He did a thorough and professional job with the information he had, which was scarce, given the importance of boundary pins as monuments but the fact that they were absent, and the "homemade" descriptions of courses and distances, and conflicting information from parties' memories. He used evidence from the ground, and also used as a reference a survey by a surveyor named Davis done 5 years after this conveyance for the purpose of subdividing a different portion of the George and Violet Stone farm. He used it because he trusted the reliability of that surveyor's work and as a means of attempting to make sense out of the description and make the descriptions of adjacent lots fit together as puzzle pieces.

The Court has had the benefit of many days of testimony in which the Court has heard evidence that was not available to the surveyor, particularly from Janice Corey, who appears to have had the best understanding and most reliable memory about what happened during the course of the various property transactions that have occurred

beginning in 1963, and about where markers were located. As a result, relying on the additional evidence, the Court has not accepted all of the surveyor's opinions. The survey provides an accurate and extremely helpful starting point from which to work visually, however. Consequently, exhibits are attached showing the Court's findings of facts, using the survey drawing as an underlying template.¹

Exhibit A attached depicts ownership of property interests immediately after the conveyance to Maurice and Margo Stone on September 6, 1968, and shows the parcel owned by Janice and Floyd Corey, their easement, the Stone Road and extent of the easement held by Ralph and Gloria Stone,² the parcel acquired by Maurice and Margo Stone, and the location of remaining lands retained by Violet Stone. The following paragraphs detail the basis for the findings as to facts that have been disputed by the parties.

These findings are illustrated on Exhibit A, which shows the location of the physical Ralph Stone Road and the location of the 50 foot wide easement. It also shows the location of the Corey parcel, and the Corey easement on the existing drive north of the Corey parcel.³ It depicts the lot conveyed to Maurice and Margo Stone in 1968, which is outlined in orange on Exhibit A. The pertinent boundaries of the Corey parcel are outlined in purple, and the Corey easement is depicted with purple cross marks. The Ralph Stone traveled road is shown in green, and the extent of the Ralph Stone right of way is depicted with green cross marks.

There is no dispute about the point of beginning of the parcel conveyed to Maurice and Margo Stone, although the pin is now gone. It was at the intersections of the northern edge of the Ralph Stone right-of-way and Scottsville Road, shown as Point A on Exhibit A.

The dispute is the distance that the western boundary runs along the east side of Scottsville Road. There was much disputed evidence about the location of the northwest corner of the parcel. The deed calls for an iron pin at 280 feet, north of a water pipe, and the Court finds credible the testimony of many members of the Stone family that there

¹ The exhibits are based on a tracing taken from the Plaintiffs' survey, which was admitted into evidence as Plaintiffs' Exhibit 1. The attached Court exhibits are thus to scale, but not entirely accurate as the measurements are not precise. They are not intended to constitute a survey, but to illustrate the intent of the Court's findings of facts.

² Note that where Ralph Stone's right of way leaves Scottsville Road, it cannot be a full 50 feet wide, because George and Violet Stone could not convey an easement over land they had previously conveyed out to Edmunds (later Corey). Therefore, the southern limit of the Ralph Stone right of way was limited by the Corey boundary line. The parties at the time may not have been aware of this fact, but it is a result compelled by property law.

³ The Court does not adopt Mr. Tinker's opinion of the boundaries of the Corey parcel, which are based on his interpretation of the Davis survey which was not done until 12 years after the conveyance of the first parcel (to Edmunds, who later conveyed to Corey) out of the whole farm. The Court also does not adopt Mr. Tinker's opinion of the location of the Corey easement. The Stone/Edmunds deed describes it as north of the boundary of the parcel conveyed, and along an existing driveway, and this location is consistent with the testimony of Janice Corey. This Court has not determined all the boundaries of the Corey parcel. For purposes of this case, it is only necessary to determine the northern boundary and the location of the Corey easement.

was a pin in approximately this location, although it is now gone. Their testimony is consistent with the description in the deed, whereas any alternative that has been suggested is at least 28 feet further north. Therefore, the Court finds that the parcel conveyed to Maurice and Margo Stone had a western boundary along Scottsville Road of 280 feet to Point B.

There is no dispute about the northeast corner, so the northern boundary ran from Point B to Point C.

There is no dispute about the course of the east line, but there is a dispute about the distance. The deed calls for a distance of 280 feet to an iron pin. There is no iron pin at that location now, although there was credible testimony that one existed in that vicinity at one time. Based on both the deed description and the credible testimony, the Court finds that the southeast corner is at the location marked as Point D on Exhibit 1, which is 280 feet from the northeast corner. The Court does not accept the opinion of Mr. Tinker that the southeast corner was 337.8 feet south of the northeast corner. First of all, it is inconsistent with the deed, and the discrepancy is huge. Second, it is inconsistent with the testimony that a pin previously existed in that location. Third, it is based on the location of a point derived from the Davis survey (northeast corner of Lot 3A described below), which is not only not referenced in any deed as of 1968, but the survey was not done until either 1973 or 1974.

The next lines, from the southeast corner (Point D) to the corner of the south boundary on Scottsville Road (Point G) are highly problematic and presented real challenges to the surveyor and to this Court. There are no existing boundary pins. There are two references in the deed description to the foundation wall of the old cow barn, which has since been demolished. The line from Point D to Point E is 245 feet long according to the deed. It ends at a spot on the easterly side of the Ralph Stone right-of-way. It requires interpretation to determine which side was meant by the easterly side in this "homemade" deed description because the right of way runs primarily east and west at that point rather than north and south. Also, does "easterly side of said right of way" refer to the travelled portion, or the full 50 foot width?

The Court declines to adopt Mr. Tinker's version of the next three lines between points D and G. The main reason is that Point F, which is supposed to be 94 feet south of Point E, is also supposed to be on the easterly side of the Ralph Stone right of way, and according to Mr. Tinker's opinion as shown on Plaintiffs' Exhibit A, he places the equivalent of Point F significantly to the south of any portion of the Ralph Stone right of way. The Court interprets the deed call of Point E as ending at a monument defined as the easterly side of the Ralph Stone right of way. Monuments have priority status, and since the location of the Ralph Stone road and right of way has not changed over time, the east side of the right of way is reliable as a monument. The Court interprets the description to mean the side of the right of way itself, and not the traveled road. The Court interprets the description 'easterly' side of the right of way to mean the north side, since the description later uses 'westerly' to clearly refer to the south side. Thus, Point E

must be on the northern edge of the Ralph Stone right of way as shown on Exhibit A.⁴ This is consistent with credible testimony that there was a boundary pin in the field north of the traveled portion of the Ralph Stone right of way that Floyd Corey bent over and buried in the mid-1970's.

Moving on from Point E, the deed description is essentially impossible to implement as written.⁵ The deed describes proceeding southerly along the 'easterly' (northerly) side of the right of way for 94 feet, which could be done, but the point at the end is at an "iron pin on the southerly side of said right of way," and then proceeds westerly along the southerly side of the right of way to Scottsville Road. There is no description of a line going from the northerly side of the right of way to the southerly side. It appears from reading the description that what was intended in general for the parcel was a rectangular piece 280 feet wide (distance of both road frontage and back line) with a depth defined by the undisputed Point C and the barbed wire fence along the back line, but the problem on the south end was addressing the existing Ralph Stone right of way and the location of the barn. Also, the parcel needed to be adjacent to Janice Corey's lot along Scottsville Road.

The traveled portion of the Ralph Stone Road was very close to the barn. It appears that the purpose of the departure from a straight line in the southerly boundary line was to jog north along the northerly edge of the right of way in order to clear the barn (which would remain in Violet Stone's ownership). Then, as the southerly line approached Scottsville Road, it crossed back over the Ralph Stone right of way to join the northern boundary line of the Corey parcel. This excluded the barn and outbuildings from the conveyance to Maurice and Margo Stone, but allowed all three children (Janice Corey, Ralph Stone, and Maurice Stone) and their spouse co-owners to use that portion of the Ralph Stone Road that they needed to access their parcels.⁶

By locating Points E and F as shown on Exhibit A, the Court has followed the deed descriptions and its monuments in accordance with credible testimony and in a manner that reconciles these sources to the maximum extent possible. The result also fits with subsequent conveyances of parcels 3 and 3A as described later, and with Janice Corey's testimony about the use of land. The guiding principal has been to ensure that the lines from Points D to E and from E to F are to the north of the barns and outbuildings as they existed in 1968,⁷ as that is what the deed description clearly intended to do, and the evidence about subsequent land use supports that interpretation.

⁴ Mr. Tinker's placement of the equivalent of Point E is not on the north side of the right of way but on the south side of the traveled road. This would have had the boundary line running through the barn.

⁵ Mr. Tinker recognized this as well, and he did an admirable job of trying to reconcile irreconcilable provisions. As stated above, the Court has made different choices based on the benefit of additional information with a result that is similar to, but not exactly the same as, Mr. Tinker's.

⁶ When Maurice and Margo Stone erected a home on their parcel, they placed their driveway not directly off Scottsville Road, but coming off the Ralph Stone Road, opposite the Corey driveway.

⁷ The credible evidence showed that when Maurice and Margot Stone acquired their parcel in 1968, all segments of the original barn, as it was rebuilt by George Stone in the 1950's, were there.

From Point F, the line runs to Scottsville Road along the line F-G which is both the northern boundary of the Corey parcel, and the southern boundary of Ralph Stone's right of way. From Point G it crosses the Ralph Stone Road and right of way to the point of beginning.

At some point after the conveyance to Maurice and Margot Stone, Floyd Corey, presumably with Violet's permission, took down one of the four parts of the old barn and rebuilt a third section of the barn. Maurice and Margo Stone put up a home on their parcel, and placed their driveway coming off the Ralph Stone Road, opposite the Corey driveway, and not from Scottsville Road.

There was a sap house located on Violet's land on Scottsville Road north of the Maurice and Margo Stone parcel. Ralph Stone used it for sugaring. In 1969, Violet conveyed a parcel with the sap house on it to Ralph and Gloria Stone. It abutted the parcel previously conveyed to Maurice and Margo Stone for the first 50 feet starting from Scottsville Road and running back along their boundary line and then turning north. Ralph's cousin put up a barbed wire fence around the sap house to keep animals that were grazing in the pasture away from the sap house. The barbed wire fence was not a boundary fence and was not located on either the south or east boundary of the sap house parcel. The back line of barbed wire fence was significantly more than 50 feet east of Scottsville Road, and thus not on the boundary, and the south line of barbed wire fence was several feet within the sap house parcel and not on the boundary. In 1970, Ralph and Gloria built a new sugar house on that lot, and located the sugarhouse further to the north than the sap house had been. The location of the animal fence did not change. The pasture behind the sugarhouse and behind Maurice and Margo Stone's house was owned partially by Violet Stone and partially by Maurice and Margo Stone, and it had been used as an open pasture for cattle since the 1950's or 1960's.

The next event was the sale by Maurice and Margo Stone on March 30, 1973 of their lot and uncompleted house to Plaintiffs, Larry and Marcia Sudlow. They were looking for a house on a small rural lot where they could keep horses. They were particularly attracted to this property because of the brook that ran through it, which would provide drinking water for horses.

When the Sudlows purchased, there was a fence behind the house that was not a boundary fence. It was to keep pasture animals away from the house. The back (east) part of the parcel continued to be part of the open pasture that ran from the Ralph Stone Road on the south northerly through Violet Stone's land. By the time the Sudlows bought, the big barn had been shortened and partially rebuilt by Floyd Corey, who was using it. Six months after the Sudlows purchased from Maurice and Margo Stone, Violet Stone conveyed to Maurice and Margo Stone a parcel of 11 acres that included that pasture and meadow, and abutted Plaintiffs' land to the north, next to the sugarhouse lot of Ralph and Gloria Stone, and to the east. Maurice and Margo built a house on it. At the end of 1973, Davis did a survey for Violet Stone for the purpose of creating lots 1, 2, and 3 to be subdivided from the Violet Stone farm at a location to the south of the parcels involved in this case.

In the spring of 1974, the Sudlows bought their first pony, which they pastured in the "community pasture" behind their house. The Sudlows were on good terms with Violet Stone and other members of the Stone family. In September of 1974, Violet Stone conveyed to Janice and Floyd Corey a 10-acre parcel to the south and east of their house lot. It was Lot 3 on the Davis survey, and had frontage on Scottsville Road to the south of the Corey house lot. A few months later, Davis added Lot 3A to his survey. This was a very small piece of land (.19 acre) northeast of the Corey house lot, and it bridged a gap between the Coreys' Lot 3 and the Sudlows' parcel. It includes the area where at least a portion of the barn had been or was located. There was no conveyance of Lot 3A at that time. The Davis survey does not accurately depict the location of Ralph and Gloria Stone's traveled road or the 50 foot wide right of way. Also in 1974, Maurice and Margo Stone conveyed their 11 acre pasture parcel to Crossman.

In 1975, the Sudlows bought a horse. The Coreys gave them permission to use the barn for their hay and their pony and horse during the winters of 1975 and 1976. During this same period (1975-76), Floyd Corey planted potatoes along the Ralph Stone Road south of the Sudlows south boundary line, between the boundary and the Ralph Stone Road. He also bent down a boundary pin in the field north of the Ralph Stone Road and buried it so it would not injure any animals.

In 1976, the Sudlows bought a second horse and built their own small barn to shelter their pony and horses. Also in 1976, Violet Stone conveyed Lot 3A to Floyd and Janice Corey. It was a landlocked parcel (although it abutted their Lot 3), and no right of way to it was conveyed. Crossman sold the 11 acre pasture parcel to Merrill. Herb Stone mowed the field for the hay, or had it done.

In 1977, the Sudlows erected electric fencing in the vicinity of both their north and south boundaries in order to fence in their land as pasture for their pony and two horses. On the north side, they ran an electric fence from a triple maple tree on Scottsville Road that was actually on Ralph and Gloria Stone's land several feet to the north of the Sudlows' own boundary corner. They did not ask any permission to do so, and no permission was given. The first portion of this electric fence was along the animal fence that kept animals away from the sugarhouse. The electric fence continued to the east all the way across the open land to the undisputed northeast corner.

Exhibit B attached depicts the location of the fence erected by the Sudlows in 1977, and shows the ownership of interests following the erection of the fence in 1977. In erecting the fence, the Sudlows enclosed for their own benefit a triangle of land that was owned by Ralph and Gloria Stone for the first 50 feet on the western end and Merrill for the remainder (hereinafter the "northern triangle"). The electric wire was strung on fiberglass posts, and was openly visible.

When the Sudlows erected their fence, in 1977, the Coreys had a fence in the vicinity of the southeast portion of the Sudlow land. The Coreys gave the Sudlows permission to move it further south all the way to the Ralph Stone Road, enclosing a triangular portion of Lot 3A owned by the Coreys (hereinafter the "southern triangle").

The permission was given to permit the Sudlows to use the enclosed land to pasture their horses all the way to the Ralph Stone Road on the land owned by the Coreys.

In 1979, the Sudlows added a second pony, so that they had two ponies and two horses. The Sudlows pastured them continuously thereafter in the fenced-in area they created in 1977, which encompassed their own land as well as the northern triangle that they were using without permission, and the southern triangle for which they had permission from the Coreys. The horses ran freely in the northern triangle area north of the Sudlow house, between the animal fence that protected their house, and the fence that started at the triple maple tree and ran east to the northeast corner.

This situation continued for several years. At some point, Ralph Stone began haying the 11 acre field owned by Merrill. In 1984, Merrill sold the 11 acre field to Ralph and Gloria Stone and their daughter Roxanne Aubrey and her husband David Aubrey. Ralph Stone continued haying the field to provide hay for the sheep he was raising on his own land. In 1985, Marci Sudlow began living during the week at a house in Rutland. Lawrence Sudlow remained living on the Danby land. The horses and ponies remained on the land, and Marci came to the property on weekends and was the one who maintained the fences.

In 1985, the Coreys' son Craig installed a mobile home on a portion of Lot 3A. To do so, the Coreys used the Ralph Stone Road as an access road, although there was no right to use the Ralph Stone Road to access Lot 3A. Starting in 1985, the route used to access this mobile home has been off the Ralph Stone Road.

In 1988, the barn was torn down, and the Coreys' son Robert put a second mobile home on Lots 3 and 3A. The access was from the Ralph Stone Road when this mobile home was installed.

In the summer of 1992, the Sudlows had used the northern triangle for their horses for a period of 15 years in an open and visible manner, without permission, and contrary to the rights of the deeded owners Ralph and Gloria Stone (sugarhouse parcel) and Ralph and Gloria Stone and David and Roxanne Aubrey (11 acre pasture parcel). In August of that summer, Ralph and Gloria Stone conveyed to David and Roxanne Aubrey their one-half interest in the 11 acre parcel.

In that same year, 1992, the Coreys wanted to replace the second mobile home and finance it. In connection with their efforts to do so, they discovered that the deed to them of Lot 3A was defective in that only three sides of the parcel were described—there was no description of the south boundary that abutted their Lot 3. In addition, there was no right of access to Lot 3A.

On October 10, 1992, Violet Stone gave a corrective deed of Lot 3A to the Coreys. This deed included the missing fourth side of the parcel in the deed description. It also purported to convey a right of way to Janice and Floyd Corey over the Ralph Stone Road. In fact, Violet had no ability to convey such a right of way, as she had already deeded away all her interests in the land on which the Ralph Stone right of way

was located. The replacement mobile home was placed on Lots 3 and 3A. The access was changed from the Ralph Stone Road to a driveway from the Coreys' other land.

In 1996, the Sudlows put in a new horse barn to replace their prior one. In 1999, Marci Sudlow stopped living during the week in Rutland and returned to living full time at the property in Danby. By that time, at least one horse had died, and the horses had aged and were not as active in grazing the land as they previously had been so that vegetation began to grow within the fenced-in area. The Sudlows began mowing their pasture in sections to keep the growth down, and the mowing included the fenced-in southern triangle.

In 2000, the Sudlows made major renovations to their house, including adding a cellar, foundation, roof, and putting on an addition and adding a garage. They shifted the driveway so that it came off of Scottsville Road and not via the Ralph Stone Road.

Mark McClellan, the son-in-law of Ralph and Gloria Stone, who resided with their daughter on a mobile home on their property, began to do the plowing of Stone Road on behalf of Ralph and Gloria Stone. In 2002 or 2003, the Coreys widened the entrance to the Stone Road from 16 feet to 40 feet by adding an additional segment of culvert to it at the southern end. The northern edge of the traveled portion of the Stone Road did not change.

In approximately 2003, the Sudlows stopped using electricity in their fence. Another horse died a year later.

In 2004, the Aubreys, who owned the parcel including land to the east of the Sudlows, brought a mobile home up the Stone Road to install it on their property for one of their children. They obtained permission from the Coreys. They never asked permission from the Sudlows, and the Sudlows did not object or claim that the Aubreys were crossing their property.

In February of 2005, Ralph and Gloria Stone deeded their home property to their daughter Nancy and son-in-law Mark McClellan, reserving for themselves a life estate. Mark McClellan assumed responsibility for maintenance of Stone Road.

In 2005, the Sudlows planted some screening trees along the fenceline toward the west end of the Aubrey land, which is located uphill to the east from the Sudlow land. They claim the trees were planted on their land, but the Court finds that the trees were planted on land owned by the Coreys (Lot 3A). In 2006 the Sudlows put in some more trees along the Stone Road opposite the mobile homes on the Coreys' land. Janice Corey pulled out two of the trees. This was the beginning of tension between the parties.

The Sudlows placed a barbecue area near their north boundary line. It came to the attention of the Aubreys that the barbecue might be on land included in the deed they received.

In November of 2006, there was an incident that started the real dispute between the parties. Mark McClellan was doing maintenance on a culvert on Stone Road. The

Sudlows came along, and Marci Sudlow objected to the cutting of a fence at that location, and began shouting angrily, claiming that the Sudlows owned that land. David and Roxanne Aubrey arrived, and fetched Janice Corey, who stated she claimed the land, and later produced the Davis survey. Thereafter, the Sudlows hired Mr. Tinker to do a survey. During this period, the Sudlows discovered minor changes in the disputed area, such as cuts in their fence, and cutting of trees that appeared unrelated to road maintenance.

Mr. Tinker completed his survey in May of 2007. He showed the Sudlow northwest corner as being at the triple maple tree. The Aubreys did not accept his survey, and claimed that the Sudlows' north line started not at the triple maple but at a point further south. In November of 2007, the Aubreys and Gloria Stone took down the Sudlows' fence that had been there since 1977 that was the northern boundary of the northern triangle. Within a week the Sudlows replaced it. The Aubreys and Gloria Stone took it down again a second time. David Aubrey, with a small piece of earthmoving equipment, cut into the ground along the boundary line that the Aubreys were claiming. The cost of replacing the fence and repairing the land is \$1,865.00.

In September of 2008, this lawsuit was filed to obtain a declaration of boundaries and other property interests, and for damages based on trespass.

In June of 2009, Ralph Stone wanted to improve and widen Stone Road, and he directed family members to do significant maintenance on Stone Road. They widened it and created a place for plowed snow to be piled. The work that was done was within the easement area held by Ralph and Gloria Stone and Mark and Nancy McClellan. However, fence lines along the Sudlow side of Stone Road were pulled up and left lying on the ground. Ralph Stone acknowledges that part of the Sudlows' fencing was removed but stated that the fencing was located within the area of his right of way easement.

Conclusions of Law

Declaration of Sudlow boundaries

Northwest Corner and Northerly Boundary Line.

Plaintiffs claim ownership of the northern triangle, and seek a declaration that their northwest corner is at the triple maple tree and their northern boundary line is as shown on the Tinker survey. They rely on the Tinker survey and the opinions of Mr. Tinker, and claim that the Sudlows and the abutters to the north have mutually agreed upon and recognized the line from the triple maple along their electric fence to the undisputed northeast corner. As the findings of facts show, the Court does not find the Tinker survey accurate with respect to the northwest corner and boundary of the parcel conveyed from George and Violet Stone to Maurice and Margo Stone and later conveyed to Plaintiffs. In addition, the findings do not show that any of the northern abutters mutually agreed to the Sudlows' fence as representing the boundary line.

Nonetheless, the Plaintiffs' evidence proves by a preponderance of the evidence that they acquired the northern triangle by adverse possession.⁸ To establish ownership by adverse possession a claimant must show adverse use or possession which is open, notorious, hostile, and continuous for a period of no less than fifteen years. *Cnty. Feed Store, Inc. v. Ne. Culvert Corp.*, 151 Vt. 152, 155 (1989). An adverse user "must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest." *Barrell v. Renehan*, 114 Vt. 23, 29 (1944). Acts of possession are deemed sufficiently open and notorious if they are conducted in a manner which would put a person of ordinary prudence on notice of the claim. *Jarvis v. Gillespie*, 155 Vt. 633, 641 (1991).

The facts show that in 1977, Plaintiffs erected a fence on a line north of their property on land owned by Ralph and Gloria Stone (sugarhouse parcel) and Merrill (11 acre pasture parcel), beginning at the triple maple tree and running along a line as shown on the Tinker survey to the undisputed northeast corner. The evidence is undisputed that Ralph and Gloria Stone knew that their common corner on Scottsville Road was at a point some distance south of the triple maple, but they never said anything to the Plaintiffs, or communicated with them in any way about the electric fence the Plaintiffs erected, or gave permission for use of any portion of the northern triangle for enclosure or the pasturing of horses. The erection of the electric fence without permission on land and along a line clearly beyond the bounds of the Sudlow northern boundary amounted to the planting and unfurling of a flag and claim of exclusive possession. This occurred in the summer of 1977, and continued without interruption. Any one could see that the fence was there, and it was electrified, demonstrating clearly that other persons and other uses were being excluded. The elements of open, notorious, and hostile use are met. The use in this manner was continuous, and ripened into ownership by adverse possession in the summer of 1992. Plaintiffs have proved their claim by a preponderance of the evidence.

The northwest corner is declared to be as shown on Exhibit C as Point B1 and the northerly boundary of the Sudlow parcel is declared to be from Point B1 to Point C as shown on Exhibit C. These points and lines are the same as shown on the Tinker survey, which has a slight change of course at one point on the northerly line, reflecting the prior location of the fence.

⁸ Plaintiffs did not expressly argue adverse possession as to the northern triangle. However, Plaintiffs' extensive evidence on use of the triangle—to which Defendants did not object—amply supports it, and notice of such evidence was given in the original Complaint at paragraphs 14–24. The issue essentially was tried by implied consent of the parties. Therefore, it is appropriate for the Court to rule on it. See *Withington v. Derrick*, 153 Vt. 598, 605 (1990) ("V.R.C.P. 15(b) allows issues raised at trial *without objection* to be treated as if they were raised in the pleadings"). In the circumstances of this case, there is no unfair surprise or other prejudice to Defendants. See *Cameron's Run, LLP v. Frohock*, 2010 VT 60, ¶ 10, 188 Vt. 610 (explaining that the trial court should not have relied on a theory that the plaintiffs explicitly disclaimed); *Potwin v. Tucker*, 126 Vt. 414, 418 (1967) (noting that the primary concern "is the right to have notice, by pleading or otherwise, of the issues to be advanced and accepted as critical to, or decisive of, the litigation").

Southeast Corner and Southerly Boundary Line.

Plaintiffs claim that their deeded southeast corner and southern boundary is as shown on the Tinker survey, and in addition they claim that they have acquired a portion of the southern triangle ("corner property") by adverse possession based on their use of the fenced in area north of Stone Road for pasture.

As to their deeded southerly boundary, the findings of fact establish that the southwest corner is at Point D as shown on Exhibits A and C, and the southerly boundary runs from Point D to Points E, F, and G as shown on those exhibits.

As to Plaintiffs' claim to the "corner property" (the southern triangle bounded by the Stone Road to the south/southwest, the portion of line D-E from where it intersects with Stone Road east to Point D, and the line from Point D south along land of the Aubreys to Stone Road), the findings of fact set forth above show that the Sudlows were given permission in 1977 to fence in that land and use it for pasturing their horses. Where an original use or possession takes place by permission, use does not become adverse unless and until there is a repudiation or disclaimer, either made known expressly to the owner or clearly indicated by unequivocal actions. *In re Estate of Nathan Smilie*, 135 Vt. 217, 220 (1977). The facts do not show that any such repudiation or disclaimer ever occurred. Plaintiffs' use of that piece of land remained by permission, and thus their claim for adverse possession is not established. The same is true of the smaller triangular piece north of Stone Road in the vicinity of Point E. The southerly boundary of the Plaintiffs' property remains as it was when deeded to them and as shown on Exhibits A and C.

Declaration of Easements

The evidence showed conflicting understandings of the rights of way that affect the property interests of the parties. The following rights of way affect the property interests of the Plaintiffs in relation to those of the Defendants.⁹

Janice and Floyd Corey acquired by deed a right of way along the north boundary of their house lot, as shown on Exhibit A, for the purpose of accessing their house lot. This is shown on Exhibits A and C with purple cross marks. It burdens the Plaintiffs' parcel to the extent shown on Exhibits A and C, and is still held by Janice Corey as owner of her house lot.

Janice and Floyd Corey did not acquire a right of way on Stone Road across Plaintiffs' parcel to Lot 3A on October 10, 1992 when they acquired Lot 3A from Violet Stone. Although she purported to convey to them such an easement, she no longer held any property interest, and therefore had no ability to convey such an interest.

Nonetheless, Janice and Floyd Corey acquired an easement on Stone Road for access to Lots 3A and 3 from Scottsville Road by adverse use beginning in October 1992

⁹ The Court has not been asked to, and does not, make a declaration of either boundary or right of way interests as between Defendants; only as between Plaintiffs and Defendants.

when they used Stone Road to place a mobile home on Lot 3 and 3A and thereafter used Stone Road for access to the mobile home. *Schonbek v. Chase*, 2010 VT 91, ¶¶ 8–9, 189 Vt. 79 (citations omitted) (noting that the elements to establish a prescriptive easement are “essentially the same” as those required to establish adverse possession, except use need not be exclusive). The use was open, notorious, hostile to the interests of the Sudlows, and continuous from 1992 forward. It ripened to a prescriptive easement in 2007. This easement burdens the Plaintiffs’ property and benefits Janice Corey as the owner of Lots 3A and 3. *Id.* This easement is not shown on Exhibit C. It runs from Scottsville Road to the point on Stone Road at which the access driveway to the 1985 mobile home on Janice Corey’s Lot 3 or 3A leaves Stone Road.

The Aubreys used Stone Road in 2004 when they took a mobile home up it to put on their property to the east of the Sudlows. It is not entirely clear whether they (or their family members) used or now use Stone Road, crossing Plaintiffs’ land, to access the mobile home on their land uphill and to the east of the Sudlows, although it can be inferred that they do so. (They can access their land off Scottsville Road further to the north, without crossing Sudlow land.) In any event, such use, if it exists, started in 2004, and has not been maintained for a long enough period for the Aubreys to have acquired an easement to cross Plaintiffs’ land on Stone Road by adverse use. Therefore, the Aubreys have no right of access across Plaintiffs’ land.

The Sudlows, as owners of the land underlying Janice Corey’s easements and the easement held by Ralph and Gloria Stone and Nancy and Mark McClellan beginning at Scottsville Road and running east on Stone Road to Point Q as shown on Exhibit C, have the right to use Stone Road up to Point Q to access their land to the extent that their use does not impede the uses by the easement holders. Restatement (Third) of Property: Servitudes § 4.9 cmt. c (“The person who holds the land burdened by a servitude is entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement or profit. An easement is a nonpossessory interest that carves out specific uses for the servitude beneficiary.”).

Trespass and Damages

Plaintiffs’ have met their burden of proof to show that in November of 2007, when Gloria Stone and David Aubrey and Roxanne Aubrey destroyed their northerly fence line and dug into the ground along a line to the south of the Sudlow northerly fenceline, they were trespassing on land that the Plaintiffs had already acquired by adverse possession. Thus these three Defendants are jointly and severally liable for damages in the amount of \$1,865.00, plus legal interest from November of 2007.

The Plaintiffs’ evidence showed that Ralph Stone caused damage to the Plaintiffs’ fence in the southeast portion of the Sudlow property in June of 2009 when he took down their fence and destroyed it without repairing or replacing it. His claim that he was entitled to do so because it was within his easement is without justification. Even though Ralph Stone had the right to maintain, improve, and widen Stone Road in conjunction with his easement rights, that does not give him the right to destroy property of the

Sudlows, as they are entitled to any use of their underlying land that is not inconsistent with the easement. *Id.* The Sudlows' fence was not inconsistent with the use of the Stone Road easement by the easement holders. While Ralph Stone had the right to widen the traveled portion of Stone Road to use more of the fifty foot wide easement area, and he had the right to move the Sudlows' fence back to accommodate the increased width of Stone Road, he did not have the right to remove or destroy the fence altogether. Nonetheless, the Plaintiffs have not made a claim of damages for destruction of the fence, and therefore no such damages are awarded.

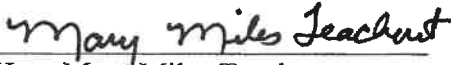
Bad Faith; Punitive Damages

Except for the damages addressed above, all actions of any of the Defendants in removing trees, maintaining Stone Road, and marking boundary lines were done in conjunction with their reasonable understandings of the locations of their property lines. Although there were actions that appeared hostile, they were in the nature of defending perceived boundary claims that did have a reasonable basis. There are no grounds for any award of damages for bad faith or for punitive damages.

ORDER

Plaintiffs' counsel shall prepare a proposed judgment consistent with these findings and conclusions, and serve it on Defendants' counsel.

Dated this 20th day of September, 2012.



Hon. Mary Miles Teachout
Superior Judge



utility pole → ●

Violet Stone

Undisputed NE corner

Maurice and Margot Stone

C

Violet Stone

280'

D x x x

Ralph + Gloria Stone

B

280'

Scottsville Road

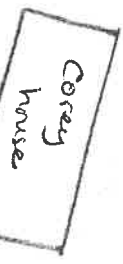
A

utility pole → ●

E

Area of barn and outbuildings

driveway



Corey parcel

Corey easement



Ralph Stone easement



Ralph Stone road



Exhibit B



Merrell

"Northern Triangle"

Stone Merrell Boundary (unmarked)

R+G Stone

Triangle myrtle trees

Larry and Merdis Sudlow

Merrell

"Southern Triangle"

Corey

Corey

Fencing put up by Sudlows in 1977 enclosing level they did not own

Corey

Scottsville Road

Summer 1977

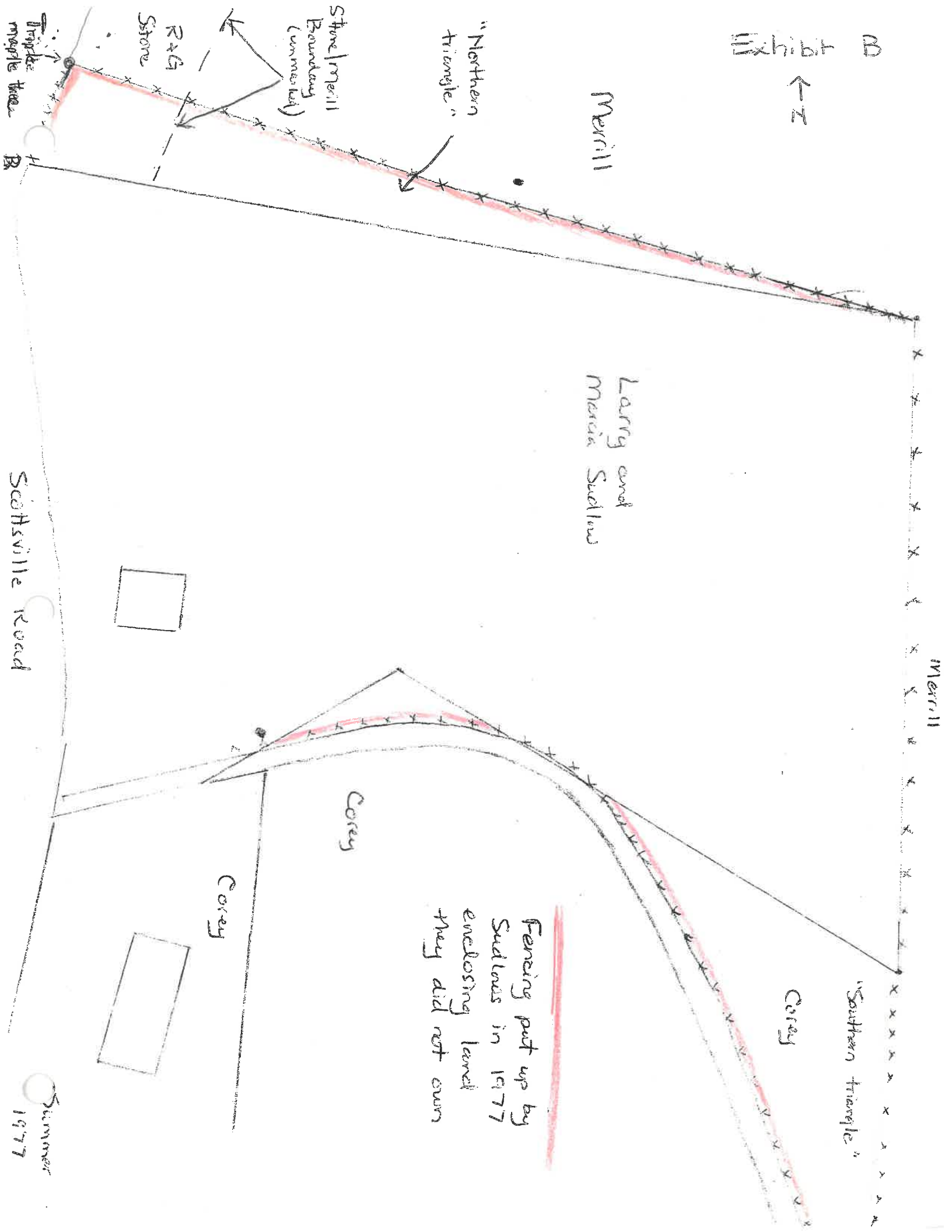


Exhibit C
← N



September 2012