

**THE USE OF EXTRINSIC EVIDENCE
AS AN AID TO THE
INTERPRETATION OF DEEDS AND THEIR DESCRIPTIONS**

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Introduction

A deed is an expression of the parties as to what real estate and rights were intended to be conveyed. It should contain an accurate description of the land and appurtenances. However, persons whose services require them to scrutinize and interpret deed descriptions know that deeds and descriptions have often been drafted by unskilled and inexperienced hands. Furthermore, in spite of the care, vigilance, and caution on the part of the skilled scrivener, errors often did and continue to creep into deeds.¹ For a deed that contains errors or ambiguities, it is well settled that it shall not be considered void if the intention of the parties to the grant can be satisfactorily determined.² The object of the law is to uphold, rather than defeat such conveyances.³ Accordingly, there are occasions when it is appropriate to determine what was intended by utilizing information outside the deed or extrinsic evidence.⁴

Defined

Extrinsic evidence is defined as evidence outside the writings — in this case the deed. Extrinsic evidence is held to be synonymous with evidence aliunde and includes parol statements, acts by the parties, unrecorded documents, historical documents, private plans, etc. Extrinsic evidence does not include maps or other documents referred to in the deed. These documents are considered part of the deed and are merged with the deed as if copied into the deed.⁵ It does not matter if the document referred to in the deed is recorded or not.⁶

When Extrinsic Evidence May Be Used

Generally, extrinsic evidence is used to clarify the intent of the parties and reasonably explain the import of the deed or the location and extent of the premises being conveyed. It is sometimes used in situations where the deed would otherwise be void but for the extrinsic evidence. When a deed does not sufficiently describe a tract of land to locate the boundaries, extrinsic evidence is properly admitted to furnish the information needed to clarify the location but only as much as is absolutely necessary to validate the description or supply its deficiency.⁷ Extrinsic evidence is allowed in the following situations.

Ambiguities - Extrinsic evidence can be used to resolve ambiguities.⁸ An ambiguity in a deed often arises when circumstances which are evident to the parties at the time of a conveyance may not be evident, after many years, to a subsequent owner or one who tries to interpret the deed. An ambiguity may arise when, for example, a deed calls for a monument at a corner and it is discovered that there are two monuments that fit the description, or where a deed calls for a distance easterly to a stream or highway and it is found that there are two potential locations that may meet the call.⁹ In another example, a deed which conveys, "my west pasture as now fenced containing 5 acres", may, 40 years after the conveyance, require reference to the recollections of older individuals who were familiar with the property or information from aerial photos to ascertain what was actually conveyed by the description.

Verification of a Monument or the Location — Often surveyors use extrinsic evidence to identify monuments referred to in the deed. Monuments are often described poorly or partially. In some deeds monuments may need to be verified using extrinsic evidence.¹⁰ It also happens that the monument called for in a deed is not permanent, such as a tree or wood stake, or may have been removed by snow plowing or earth moving. The location of those monuments, even after their disappearance, is subject to proof by extrinsic evidence.¹¹ An example which may require extrinsic evidence is a description that calls for a line running "northerly, passing 15 feet westerly of the Jackson sawmill" when the sawmill burned down years ago. The Jackson sawmill's proper location may be established by extrinsic

evidence.

Errors, Omissions, and Conflict — When there is clearly an error, omission, or conflict between two or more parts of a deed, extrinsic evidence can often be helpful in resolving the error, omission, or conflict.¹² This may be particularly applicable when a scrivener's error is revealed such as in the transposition of numbers in bearings or distances, the reversal of a course, missing courses, and so on.

Circumstances — Circumstances surrounding the conveyance have also been the topic of extrinsic evidence.¹³ Examples include the use of tidal shores and marsh, determining a fence type, the location of utility poles, use of slope distances or magnetic bearings, and so on. An example is a deed which conveys "all that land which was the homestead farm of Caleb Daniels at the time of his death." Determining the homestead by looking at the circumstances existing at the time of Daniels' death may require extensive research into deeds, maps, tax records, ancient lines of occupation and other evidence outside the deed to determine what was intended to be conveyed by the terms.

Definitions and Terms — Often extrinsic evidence such as information from history books, technical manuals, journals, and so on must be used to clarify terms used in the deed. It is common for deeds to use terms that were familiar to the parties to the conveyance but which today may be very obscure.¹⁴ For example a deed which contains the wording, "beginning at a balm of gilead on the easterly side of Black Brook 25 rods north of Stones crossing..." may need to be clarified by knowledgeable witnesses or reliable documentation that a balm of gilead is a balsam poplar tree and that "Stones Crossing" was the point just above Morgan Stone's grist mill where the old county road crossed the brook. The court will utilize credible information outside the deed to define terms and give effect to the deed description.

Validate or Prove Lost Deeds — Less frequent but required from time to time is to use extrinsic evidence to validate or prove lost deeds. If sufficient evidence can be produced by unsigned copies, testimony of credible witnesses who read the deed, or other means of verifying the fact of the conveyance, the conveyance may be

supported and proven.¹⁵

What May Be Used As Extrinsic Evidence

There are several sources of extrinsic evidence that have been recognized by the courts. These sources can be used to good advantage when the need arises.¹⁶

Parol — Parol evidence or verbal testimony is perhaps the most common source of extrinsic evidence. Surveyors, attorneys, and the courts, while recognizing the limitations of the recollections and statements of witnesses, make frequent use of this source when boundary locations are being retraced. It is common practice for the surveyor to talk to a landowner and the neighbors to hear their explanation of the boundary location and compare the testimony with the written descriptions in the deeds and the measurements made on the ground.

Historical Survey Plans — Surveys, both old and recent, are also a source of evidence which may shed light on circumstances surrounding the conveyance and the relative location of monuments and physical features on the ground. Surveyors may locate stone wall remnants, old wire fence remnants, physical features like brooks, old roadways, wells, foundation remains, timber cut lines, logging roads, buildings, utilities and easements. Without that information, which may verify or explain ambiguities, discrepancies, or errors in the deed, it is often difficult or impossible to properly fit the description to the ground.

Aerial Photographs — In addition to surveys and plans, aerial photos of a property may give clear evidence to the trained eye of the relative position of many physical features on the ground including buildings, roads, utility lines, streams, fences, and many other physical features.

Unrecorded Papers — Unrecorded papers and previous agreements between the parties may also, in some situations, be utilized to clarify an ambiguity or identify an obvious error in a deed.¹⁷ The evidence may take the form of purchase and sale agreements, sketches, annotated drawings, or memoranda of the transaction. Because of the Doctrine of Merger, this source of information can not enlarge or

diminish the grant or contradict the clear writings of the deed — it may only supply necessary information that was omitted from the deed.

Contemporaneous and Subsequent Acts — Another form of extrinsic evidence which the courts have relied on is information pertaining to the contemporaneous and subsequent acts of the parties to a deed.¹⁸ If the description in a deed is ambiguous the acts of the parties in recognizing a certain line by setting boundary markers, and blazing lines or making improvements such as erecting fences, building roads, placing utility poles, or landscaping may give the only evidence of the intent of the parties to the deed.¹⁹

Declarations With Knowledge — Persons with some peculiar means of knowledge such as near-by-residents, surveyors, farm hands, etc. have all been used to clear up ambiguity. After the tract of land has been conveyed, the declarations of a former owner regarding his or her understanding of the boundaries and their use of the property may be admissible to clarify an ambiguous deed.²⁰

Limitations

Extrinsic evidence is not used perfunctorily. The court has gone to great lengths to state and make clear that extrinsic evidence cannot be used to control, vary, or contradict the clear language in a deed. In other words, extrinsic evidence cannot enlarge or diminish that which is clearly described.²¹ For example, a plan or deed not referenced or cited in a conveyance is evidence aliunde and therefore cannot control, vary or contradict the clear written description contained in a deed.²² The reasoning behind the principle is obvious. Why would people go to the trouble to clearly articulate their contract and solemnly execute a deed if those writings could be annulled by verbal contradictions or extraneous memoranda? The court has recognized that titles would be completely unsettled.²³

Exception Not A Commonplace — The use of extrinsic evidence is to be an exception or a last resort when the language of the deed is found deficient after harmonizing all the calls in the deed under the standard rules of construction²⁴. In the interpretation of deeds, the intention of the parties must govern, and that

intention is to be determined if possible from the words expressed in the deed.²⁵ Where the words are clear, extrinsic evidence is not allowed²⁶. Accordingly, extrinsic evidence was inadmissible to show that in drafting a deed the scrivener erroneously inserted the words, "the north half" preceding the number of the lot to be conveyed or that instead of a certain parcel described in a deed, another tract was intended to be conveyed.²⁷

No Substitution — In other cases, extrinsic evidence cannot be substituted where common sense, plain meaning, rules of construction, and logic adequately provide recourse. For example, when a deed calls for the ending point of a line to be opposite a certain and definite point on the other side of a street, the line must end at a point at right angles to the point called for.²⁸

Cannot Vary Rules of Law or Legislature — Extrinsic evidence has not been allowed to vary rules established to protect purchasers and the sanctity of the deed²⁹. For example, the Court did not permit a deed to be used as a security for a debt or as a mortgage or allow that the delivery of a deed was to be void on the fulfillment of a certain condition when these conditions are not cited in the deed.³⁰ Neither can a parol reservation of fixtures, crops, manure or the like be considered valid.³¹ Even if the act of conveying a deed does not make sense or appears to have been unwise or absurd in what it accomplishes, if the language is clear, it is not to be altered by extrinsic or parol evidence.³²

Conclusion

As can be seen from this discussion, extrinsic evidence, while not always the favored tool for the interpretation of deeds, is often a necessary one. Persons who must interpret, retrace, or delineate the descriptions in deeds must be familiar with the rules pertaining to these matters so that their construction will coincide with that of the court.

See e.g., *Cushing v. State of Maine*, 434 A.2d 486 (1981)

¹ *Madden v. Tucker*, 46 Me. 367 (1859) and *Wing v. Burgis*, 13 Me. 111 (1836)

² "...it is well settled law, that a deed shall not be held void for uncertainty, but shall be so construed wherever it is possible as to give effect to the intention of the parties and not defeat it; and that this may be done whenever the court placing itself in the situation of the grantor at the date of the transaction, with knowledge of the surrounding

circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance thus illustrated. Greenleaf's Cruise, vol. IV, p. 306; ed. of 1850, tit. XXXII, chap. XX, note to § 24. And this, even where it becomes necessary to reject parts of the description given as false and inconsistent. " *Vose v. Handy*, 2 Maine, 322, 330 citing *Worthington v. Hyler*, 4 Mass. 196; *Jackson v. Clark*, 7 Johns. 217. To the same effect are *Wing v. Burgis*, 13 Maine, 111, and *Vose v. Bradstreet*, 27 Maine, 156, 171. Also see *Cilley v. Childs*, 73 Me. 130 (1882)

3 *Pelletier v. Langlois*, 130 Me. 486 (1931); *Patrick v. Grant*, 14 Me. 233 (1837); and *Wing v. Burgis*, 13 Me. 111 (1836)

4 See e.g., *St. Pierre v. Grondin*, 513 A.2d 1368 (Me. 1986); *Bailey v. Look*, 432 A.2d 1271 (Me. 1981); *Perreault v. Toussaint*, 419 A.2d 1009 (Me. 1980); *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898); and *Abbott v. Abbott*, 51 Me. 575 (1863)

5 *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss* 63 Me. 287 (1873); *Thomas v. Patten* 13 Me. 329 (1836)

6 *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss*, 63 Me. 287 (1873); and *Thomas v. Patten*, 13 Me. 329 (1836)

7 *Perreault v. Toussaint*, 419 A.2d 1009 (Me. 1980) and *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898)

8 *Taylor v. Hanson*, Me. 514 A.2d 155 (Me. 1988); *Abbott v. Abbott*, 51 Me. 575 (1863); *Bonney v. Morrill*, 52 Me. 252 (1863); *Linscott v. Fernald*, 5 Me. 496 (1829); and *Linscott v. Fernald*, 5 Me. 496 (1829)

9 *Tyler v. Fickett & 3 Me.* 410 (1882) *Abbott v. Abbott*, 51 Me. 575 (1863); *Chadbourne v. Mason*, 48 Me. 389 (1861); *Emery v. Webster*, 42 Me. 204 (1856); and *Wing v. Burgis*, 13 Me. 111 (1836)

10 Cf. *Tyler v. Fickett*, 73 Me. 410 (1882); *Abbott v. Abbott*, 51 Me. 575 (1863); *Chadbourne v. Mason* 48 Me. 389 (1861) and *Wing v. Burgis* 13 Me. 111 (1836)

11 *Theriault v. Murray*, 588 A.2d 720 (Me. 1991); *Savage v. Renaud*, 588 A.2d 724 (Me. 1991); and *Ricci v. Godin*, 523 A.2d 589 (Me. 1987)

12 *Wing v. Burgis*, 13 Me. 111 (1836) and *Vose v. Handy*, 2 Me. 296 (1823)

13 *Holden v. Morgan*, 516 A.2d 955 (Me. 1986); *Cushing v. State of Maine*, 434 A.2d 486 (1981); *Gillespie v. Worcester*, 322 A.2d 93 (Me. 1974); *C Company v. Westbrook* 269 A.2d 307 (Me. 1970) ; *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Pelletier v. Langlois* 130 Me. 486 (1931); *Emery v. Webster*, 42 Me. 204 (1856); *Linscott v. Fernald*, 5 Me. 496 (1829)

14 *Emery v. Webster*, 42 Me. 204 (1856) and *Linscott v. Fernald*, 5 Me. 496 (1829)

15 *Day v. Philbrook*, 89 Me. 462 (1897); *Moses v. Morse*, 74 Me. 472 (1883); and *Gore v. Elwell*, 22 Me. 442 (1843)

16 *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968) and *Cilley v. Childs*, 73 Me. 130 (1882)

17 *Company v. Westbrook*, 269 A.2d 307 (1970); *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Vumbaca v. West*, 107 Me. 130 (1910) and *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898); *Haight v. Hamor*, 83 Me. 453 (1891); and *Whitman v. Westman*, 30 Me. 285 (1849)

18 *Theriault v. Murray* 588 A.2d 720 (Me. 1991); *Bemis v. Bradley*, 126 Me. 462 (1927); *Borneman v. Milliken*, 123 Me. 488 (1924); ; *Woolen Co. v. Gas Co.*, 101 Me. 198 (1906); *Roberts v. Richards*, 84 Me. 1 (1891); *Cilley v. Childs*, 73 Me. 130 (1882); *Tyler v. Fickett*, 73 Me. 410 (1882); *Abbott v. Abbott*, 51 Me. 575 (1863)

19 *Knowles v. Toothaker*, 58 Me. 172 (1870) and *Emery v. Fowler*, 38 Me. 99 (1854)

20 *Bradstreet v. Bradstreet*, 158 Me. 140 (1962).

21 *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Card v. Nickerson*, 150 Me. 89 (1954); *Parkman v. Freeman*, 121 Me. 341 (1922); *Bassett v. Breen*, 118 Me. 279 (1919); *May v. Labbe*, 114 Me. 374 (1895); *Neal v. Flint*, 88 Me. 72 (1895); *Ames v. Hilton*, 70 Me. 36 (1879); *Mitchell v. Smith*, 67 Me. 338 (1876); *Bartlett v. Corliss*, 63 Me. 287 (1873); *Faught v. Holway*, 50 Me. 24 (1861); *Emery v. Webster*, 42 Me. 204 (1856); *Wellington v. Murdough*, 41 Me. 281 (1856); *Kennebec Ferry Co. v. Bradstreet* ,28 Me. 374 (1848); *Pride v. Lunt*, 19 Me. 115 (1841); *Allen v. Allen*, 14 Me. 387 (1837); *Thomas v. Patten*, 13 Me. 329 (1836); *Lincoln v. Avery*, 10 Me. 418 (1833); and *Linscott v. Fernald*, 5 Me. 496 (1829);

22 *Kinney v. Central Maine Power Co.*, 403 A.2d 346 (Me. 1979); *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss*, 63 Me. 287 (1873); *Talbot v. Copeland*, 38 Me. 333 (1854); and *Thomas v. Patten*, 13 Me. 329 (1836)

23 *Card v. Nickerson*, 150 Me. 89 (1954); *Bonney v. Morrill*, 52 Me. 252 (1863); *Madden v. Tucker*, 46 Me. 367 (1859); *Allen v. Allen*, 14 Me. 387 (1837); and *Lincoln v. Avery*, 10 Me. 418 (1833)

24 *Taylor v. Hanson*, 514 A.2d 155 (Me. 1988); *Kinney v. Central Me. Power Co.*, 403 A.2d 346 (Me. 1979);

25 *Wentworth v. Laporte*, 156 Me. 392 (1960); *Penly v. Emmons*, 117 Me. 108 (1918); *Haight v. Hamor*, 83 Me. 453
(1891); *Ames v. Hilton*, 70 Me. 36 (1879); *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374 (1848); *Grover v.*
Drummond, 25 Me. 185 (1845)

26 *St. Pierre v. Grondin*, 513 A.2d 1369 (Me. 1986); *Cushing v. State of Maine*, 434 A.2d 486 (1981); *Kinney v.*
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(1891); *Ames v. Hilton*, 70 Me. 36 (1879); and *Bartlett v. Corliss*, 63 Me. 287 (1873)

27 *Bonney v. Morrill*, 52 Me. 252 (1863); *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374 (1848); *Grover v.*
Drummond, 25 Me. 185 (1845); *Lincoln v. Avery*, 10 Me. 418 (1833)

28 *Card v. Nickerson*, 150 Me. 89 (1954); *Brown v. Allen*, 43 Me. 590 (1857); and *Williams v. Spaulding*, 29 Me. 112
(1848)

29 *Bradley v. Wilson*, 58 Me. 357 (1870)

30 *Madden v. Tucker*, 46 Me. 367, 376 [1859]

31 *Card v. Nickerson*, 150 Me. 89 (1954); *May v. Labbe*, 114 Me. 374 (1916); and *Reed v. Reed*, 71 Me. 156 (1880)

32 *Card v. Nickerson*, 150 Me. 89 (1954) and *Brown v. Thurston*, 56 Me. 126 (1868)

Warren v. Blake, 54 Me. 276 (1866) and *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374 (1848)