

825.00 PROCESSIONING ACTION.

The (*state number*) issue reads:

"What is the location of the true boundary between the plaintiff's land and the defendant's land?"¹

On this issue the burden of proof is on the plaintiff.² This means that the plaintiff must prove, by the greater weight of the evidence, the location of the true boundary between the land of the plaintiff and the land of the defendant.

In this case, the plaintiff contends, and the defendant denies, that the true boundary between their lands is (*describe alleged boundary*) as shown on (*identify map, survey or exhibit*).³ (On the other hand, the defendant contends, and the plaintiff denies, that the true boundary between their lands is (*describe alleged boundary*) as shown on (*identify map, survey or exhibit*).)

Members of the jury, in cases such as this it is a function of the Court to determine from the evidence presented a description of the boundary. After I give you the description of the boundary, it is your duty to use this description to locate the true boundary between the lands of the plaintiff and the defendant.

I now instruct you that the description of the boundary is as follows: (*here give the boundary description*).

Your duty in this case is to locate the true boundary by following the description I have given you. The law provides rules to assist you in fixing the location of a boundary. I will now instruct you as to those rules.

(*Select the appropriate paragraph(s).*)⁴

[If a conflict exists between a call⁵ running to a natural or permanent monument and a call for a [course]⁶ [distance], the call running to the monument will control.⁷ (Natural or permanent monuments are objects on the land relatively permanent in their character.) (A call for a monument will run to its center, unless a different point on the monument is described.)⁸ I instruct you that in this case the call(s) for (*name natural or permanent monument(s)*) [is] [are] (a) call(s) for (a) natural or permanent monument(s).]⁹

[If there is a conflict between the actual distance between two monuments and the distance called for in the deed, the actual distance will control.]¹⁰

[If there is a conflict between the course and the distance stated in the description, the course will control.]¹¹

[If the true boundary cannot be located by following the calls in the description in the order I have given them, it is permissible for you to begin your determination by starting with an established point and following the calls of the description in reverse order.]¹²

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff has proved that the location of the boundary between the land of plaintiff and the land of the defendant is the line shown as (*describe line, e.g., A, B, C*) on the [map] [survey] [(*name other exhibit*)], then it would be your duty to answer this issue in accordance with plaintiff's contentions by designating that line as the location of the boundary.

If, on the other hand, you fail to so find, then it would be your duty to establish the location of the boundary between the plaintiff's land and the defendant's land by fixing the line wherever the evidence, fully considered, justifies.¹³ This line may be as contended by the defendant, that is: (*describe line, e.g., 1, 2 3*) on the [map] [survey] [(*name other exhibit, if necessary*)], or as you find it from the evidence.

1. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945); *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943); *Combs v. Woody*, 53 N.C. App. 789, 281 S.E.2d 705 (1981) (indicating that the jury may locate the boundary wherever the evidence suggests).

2. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187, 835 S.E.2d 411, 415 (2019) (citing *Day v. Godwin*, 235 N.C. 465, 469, 128 S.E.2d 814, 816-17 (1963)). In a processioning action the burden of proof remains on the plaintiff whether or not the defendant submits a contention that another line is the true boundary. *Garris v. Harrington*, 167 N.C. 86, 83 S.E. 253 (1914). Moreover, dismissal is improper so long as it appears that a bona fide dispute exists as to the location of the boundary, regardless of the nature of the evidence presented. A boundary must be located. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E.2d 74 (1949); *see also Rice v. Rice*, 259 N.C. 171, 130 S.E.2d 41 (1963).

The question of title is not in issue in a processioning proceeding. If title becomes an issue, the proceeding is converted to an action to quiet title under N.C. Gen. Stat. § 41-10. *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961); *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

3. According to *Norwood v. Crawford*, 114 N.C. 513, 514, 19 S.E. 349, 351 (1894), the duty of the surveyor is to do the following: "He is required to survey the lines according to the contention of each of the parties, and to make a map, in which shall be designated, by lines and letters or figures, the boundaries as claimed by each. His report should show by what deed or deeds he surveyed, at the request of either, and the successive calls surveyed, with detailed accounts of the measurement by course and distance; also of the marked trees or corners claimed as such, and what was the nature and appearance of the marks, whether course and distance were disregarded in running any given line, whether any steps were taken to ascertain the age of the marks on line trees and corners, and all other facts developed by such survey as would tend to enlighten a court or jury in the trial of a controversy as to boundary." The parties, however, may also provide their own maps and surveys. *Nichols v. Wilson*, 116 N.C. App. 286, 293, 448 S.E.2d 119, 123 (1994).

4. For references to other rules of construction that might be relevant, *see Webster, Real Estate Law In North Carolina* (4th Ed), §§ 10-36 through 39.

5. In some cases it may be appropriate to define the word "call" if the word has not been defined in course of the trial: *A call is defined as a statement in a description which defines a line between two points by reference to a direction, distance and/or*

monument. See, e.g., *Green v. Barker*, 254 N.C. 603, 605, 119 S.E.2d 456, 457 (1961). *Brown v. Hodges*, 233 N.C. 617, 119 S.E.2d 456 (1951).

6. In some cases it may be appropriate to define the word "course" if the word has not been defined during the trial: *A course is defined as the direction in which a line runs based upon its correspondence with a certain point on the compass.* Webster, *Real Estate Law in North Carolina* (4th Ed), 10-35. See also *Jones v. Arehart*, 125 N.C. App. 89, 479 S.E.2d 254 (1997).

7. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); *Brown, supra*.

8. Webster, *Real Estate Law in North Carolina* (4th Ed), § 10-39. See also *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Candy v. Cliff*, 93 N.C. App. 50, 376 S.E.2d 5405 (1989).

9. It is the function of the court to determine which objects are monuments. The court must designate the termini of the boundary. The sole duty of the jury is to locate the termini specified and establish the line on the ground. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187, 835 S.E.2d 411, 416 (2019).

A monument may be any natural or artificial object which is fixed in position. Watercourses, rocks, trees or anything immovable that may be identified may serve as a monument. Moveable things may become boundaries of land when they become immovable, such as a wall or pillar of stones or any other fixed, stable substance. *Allen v. Cates*, 262 N.C. 268, 136 S.E.2d 579 (1964); a wall, *Bostic v. Blanton*, 232 N.C. 441, 61 S.E.2d 443 (1950); a highway, *Franklin, supra* 248 N.C. 656, 104 S.E.2d 841 (1958); a ditch, *Franklin v. Faulkner* (dictum); and established line of an adjacent tract, *Cutts, supra*, an established corner of an adjoining tract, *Allen v. Cates*; and a marked tree, *Smothers v. Schlosser*, 2 N.C. App. 272, 163 S.E.2d 127 (1968) have been held to constitute monuments within the meaning of the rule.

A call to a stone, without additional description of distinguishing features, is insufficient to constitute a call to a permanent monument. *Allen v. Cates*. Similarly, a call to a stake is considered to lack the stability and permanence essential to monuments. See also Webster, *supra* note 7, § 10-35. *Brown v. Hodges, supra*, note 8.

10. *North Carolina State Highway Comm'n v. Gamble*, 9 N.C. App. 618, 177 S.E.2d 434 (1970).

11. *Tice v. Winchester*, 225 N.C. 673, 36 S.E.2d 257 (1945).

12. *Cutts, supra*.

13. The jury is not compelled to agree with the plaintiff or the defendant, but may fix the line in accordance with the evidence. *Combs, supra*, 53 N.C. App. at 792, 281 S.E.2d at 707; *Combs v. Woody*, 53 N.C. App. 789, 281 S.E.2d 705 (1981) (indicating that the jury may locate the boundary wherever the evidence suggests). See also *Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 44 (1960).