IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Lawrence S. Foley, Plaintiff	)	Civil Action No. 4776-MA
v.	)	
Joseph V. and Julie Ann Vari Defendants	)	

MASTER'S REPORT

Date Submitted: December 18, 2013
Draft Report: March 26, 2014
Final Report: April 7, 2014

This case involves a dispute over the location of the common boundary between two properties near Odessa, Delaware. The lands of Petitioner Lawrence S. Foley, New Castle County tax parcel no. 14-003.00-005 (hereinafter "Parcel 005"), and the lands of Respondents Joseph V. and Julie Ann Vari, New Castle County tax parcel no. 14-003.00-008 (hereinafter "Parcel 008"), are located on River Road east of Odessa along the Appoquinimink Creek (hereinafter "the Creek").[1] The dispute first arose in 2006 after Foley built a duck blind on the edge of the marsh in close proximity to a duck blind on the Varis' property. Foley subsequently filed suit in this Court, seeking legal and equitable title to two

[1] Parcel 8 is closer to Odessa than Parcel 5, which extends eastward toward the Delaware Bay and includes a large island in the Creek that is not shown on the diagram below. Joint Exhibit 28 (hereinafter "JX").

disputed areas of marsh, which are shown on the diagram below as "Disputed Area 1" and "Disputed Area 2." A two-day trial took place in April 2013, after which the parties submitted written closing arguments. Having reviewed carefully the exhibits, the transcripts of witnesses' testimony, and the written closing arguments, I am now issuing a draft report in which I recommend that the Court deny Petitioner's legal and equitable claims to Disputed Area 2 but grant Petitioner title by adverse possession to Disputed Area 1.

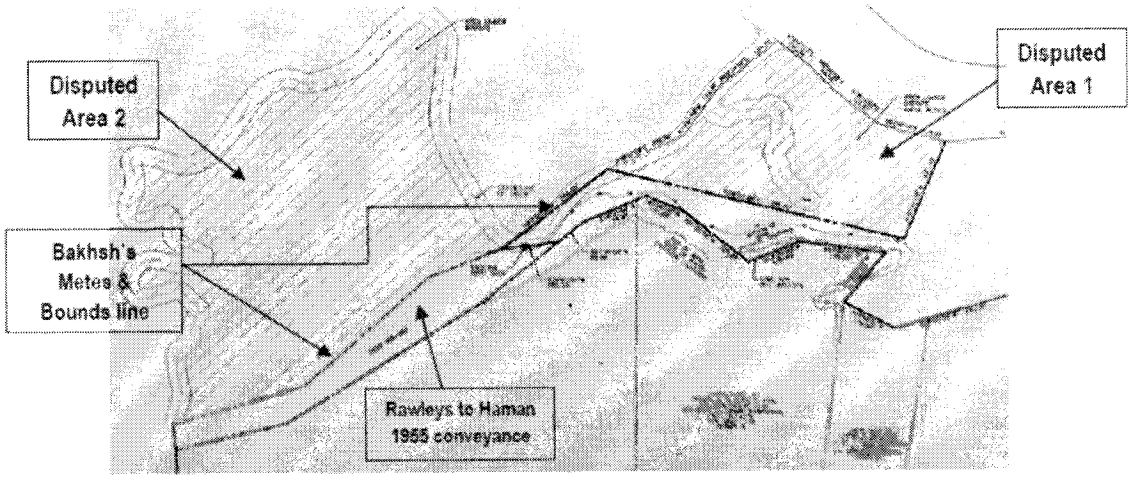
I. Introduction

I have attached a diagram below showing: (a) the two disputed areas of marsh; (b) a boundary line denominated "Bakhsh's Metes and Bounds line;" and (c) a plot of the 1955 conveyance of land from Irving Rawley to Claude Haman, Sr., the parties' predecessors in interest.[2] The diagram below does not include compass directions, but if a line were drawn from the bottom left corner of the diagram to a point where a large ditch joins the Creek near the top right corner, this imaginary line would lie along the north/south axis. Disputed Area 1 lies to the east and Disputed Area 2 lies to the west of this imaginary line. Disputed Area 1 is bordered on the north by the Creek and on the west by the large ditch.[3] Disputed

[2]This diagram was copied from a diagram on page 2 of Respondents' Post-Trial Closing Argument, Docket Item 66 (hereinafter "DI"), which depicts part of the "Boundary Survey for the Lands of Larry Foley" prepared by Clifton L. Bakhsh, Jr., overlaid with arrows and boxes. JX 22.

[3] Foley built his duck blind near the northwest corner of Disputed Area 1, which contains approximately 4.8 acres of marsh land. Trial Transcript 151 (hereinafter "TT"); JX 22.

Area 2 is bordered approximately on three sides by the upper portion of this ditch and on the fourth side by marsh and cripple land owned by the Varis. "Bakhsh's Metes & Bounds line" (hereinafter "the metes and bounds line") divides Disputed Area 1 from Foley's marsh and cripple land along its southern and eastern borders, and divides Disputed Area 2 from the Varis' marsh and cripple land along its eastern border.



II. Legal Title

A. Factual Background

The lands owned by the parties were once part of a single agricultural parcel that was foreclosed upon and divided into two farms in 1886.[4] Between 1894 and 1902, both farms were owned by Edwin S. Armstrong.[5] In 1902, Armstrong sold

[4] TT 106.
[5] JX 19.

one farm containing approximately 252 acres to Richard L. Gray,[6] and the other farm containing approximately 141 acres to William C. McCoy.[7] Gray's farm changed ownership many times before 1954, when it was purchased by Haman, Sr.[8] In 1969, Haman, Sr. sold the farm to his son Claude Haman, Jr.,[9] who sold it to the Varis in 2006.[10] Ownership of McCoy's farm changed twice before it was purchased by Rawley in 1918.[11] During his lifetime, Rawley made two out-conveyances of property, which will be discussed more fully below. When Rawley died in 1965,[12] ownership of what remained of his farm descended through his daughter's family to his grandson Foley,[13] who inherited the property upon his father's death in 1996.[14]

The legal description of the common boundary is the same in both chains of title going back to 1886, with one major difference.[15] In the Varis' chain of title, the legal description of the common boundary line begins at a low water mark on the Creek, and then runs "[six courses and distances] to a stake at the head of a

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[6] JX 18.
[7] JX 8.
[8] The Haman and Rawley farms were owned by married couples. For the sake of simplicity, I am omitting any reference to spouses, and intend no disrespect by this practice.
[9] JX 11.
[10] JX 10.
[11] JX 5-7.
[12] TT 39.
[13] What remained of the Rawley farm after two out-conveyances was only cripple land and marsh along the perimeters of the original property. TT 41. "Cripple" is defined as "swampy or low wet ground usually covered with brush or thickets." *Webster's Third New International Dictionary*, at 537 (Merriam-Webster, Inc. 2002).
[14] TT 42.
[15] TT 161.

ditch; thence South 50.5 degrees East, [38.6 perches] to a stake in the river road leading from Odessa to Port Penn, dividing this land from the land late of John Atherly, deceased[.]"[16] In Foley's chain of title, the legal description of the common boundary line begins at a stake in the River Road, and "thence by lands, late of Joshua B. Fennimore, now of Richard L. Gray, North 51.5 degrees West [38.6 perches] to a stake at the head of a ditch; thence with the center of said ditch the following [six] courses and distances ... to low water mark in the" Creek.[17] Both chains of title contain calls to "the stake at the head of a ditch" and "the low water mark" on the Creek. In addition, between these two calls is a call to a series of six courses and distances that are nearly identical except for the compass directions.[18] The major difference is that the Varis' chain of title does not contain the additional call "thence with the center of said ditch."[19]

B. Issues

The deed from Armstrong to Gray was recorded on August 22, 1902,[20] approximately two weeks before the deed from Armstrong to McCoy was recorded on September 4, 1902.[21] The Varis contend that because the 1902 deed to Gray was recorded first, their chain of title is senior to Foley's chain of title.

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[16] JX 12.
[17] JX 2.
[18] The different compass directions are due to the fact that the legal descriptions of the two properties have different starting points.
[19] TT 108-109.
[20] JX 18.
[21] JX 8.

Furthermore, since Foley's chain of title contains a call to the lands of Gray, the Varis contend that Foley's deed accepted the boundary of the Varis' property as a monument. They argue, therefore, that the seniority of their chain of title and the rule of preference render irrelevant the call to "the center of said ditch" in Foley's chain of title. According to the Varis, the call to the six courses and distances, which is shown on the above diagram as "Bakhsh's Metes and Bounds line," establishes the common boundary between the two properties. Since the two disputed areas lie west of this metes and bounds line, the Varis claim legal title to both disputed areas of marsh.

Foley argues that the Varis are estopped from arguing that their chain of title takes precedence because in a deed dated September 30, 1955 (hereinafter "the 1955 Deed"),[22] Rawley and Haman, Sr. agreed that the center line of the ditch was their common boundary line.[23] Foley also contends that the ditch called to in the 1955 Deed is the existing ditch that borders the two disputed areas of marsh. Since the two disputed areas are located east of this ditch, Foley claims legal title to both disputed areas.

C. Analysis

[22] This conveyance is plotted on the above diagram and on JX 22 and labeled "Deed V56-582." During the trial, the 1955 Deed was sometimes erroneously referred to as the "1954 Deed." JX 26.
[23] JX 26.

After this dispute arose in 2006, Foley hired Clifton L. Bakhsh, Jr., a registered professional land surveyor, who conducted extensive field work in the area with his team of surveyors, in addition to researching the historical records, aerial photographs, tax assessment maps, and other relevant documents.[24] Bakhsh was unable to locate the stake at the head of the ditch because the topography in the area where the stake should have been had been altered by the construction of a pond.[25] Bakhsh also was unable to find any ditch that corresponded to the set of six courses and distances recited in the 1902 deeds.[26] However, Bakhsh considered the six courses and distances in the original deeds to be unreliable because the deeds did not contain any reference to a survey. Furthermore, in his opinion, a call to a physical monument takes precedence over courses and distances where there is an inconsistency. According to Bakhsh, the ditch shown on the above diagram meandering around Disputed Area 2 down to the Creek was the ditch mentioned in the original deeds.[27] During his search of the historical records, Bakhsh also discovered the 1955 Deed, when Rawley conveyed approximately 2 acres of land to Haman, Sr.[28] The legal description of the property being conveyed contained a call to the center line of the ditch. Bakhsh surmised from this deed that the two landowners had reached an understanding or agreement as to their common

[24] TT 102, 105-106, 111-112, 125.
[25] TT 113.
[26] TT113-114.
[27] TT 166.
[28] JX 26.

boundary line. Their agreement, in Bakhsh's opinion, superceded the senior rights of the Varis' chain of title.[29] As a result, Bakhsh concluded that Foley was the legal owner of the two disputed areas of marsh.

In 2013, the Varis hired Michael R. Paraskewich, Sr., who is the preferred land surveyor for the Delaware Agricultural Land Preservation Foundation (hereinafter "the Foundation").[30] The Foundation previously had asked Paraskewich to review this matter because the Foundation had purchased the development rights to Haman, Jr.'s farm in 2006 and, in the process, had commissioned Greenbriar, Inc. to perform a survey of this farm.[31] Paraskewich prepared a report for the Foundation in 2009 without doing his own field boundary survey.[32] In his report, Paraskewich concluded that the duck blind Foley had built in 2006 was located on the Varis' marsh.[33] In 2013, after he was hired by the Varis, Paraskewich conducted a more extensive retracement of the original boundaries of their property.[34]

Paraskewich examined both chains of title back to 1894, and drew plots of each conveyance. Paraskewich studied old photographs, consulted with a wetlands expert, and sent out survey crews to the Varis' property. For trial, Paraskewich

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[29] TT 116-117.
[30] TT 314.
[31] JX 21.
[32] TT 317-321.
[33] JX 25.
[34] TT 321.

prepared an exhibit boundary plan overlaid on an enlarged 1937 aerial photograph of the area.[35] To create this plan, he traced the deed distances in the respective deeds using the only two calls to physical monuments that he could find, i.e., the corner or turn in the road and the centerline of River Road. He was unable to locate the head of the ditch because the Haman family had dug a pond where the head of the ditch should have been, thereby changing the characteristics of the area.[36] Using computer technology, Paraskewich drew a green line on the enlarged 1937 aerial photograph following the set of six courses and distances in the deed to outline the boundaries of the original conveyance from Armstrong to Gray, i.e., the property that Haman, Sr. subsequently acquired.[37] Paraskewich drew a red line on the photograph to trace the original conveyance from Armstrong to McCoy, i.e., the property that Rawley subsequently acquired, but Paraskewich proceeded counter-clockwise from the starting point in the deed's legal description because he believed there were incorrect angles and distances in Foley's deed.[38] Paraskewich also outlined in blue the ditches he had observed on the 1937 aerial photograph and, in an inset to his exhibit, further enlarged a section of the 1937 aerial photograph to show where he had located the remnant of a ditch along the Creek

[35] TT 328-329.
[36] TT 334-335.
[37] JX 23; TT 336.
[38] TT 337.

during his fieldwork.[39] This enlargement shows a ditch that roughly follows the red line as it angles southeast from the Creek to the red line's first turn to the southwest.[40]

In his 2009 report to the Foundation, Paraskewich concluded that the phrase "thence with the center of said ditch" in Foley's chain of title had been misused or else the ditch was no longer visible due to natural changes in the marshland.[41] Since Paraskewich was unable to locate the physical call, i.e., the ditch, he used the courses and distances to show the location of the common boundary between the properties.[42]

Bakhsh, however, saw nothing that led him to believe that the call "thence with the center of said ditch" had been misused or that the ditch was no longer visible due to natural changes in the marsh land.[43] On his boundary survey, Bakhsh drew the center line of this ditch beginning at the upper left corner of the small parcel identified as Deed V56-582 (the 1955 Deed), to the mouth of the

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[39] TT 338-339.
[40] JX 23.
[41] TT 374.
[42] TT 362. Paraskewich's plan shows the green and red lines running mostly parallel to each other at distances of 144 to 154 feet. TT 340. The lines did not overlap because of the monuments that Paraskewich used. *Id.* The Varis now have adopted Bakhsh's metes and bounds boundary line as the location of the common boundary. *See* Respondent's Post-Trial Closing Argument at p. 2. DI 66.
[43] TT 141-143.

ditch.[44] Bakhsh then drew crosshatches from the metes and bounds line to the center line of the ditch to depict the two disputed areas of marsh.[45] Although Paraskewich agreed with Bakhsh as to the proximate location of the head of the ditch,[46] he rejected as too speculative Bakhsh's identification of the existing ditch in that location as the ditch mentioned in the 1902 deeds.[47] Paraskewich further claimed that the watercourse Bakhsh had identified was a "gut," not a "ditch." Paraskewich defined a "ditch" as a man-made separation of land.[48]

In both chains of title, the common boundary line runs from a stake at the head of a ditch to a low water mark of the Creek. The path of that line depends upon the intermediate calls between those two points. Assuming that the ditch mentioned in both chains of title is, as Bakhsh claimed, the existing ditch shown on Bakhsh's boundary survey, then the path of the common boundary line must differ in the two chains of title because the Varis' chain of title contains a single intermediate call to a set of six courses and distances while Foley's chain of title contains an additional intermediate call to the center line of the ditch. However, the parties agree that the Varis' chain of title is senior to Foley's chain of title. Since there is no call to the center line of the ditch in the senior chain of title, then

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[44] JX 22. On his boundary survey plan, Bakhsh also drew the center line of a small branch of the ditch in Disputed Area 1.
[45] JX 22.
[46] TT 334-335.
[47] TT 380-381.
[48] TT 400-401.

the call to the six courses and distances in the 1902 deed from Armstrong to Gray, i.e., the metes and bounds line, delineated the eastern boundary of Gray's lands. As shown on the above diagram, Disputed Areas 1 and 2 lie west of the metes and bounds line. Therefore, when the 1902 deed from Armstrong to Gray was recorded, Gray obtained legal title to both disputed areas. Approximately two weeks later, when Armstrong conveyed his other farm to McCoy, Armstrong no longer had title to Disputed Areas 1 and 2 and, thus, was unable to convey these two areas of marsh to McCoy.[49]

Nevertheless, Foley argues that Haman Sr.'s acceptance of the 1955 Deed is evidence that Haman, Sr. had agreed with Rawley that the center line of the ditch was their common boundary. According to Foley, the language in the 1955 Deed clearly establishes the center line of the ditch as the common boundary between the parties' lands. Furthermore, Foley argues that if the metes and bounds line had been the common boundary, there would have been no need for the 1955 Deed because Haman, Sr. would have already owned Disputed Area 2. Therefore, Foley infers from the existence of the 1955 Deed that Rawley owned Disputed Area 2 and, by agreeing to the center line of the ditch as the property line, Haman, Sr. derived some benefit in purchasing this portion of the Rawley property. Citing

[49] *See Stransky v. Monmouth Council of Girl Scouts*, 925 A.2d 45, 52 (N.J.Super.A.D. 2007).

Farkas v. Jarrell, 1993 WL 401878 (Del. Ch. Sept. 17, 1993), Foley argues that the Varis are now estopped from asserting a contrary boundary line.

In 1955, Rawley conveyed 2.15 acres of land to Haman, Sr. for $10.00 in consideration.[50] The legal description of the property that was conveyed states as follows:

> Beginning at a Hickory Tree on the high water level of marsh and in the division line of land formerly of J.T. Ward, now C.D. Haman, and lands formerly of Purnell Moody, now C.D. Haman; thence north forty-eight degrees, west, four and six-tenths perches along lands of C.D. Haman to the center line of a ditch; thence continuing along lands of C.D. Haman ***and with center line of said ditch by the following four courses***: North twenty-four degrees and thirty minutes East, twenty-two and seven-tenths perches to a point; North one degree west, twenty-seven and three-tenths perches to a point; North nineteen degrees and forty-five minutes east, twelve and five-tenths perches to a point; and North twenty three degrees east, ten perches to a point on marsh high water level and other land of C.D. Haman; thence with lands of C.D. Haman and marsh high water level by the following four courses; South one degree and thirty minutes west, fifteen and three-tenths perches to a point; South eight degrees thirty minutes west, thirty eight and six-tenths perches to a point; south forty-one degrees west, eight perches to a point; and South eighteen degrees west, eleven and five-tenths perches to a point and place of beginning.[51]

A short history of Haman, Sr.'s farm is helpful to understanding what was conveyed in the 1955 Deed. Haman, Sr. was a dairy farmer who,[52] on August 25, 1954, purchased from J.T. Ward the original 252-acre farm that Armstrong had

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[50] JX 26.
[51] JX 26 (emphasis added).
[52] TT 35.

sold to Gray in 1902.[53] Shortly thereafter, on March 7, 1955, Haman, Sr. purchased from Purnell Moody a 76-acre parcel that Rawley had sold to Moody on September 27, 1953.[54] This was a new parcel consisting of the tillable acreage Rawley had conveyed out of the farm that he had purchased in 1918, i.e., the original 141-acre farm that Armstrong had sold to McCoy in 1902.[55] When Rawley conveyed his tillable acres to Moody, Rawley expressly reserved ownership of the cripple land and marsh along the perimeters of his farm, as shown in the legal description of the property that Moody subsequently conveyed to Haman, Sr.:

> All the certain tract and parcel of land situate in Appoquinimink Hundred aforesaid, lying on the west side of the Black Top public road leading from Odessa to Bay View and Port Penn, known as the River Road, with improvements thereon erected, ***excepting therefrom all of the marsh and cripple land as hereinbefore was included in the whole tract, bounded on the north and east by marsh and cripple lands now being reserved by said grantors***, on the east also by the aforesaid public road known as the River Road leading from Odessa to Bay View and Port Penn, and lands now or late of W.F. Coleman and on the south and west by lands now or late of Claude D. Haman, Sr., formerly of Joseph T. Ward, Fennimore and Richard L. Gray ***and also on the west by marsh and cripple land now being reserved by said grantors and being more fully described in accordance with a survey made by J.K. Haddaway, Surveyor, during January 1953,*** as follows, to wit:
>
> BEGINNING at the old original corner in the center of the aforesaid Black Top Road leading from Odessa to Bay View and Port Penn, for lands

[53] JX 11.
[54] JX 1.
[55] A survey purportedly prepared by a registered engineer and surveyor named Haddaway in January 1953 shows how this new parcel was created, and generally shows the areas of reserved cripple land and marsh. However, copies of the survey introduced into evidence appear overlaid with many notations and lines made by later hands. JXs 33 & 37.

> now or late of J.T. Ward, formerly of Fennimore and Richard L. Gray; thence from said beginning corner and running with the Ward lands, north forty-eight degrees east, thirty-four perches to a Hickory tree standing in low lands in line of the Ward lands ***and being a new corner now established for this land and marsh and cripple lands being reserved***; ***thence turning and running the following new lines which will separate the land hereby being conveyed from the marsh and cripple land now being reserved along the edge of fast and marsh land;*** thus north eighteen degrees east eleven and five-tenths perches; north forty-one degrees east, eight perches; north eight degrees and thirty minutes east thirty-eight and six-tenths perches; north one degree and thirty minutes east, and passing along the east edge of gut or prong of the Appoquinimink Creek twenty and three-tenths perches, north eighteen degrees east, ten and six–tenths perches;[.....] back to the beginning and ***containing an area of about seventy-six acres of high and arable or tillable land excluding the marsh and cripple land.***[56]

After Rawley conveyed his tillable acres to Moody, a section of Rawley's reserved marsh and cripple land became isolated between Moody's new parcel and Haman, Sr.'s original 252-acre farm, i.e., from the Hickory tree in the south to the eastern edge of the gut in the north. Nine months after Haman Sr. purchased the 76-acre parcel from Moody, Haman Sr. purchased this isolated section of reserved marsh and cripple land from Rawley, as shown in the 1955 Deed. As plotted on the above diagram, the parcel that was conveyed looks like a sliver or thin strip of land. Foley speculated that Haman, Sr. had purchased this parcel to obtain water access to the ditch and the Creek beyond and, in fact, a boat dock was later built on

[56] JX 11 (emphasis added).

the eastern edge of the ditch.[57] Paraskewich had been told that Haman Sr. needed this sliver of land to support the pond he was building.[58]

Bakhsh testified that there would have been no need for Haman Sr. to have purchased this land in 1955 if the metes and bounds line was the common boundary line because he would have already owned the land. In other words, Haman Sr. would have acquired this sliver of land when he purchased the original 252-acre farm from Ward in 1954.[59] The problem with Bakhsh's testimony is that the call to the six courses and distances in the 1902 deed from Armstrong to Gray runs along the western boundary of the sliver of land as plotted on the above diagram. At trial, Paraskewich used an orange marker to trace these six courses and distances on a copy of Bakhsh's boundary survey.[60] Paraskewich's orange line is identical to the metes and bounds line shown on the diagram above. Since the sliver of marsh and cripple land lies east of the metes and bounds line, it would not have been part of the original 252-acre farm that Haman, Sr. had purchased in 1954. With the 1955 Deed, Haman, Sr. acquired a sliver of marsh and cripple land that he had not previously owned and thereby consolidated his properties into one large contiguous farm.

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[57] JX 22.
[58] TT 350-351.
[59] TT 117-118.
[60] JX 38.

Foley's argument that the 1955 Deed reflects an agreement by the parties to consider the center line of the ditch as their common boundary appears to be without any factual foundation. There was no evidence of any boundary line dispute between Rawley and Haman, Sr. at that time. Foley himself never knew the boundaries of his grandfather's farm; he just knew where they trapped and that his family referred to the existing ditch as the "line ditch" or "property line ditch."[61] The first time Foley realized there was a boundary dispute was in 2006.[62]

Foley's argument that the Varis are estopped by the 1955 Deed from claiming legal title to the two disputed areas also fails because Foley has not satisfied the requirements of the doctrine of estoppel by deed.

> The doctrine of estoppel by deed acts as a bar to preclude "one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted in it." State v. Phillips, Del.Ch. 400 A.2d 299, 310 (1979), quoting 28 AM.JUR.2d, Estoppel and Waiver 4 (1966). The party asserting an estoppel by deed generally must show that he has changed position in reliance on the representations in the deed and that he will suffer damage if such representations are altered. 31 C.J.S. Estoppel by Deed 10 (1964).[63]

As the party asserting an estoppel by deed, Foley must demonstrate that he or his privies somehow changed position in reliance on the representations in the 1955 Deed, and that he would suffer damage if such representations are altered.

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[61] TT 28, 33.
[62] TT 46, 63.
[63] *Farkas*, mem. op. at *1, *supra.*

Foley has made no such demonstration. Foley himself had no knowledge of the existence of the 1955 Deed until Bakhsh discovered it during the course of his historical research. Therefore, the doctrine of estoppel by deed does not apply, and the 1955 Deed has no effect on the Varis' title to the two disputed areas.

III. Adverse Possession and Prescriptive Easement

A. Factual Background

The two areas in dispute consist of tidal marsh lands. According to Foley, his family has used the disputed areas since 1918 for duck hunting, fishing, trapping muskrat, and catching snapping turtles. Vari made similar claims to have hunted and trapped the disputed areas since 1979. At trial, both parties presented independent witnesses who, over the past four decades, had hunted or trapped on the two farms.

B. Issues

Foley has raised two alternative arguments. First, Foley argues that he acquired title to the two disputed areas through adverse possession in light of his family's use of the tidal marshes for nearly one hundred years. Second, Foley contends that he has a right to the continued use of the duck blind on the east side of the line ditch by virtue of an easement by prescription.

The Varis argue that Foley has failed to assert adverse possession with respect to Disputed Area 2; therefore, the Court should conclude that Foley

concedes this parcel has always been the Varis' property. They also contend that Foley failed to provide evidence that Disputed Area 1 was used for hunting and trapping continuously and exclusively for a period of 20 years. According to the Varis, there were many duck blinds in the area, including the Varis' duck blind on the left bank of the gut, and it would have been unusual to have had two duck blinds in such close proximity. The Varis contend that Foley's witnesses were long-time friends who were biased. Their own witnesses were more compelling, and could not recall having seen another duck blind in Disputed Area 1 before 2006. It is the Varis' contention that Foley's sporadic hunting and trapping of the disputed lands does not rise to the level of adverse possession.

C. Analysis

To acquire title by adverse possession, a party's intended possession must be: (1) hostile and under a claim of right; (2) exclusive; (3) open and notorious; (4) actual; and (5) continuous for a period of twenty years.[64] The party asserting adverse possession has the burden of proving all of these elements by a preponderance of the evidence.[65] Since the land Foley claims is marshland, Foley has to show possession of the land that is "commensurate with its nature."[66]

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[64] *Edwards v. Estate of Muller*, 1993 WL 489381, at *13 (Del. Ch. Nov. 15, 1993) (citing 10 *Del. C.* § 7901).
[65] *Id.*
[66] *Id.* (quoting *Steller v. David*, 257 A.2d 391, 396 (Del. Super. 1969)).

At trial, there was considerable testimony about muskrat trapping, pronging for turtles, and duck hunting on the marsh, activities that appear fully commensurate with the nature and characteristics of a marsh.[67] Foley started trapping with his grandfather when he was 11 or 12, which would have been in the early to mid-1950s.[68] Foley specifically pointed to both disputed areas on JX 22 as locations where he trapped muskrat on the Rawley/Foley farm over the years.[69] However, Foley entered the United States Navy in February 1960 and was absent from the farm for four years while he was in military service.[70] There was no evidence of anyone else in Foley's family trapping Disputed Area 2 during his absence; to the contrary, there was evidence that his uncle, Foster Rawley, who lived on the farm, did not do much trapping, and his other uncle, Roy Rawley, trapped a different farm.[71] When Foley returned to Middletown in 1964, he resumed trapping in the two disputed areas. He trapped the Foley farm every year until his younger brother Danny began trapping muskrat there with his friend Jack

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[67] *Steller*, 257 A.2d at 395 ("If the chief value of the acreage is trapping muskrat in season, such evidence for the required statutory time may under proper circumstances be sufficient possession to establish ownership adversely.") Waterfowl seasons start in September and conclude in the first part of January. TT 63-66. Trapping season starts in December and goes through the 15th of March. TT 56. Snapping turtle season starts when the water warms in June and lasts until mid-August. TT 64.
[68] TT 24, 26, 28.
[69] TT 32-33, 52-53, 56.
[70] TT 34-35.
[71] TT39.

Grove.[72] At some point, Foley began to lease other farms in the region for hunting and trapping, and he had a commercial hunting and trapping business during the 1980s.[73]

Grove testified that he went to school with Danny Foley and started hunting ducks and trapping muskrat on the Foley farm in the fall of 1969 when he was a junior in high school.[74] He helped Danny trap the entire marsh east of the ditch from the Creek to the head of the ditch, which included the two disputed areas.[75] Grove hunted and trapped the Foley farm with Danny on a regular basis until 1982 or 1983, when Grove started to trap muskrat and hunt ducks in different areas.[76] He returned to the Foley farm in the early 1990s, and hunted and trapped in that area until the late 1990s.[77] Grove testified that he never saw anyone hunting or trapping on the east side of the ditch, which he called the "line ditch," other than Glenn Foley, who is Foley's son, and Sean Foley, who is Danny's son.[78]

Vari began working for Claude Haman, Jr. in 1982 as a cow herdsman, and worked for Haman, Jr. until the man retired.[79] Vari testified that starting in 1979, he trapped the marsh on the Haman farm, including the two disputed areas, and

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[72] TT 41-42, 67.
[73] TT 37-38, 56, 66.
[74] TT 71.
[75] TT 73-74.
[76] TT 75.
[77] TT 75.
[78] TT 77.
[79] TT 254-255.

never saw signs of anyone else trapping there.[80] George O'Neal testified that when he trapped the Haman farm from 1988 to 2003, he trapped both sides of the ditch with Vari and Haman, Jr.[81] Randolph Moody, Jr. started trapping the Haman farm, including both sides of the ditch, in the late 1990s when he was about 12 or 13 years old, and never saw other people trapping this area.[82]

Foley has failed to demonstrate continuous trapping activity in Disputed Area 2 by him, his family, or invitees for the statutory period of 20 years. While Foley may have started trapping Disputed Area 2 during the 1950s, there was a gap of four years with little or no trapping there while Foley served in the Navy. Foley resumed trapping Disputed Area 2 in 1964 and continued trapping until 1969, when his brother Danny and Grove took up trapping in Disputed Area 2, among other areas. However, there was no evidence that Foley or his brother continued to trap in Disputed Area 2 after Grove left in 1982 or 1983. Therefore, I recommend that Foley's claim of title to Disputed Area 2 by adverse possession be denied.

Foley also testified that in 1959 he built two duck blinds on his grandfather's farm. One blind was built on the edge of the marsh along the Creek east of the ditch, i.e., at the northwest corner of Disputed Area 1 (hereinafter "the corner blind"). The other blind was on Poison Ivy Island, the name the Rawley and Foley

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[80] TT 262-264.
[81] TT 271, 275.
[82] TT 279, 286-287.

family had given to the marsh island they owned in the Creek.[83] Foley hunted ducks from the corner blind in 1959, and while he was in the Navy, his father, Foster Rawley, and an unidentified man hunted the corner blind for four years.[84] Foley resumed duck hunting and muskrat trapping on his family farm during the 1960s.[85] In the late 1960s or early 1970s, Foley began to rent the corner blind to other hunters.[86] He gave the money he received from renting the corner blind to his father for property taxes.[87] John Stewart hunted the Foley farm on three or four occasions in the late 1960s.[88] He recalled a snowy day when he may have hunted the corner blind on the Creek, because it was not one of the other two blinds on the Foley farm that he had hunted previously.[89] Joseph Roman testified that he started duck hunting on the Foley farm in 1973 or 1974.[90] Over the course of the next decade, Roman hunted the Foley farm approximately eight to ten times, including at least three or four times from the corner blind.[91] Preston Smith rented the corner blind on the Foley farm for $300.00 for one year between 1973 and 1980.[92] There had been a fire the previous year, and only a portion of the blind's floor remained

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[83] TT 31, 33.
[84] TT 34.
[85] TT 37, 39.
[86] TT 43-44, 57-58.
[87] TT 43-44.
[88] TT 183, 185.
[89] TT 183-184.
[90] TT 89, 95.
[91] TT 96-97.
[92] TT 189, 192.

so Smith and his hunting partner had to put a new duck blind at that location.[93] Roman, Smith, and Grove all testified that they understood the ditch to be the property line between the Haman and Foley farms.[94] Grove testified that every year during the 1970s, he and Danny would rebuild the corner blind as one of their jobs to earn the right to hunt the Foley farm.[95] Grove also recalled leading a hunting party from Chicago to the corner blind in 1980.[96]

Foley testified that before his father died, he had asked Foley to make sure that Danny always had a place to hunt.[97] Foley told his brother that the corner blind was his blind forever.[98] Charles Thomas, who had hunted the Haman farm from the early 1980s until 2006, testified that he was not allowed to hunt on the east side of the ditch because that was Foley's property.[99] Thomas also had known from the start that the corner blind was "Danny's blind," even though he had never seen anybody hunt from it.[100] From his blind further down along the Creek, Thomas watched the corner blind during the 1990s as it slowly disappeared into

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[93] TT 191. Foley testified that almost every year his family would burn the marshes when the phragmites began to grow or else the phragmites would grow so thick that no one could walk through the marsh. TT 45.
[94] TT 77, 92, 191.
[95] TT 84.
[96] TT 75-76.
[97] TT 42-43.
[98] TT 43.
[99] TT 167.
[100] TT 176.

the marsh.[101] Grove testified that the last time he personally hunted the corner blind was in 1982 or 1983, but as a commercial waterman, he rode by the area and always saw the corner duck blind on the east side of the ditch until the late 1990s.[102]

Foley testified that there was no duck hunting in Disputed Area 1 from the late 1990s until 2006.[103] After his brother died in 2001,[104] Foley did not immediately reconstruct the corner blind. In 2006, Roman helped Foley rebuild the three duck blinds on his farm.[105] Roman testified that they rebuilt the corner blind in the exact spot where he had hunted during the 1970s and 1980s.[106]

William Wilson hunted and trapped the Haman farm on a regular basis starting in 1989 or 1990, and had been instructed by Vari always to stay on the west side of the ditch.[107] Wilson would put in his boat at Haman's boat dock,[108] and ride back into the marsh to the first bend in the ditch where he would trap.[109] To go duck hunting, he would take his boat out the ditch to the Creek and head west toward Odessa where he hunted from a blind in the "cabin ditch."[110] Wilson

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[101] TT 173-174, 177.
[102] TT 84-85.
[103] TT 61.
[104] TT 58.
[105] TT 193.
[106] TT 94, 101.
[107] TT 236, 241-242.
[108] *See* "Existing Boat Dock" marked on JX 22.
[109] TT 238.
[110] TT 232-233, 238.

testified that he never saw a duck blind on the east side of the ditch,[111] but some time before 2000, a man named Ward Logan built a duck blind on the corner of the west side of the ditch.[112] Leonard Hobson worked with Vari on the Haman farm, and he also went duck hunting and deer hunting on the Haman farm starting in 1989.[113] Hobson would travel by boat from Haman's dock to a duck blind further down the Creek.[114] Hobson knew that Vari had rented a duck blind on the left corner of the ditch where it joins the Creek to a gentleman named Ward.[115] Hobson testified that from 1989 until 2006, he never saw a duck blind on the right side of the ditch.[116] Vari testified that he and Haman, Jr. had built five duck blinds along the Creek west of the ditch, some of which they leased and others they kept for themselves to hunt.[117] Vari also testified that in 1986 or 1987, Ward Logan built a duck blind at the intersection of the gut and the Creek, which was still in existence.[118] The distance across the gut at that point was only 60 feet, and Vari was incensed that in 2006, Foley built a duck blind on the other side of the gut on the Creek within 80 feet of his own blind.[119] Although Vari knew the land on the east side of the ditch was part of the Haman farm, he never built a duck blind in

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[111] TT 236-237.
[112] TT 234, 243.
[113] TT 245-246.
[114] TT 247-248.
[115] TT 248.
[116] TT 250.
[117] TT 255-56.
[118] TT 256.
[119] TT 257-258.

Disputed Area 1 because he had another duck blind nearby. Furthermore, there were power lines running through the area, and "ducks don't like power lines."[120]

While there was some dispute about the frequency of the Foley family's use of the corner blind during the late 1980s and the 1990s, there was sufficient evidence that for a period of 20 years, i.e., from 1959 through 1978, the Foley family, their guests and lessees continuously and exclusively used Disputed Area 1 for duck hunting. Their actions of erecting a duck blind, hunting ducks from that blind, burning marsh grass in order to walk through the marsh, leasing that duck blind to other hunters, and paying property taxes on Disputed Area 1 were the same types of actions that were taking place on the adjoining Foley farm.[121] Given the nature and character of this property, these actions are sufficient to establish acts of ownership.[122] Therefore, I recommend that Foley's claim of title to Disputed Area 1 by adverse possession be approved.

IV. Conclusion

For the reasons above, I recommend that the Court approve Foley's claim of title to Disputed Area 1 through adverse possession, and deny Foley's claim of title

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[120] TT 302.

[121] From 1976 through 1998, according to the New Castle County property tax maps in the record, the boundary line between Parcels 5 and 8 was the ditch from the Creek to the first bend by the boat dock. Thus, Disputed Area 1 was included in Parcel 5 and assessed to the Foleys during this time period. JX 28. After the 1998 survey of the Haman farm by Greenbriar, Inc., JX 21, TT 126-127, the County altered its tax map to include Disputed Area 1 in Parcel 8 on January 7, 2005. JX 28.

[122] *See Marvel v. Barley Mill Road Homes, Inc.* 104, A.2d 908, 912 (Del. Ch. 1954).

to Disputed Area 2, thereby quieting legal title of Disputed Area 2 in the Varis. As a result, I do not need to address Foley's claim of a prescriptive easement. I refer the parties to Rule 144 for the process of taking exception to a Master's Draft Report.

Respectfully submitted

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery