RESOLVING COMMON BOUNDARY DISPUTES: WHERE IS THE LINE *REALLY* DRAWN?

By William J. Maffucci*

I. INTRODUCTION

Boundary disputes can be bitter. Owners often invest much more than money into their land. Their land becomes part of their identity, and they take attacks upon it personally. This is particularly true when the attacks hit close to home (literally): in the residential context.

Boundary disputes can be expensive. They are fact- and labor-intensive, and the disputants' zeal blinds them to the illogic that might be revealed by a disinterested cost-benefit analysis. Every lawyer who handles boundary disputes regularly has heard a client say it: "I don't care how much it costs me to get that b$#@&^$ off my land!"

Above all, boundary disputes can be frustrating. The rules for resolving them are riddled with exceptions; they can yield conflicting results; and they often are not adequate for the task at hand. Disputants and their lawyers are often forced to conclude that there simply is no black-and-white answer to the question of where the line is "really drawn."

Still, recurrent themes in the case law have yielded principles that supplement the rules. Mastering the principles will provide maximum leverage in the resolution of boundary disputes, whether in court or at the settlement table. Those principles, as expressed and recognized under Pennsylvania law, are outlined below.

II. DEFINITIONS

Surveyors have a distinct vernacular. Its terms are sometimes quaint, sometimes curious, and ofttimes confusing.[1] An unabridged glossary would fill a volume, but for present purposes familiarity with a handful of terms will suffice:

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* Counsel, Semanoff Ormsby Greenberg Torchia, LLC, Huntingdon Valley PA

[1] One term, applicable only in Philadelphia, is particularly confusing: "District Standard Measure" (or "D.S.M.") In Philadelphia, a foot (twelve inches) as measured under the D.S.M. is not equivalent to a foot as measured anywhere else3. Worse, a foot as measured in any one of Philadelphia's several separate "Survey Districts" (each of which is overseen by an official Surveyor and Regulator) is not necessarily the same as a foot measured in any one of the other districts. Instead, consistent with a local custom that has held sway for centuries in Philadelphia (while inspiring incredulity among outside surveyors who first hear about it and contempt among

- "Adjoiner" (or "adjoinder") — An adjacent (contiguous) parcel.

- "Call" — An individual specification in a boundary description. Some use "call" and "monument" (defined below) synonymously. In common parlance, it is easier to use "call" to mean a "specification" in a boundary description and "monument" to mean the "thing" specified.

- "Course" (as in the expression "courses and distances") — A single direction (*e.g.*, South 72 degrees 26 minutes 03 seconds West). The statement of a course is usually followed immediately by a measurement, the "distance."

- "Metes-and-bounds description" — A perimeter description, whether expressed by courses and distances, by monuments, by reference to adjoiners, or by some combination of these methods.

- "Monument" — Something used to define and perpetuate a boundary. Monuments may be either tangible (something visible) or intangible (not visible in space but fixed and locatable through some other means, such as the boundary of an adjoining property). Tangible boundaries can be either natural (*e.g.*, a river) or manmade (*e.g.*, a road); they may preexist or be placed by the surveyor (*e.g.*, an iron

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those who finally accept it), each Survey District has been allowed to adopt *its own standards for measurement* within its district.

The differences among the measurement standards are not great; generally speaking, a foot measured under a standard adopted in any of the Survey Districts will be slightly longer than a foot, and generally speaking the difference will add up to approximately 3 inches over 100 feet measured under the district standard. But "generally speaking" doesn't settle boundary disputes in Philadelphia, which can be nasty, time-consuming, and expensive.

Here's how one surveyor described the legend and reality of Philadelphia's District Standard Measure:

> "It is rumored that William Penn, in planning the city, instructed his deputy surveyors to lay out each block with surplus measure . . . . The surplus measure was to be distributed among the lot owners in proportion to their individual frontages. The surplus measure, known as Philadelphia district measure, is generally an additional 3 inches for every 100 feet. In reality, the Philadelphia district standard measure is what the local district surveyor and regulator finds the same to be in his regulation of party lines and property lines in each block."

Milton Denny, P.L.S., "City of Philadelphia Regulators," *Point of Beginning*, posted on Dec. 1, 2001, on www.pobonline.com.

stake); and they may even be something that can easily be removed (*e.g.*, a wooden stake).

III. RULES AND PRINCIPLES

1. Intent is paramount. "The primary function of a court faced with a boundary dispute is to ascertain and effectuate the intent of the parties at the time of the original subdivision." 7 **Summ. Pa. Juris. 2d** *Adjoining Landowners* § 22:22.

2. Writings are the best evidence of intent. Intent should be determined principally by the language of the deed. Therefore, when a deed is clear and is consistent with the lines marked or otherwise identified on the ground (and in the absence of evidence of fraud, accident, or mistake), parol evidence is inadmissible to vary the terms of the deed. *Doman v. Brogan*, 405 Pa. Super. 254, 592 A.2d 104 (1991); *Pencil v. Buchart*, 380 Pa. Super. 205, 551 A.2d 302 (1988).

3. Other evidence of intent is admissible when necessary. When the parties' intent is not clear from the language of the deed, the intent may be established by direct or circumstantial evidence. The evidence may include testimony of surveyors, the language of a prior survey (especially a survey that was made when the grantor was still alive), maps referenced in the deed, or other documentation (such as an agreement of sale). *Koch v. Dunkel*, 90 Pa. 264 (1879); *Jackson v. Lambert*, 121 Pa. 182, 15 A. 502 (1888); *Will v. Piper*; 184 Pa. Super. 313, 134 A.2d 41 (1957); *Appeals of Borough of Dallas*, 169 Pa. Super. 129, 82 A.2d 676 (1951); *Hostetter v. Commonwealth*, 367 Pa. 603, 80 A.2d 719 (1951); *Cole v. Pittsburgh & L.E.R. Co.*, 106 Pa. Super. 436, 162 A.2d 712 (1932).

4. Context also helps determine intent. The context of a conveyance must be considered in resolving disputes as to the intention of the parties. The language of a deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties, and the conditions existing when the deed was executed. *Yuscavage v. Hamlin*, 391 Pa. 13, 137 A.2d 242 (1958).

5. Intent can be implied. In certain situations, the law will imply intent:

   - When a boundary is defined by a public road, the law will (in the absence of preclusive language) imply an intent to convey to the center of the road. *Dellach v. DeNinno*, 862 A.2d 117 (Pa. Super. 2004), *appeal denied*, 2005 Pa. LEXIS 1657 (Aug. 10, 2005). When a boundary is defined by a private road not dedicated to public use, the law will (in the absence of preclusive language)

imply an intent to convey only to the edge of the road, but in this case the law will also imply an intent to grant an easement over the road.

- When a boundary is defined by a watercourse, the law will (in the absence of preclusive language) imply an intent to extend the boundary to an extent that differs for navigable and nonnavigable watercourse: If the watercourse is navigable, the boundary will be deemed to extend only to the natural low-water mark. If the watercourse is not navigable, the law will imply an intent to extend the boundary to the center of the watercourse. *Miles Land Co. v. Hudson Coal Company*, 246 Pa. 11, 91 A. 1061 (1914); *Smoulter v. Boyd*, 209 Pa. 146, 58 A. 144 (1904).

6. When land is surveyed, the markings on the ground — and not the surveyor's written words — constitute the "survey." This may be restated as an observation that a "legal description" is just that: a *description*. The land is the "thing." *Baker v. Roslyn Swim Club*, 206 Pa. Super. 192, 213 A.2d 145 (1965). Therefore, when recreating ("retracing") a prior survey, one must "walk in the footsteps of the surveyor." *See* 11 **C.J.S.** *Boundaries* § 3, at 58.

7. Some calls are more reliable than others, and the law observes a hierarchy to resolve disputes between them. When the calls in an instrument are inconsistent, the following hierarchy (stated here from highest to lowest) should be observed to resolve the inconsistency:

   - Natural monuments (*e.g.*, bank of a stream, precipice of a ledge). *New York State Natural Gas Corp. v. Roeder*, 384 Pa. 198 (1956); *Albert v. Schenley Auto Sales*, 375 Pa. 512, 100 A.2d 605 (1953); *Pringle v. Rogers*, 193 Pa. 94, 44 A. 275 (1899); *Pencil v. Buchart*, 380 Pa. Super. 205, 551 A.2d 302 (1988); *Pato v. Cernuska*, 342 Pa. Super. 609, 493 A.2d 758 (1985); *Appeal of Borough of Dallas*, 169 Pa. Super. 129, 82 A.2d 676 (1951).

   - Artificial monuments, with greater weight given to a monument that is relatively permanent (*e.g.*, a building) rather than impermanent (*e.g.*, an iron pin). *Jedlicka v. Clemmer*, 450 Pa. Super. 647, 677 A.2d 1232 (1996); *In re Borough of Pleasant Hills*, 161 Pa. Super. 259, 53 A.2d 882 (1947). The mere existence of an artificial monument (not referenced in a writing), however, is insufficient to establish that it was intended to define a boundary. *Yoho v. Stack*, 373 Pa. Super. 77, 540 A.2d 307 (1988). If the monument is uncertain as to either existence or location, it will not control over conflicting calls that would otherwise be subordinate to the monument. *Post v. Wilkes-Barre Connecting Railroad Co.*, 286 Pa. 273, 133 A. 377 (1926); *Pittsburg Outdoor Advertising*

Co. v. Surowski, 164 Pa. Super. 383, 64 A.2d 854 (1949); *Howarth v. Miller*, 382 Pa. 419, 115 A.2d 222 (1955).

- Boundaries of adjoining property (*e.g.*, "thence along the lines of land now or formerly owned by Thurston Thwacklethwaite"). *Koch v. Dunkel*, 90 Pa. 264 (1879).

- Courses (*i.e.*, directions). *Baker v. Roslyn Swim Club*, 206 Pa. Super. 192, 213 A.2d 145 (1965).

- Distances. *Id.*

- Quantity of land, which is considered even less reliable when stated as being "more or less" (or with other words of approximation). *Bosler v. Sun Oil Co*, 325 Pa. 411, 190 A. 718 (1937); *Hutchinson v. Little Four Oil & Gas Co.*, 275 Pa. 380, 119 A. 534 (1923); *Dawson v. Coulter*, 262 Pa. 566, 106 A. 187 (1919); *Pencil v. Buchart*, 380 Pa. Super. 205, 551 A.2d 302 (1988).

8. The rules of priority are not absolute. The rules are merely aids in determining the parties' intent. Consequently, an "inferior" call may supplant a "superior" one when it is clear that the latter reflects a surveyor's (or transcriber's) error. *Pennsylvania Electric Co. v. Waltman*, 448 Pa. Super. 174, 670 A.2d 1165 (1995), *appeal denied*, 544 Pa. 611, 674 A.2d 1074 (1996); *Yoho v. Stack*, 373 Pa. Super. 77, 540 A.2d 307 (1988); *Appeals of Borough of Dallas*, 169 Pa. Super. 129, 82 A.2d 676 (1951).

9. First in time, first in right. When two grantees claim title to the same land by separate conveyances by the same grantor (with no conveyance back to the grantor), the first conveyance prevails. This is sometimes called the doctrine of "senior rights." 7 **Summ. Pa. Juris. 2d** *Adjoining Landowners* § 22:22.

10. Actions of adjoining owners — particularly the erection and honoring of fences — can nonetheless have consequences, even if the actions are inconsistent with the public record. Adjoining owners can, through words or action, create a "consentable" (or "consentible") boundary: An agreed-upon boundary that literally supersedes and changes the boundary as defined by the land records. There are two ways to create a consentable line: by "recognition and acquiescence," and by "dispute and compromise."

    i. Recognition and Acquiescence: When adjoining owners treat a line as being the boundary between them, though that line may be different from the boundary described in their deeds, and when those actions continue uninterrupted for twenty-one years (whether

by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their deeds. Indeed, this is the law even if during the 21-year period one or both of the properties is conveyed by deed(s) that use(s) the "record" boundary. *Zeglin v. Gahagen*, 571 Pa. 321, 812 A.2d 558 (2002); *Lilly v. Markvan*, 563 Pa. 553, 763 A.2d 370 (2000); *Dawson v. Coulter*, 262 Pa. 566, 106 A. 187 (1919); *Corbin v. Cowan*, 716 A.2d 614 (Pa. Super.1998); *Moore v. Moore*, 2007 Pa. Super. 61, 921 A.2d 1 (Pa. Super. 2007); *Soderberg v. Weisel*, 455 Pa. Super. 158, 687 A.2d 839 (1997); *Plauchak v. Boling*, 439 Pa. Super. 156, 653 A.2d 671 (1995); *Plott v. Cole*, 377 Pa. Super. 585, 547 A.2d 1216 (1988); *Niles v. Fall Creek Hunting Club*, 376 Pa. Super. 260, 545 A.2d 926 (1988); *Inn Le'Daerda, Inc. v. Davis*, 241 Pa. Super. 150, 360 A.2d 209 (1976).

A. It is not even necessary that the parties specifically *consent* to the line so defined. It is sufficient that their actions consistently honored the boundary. *Dimura v. Williams*, 446 Pa. 316, 286 A.2d 370 (1972); *Sorg v. Cunningham*, 455 Pa. Super. 171, 687 A.2d 846 (1997).

B. The fact (if true) that the parties' beliefs as to ownership were based on inadvertence, ignorance, or mistake is irrelevant. *Zeglin v. Gahagen*, 571 Pa. 321, 812 A.2d 558 (2002).

C. The statute of frauds does not apply. The boundary is binding even when it is not reflected in a writing. The reason for this rule is that — even though the practical effect of establishing a boundary by consent and acquiescence is to modify a boundary line (and thereby, in effect, "convey" the land between the line established by the land records and the land recognized by consent) — no "estate," as contemplated by the statute, is created. *Hagey v. Detweiler*, 35 Pa. 409 (1860); *Plauchak v. Boling*, 439 Pa. Super. 156, 653 A.2d 671 (1995); *Beals v. Allison*, 161 Pa. Super. 125, 54 A.2d 84 (1947).

D. Finally, it is not necessary that each party exclusively possessed the land on the party's side of the line; it is enough that the parties agree as to their ownership up to the line. *Schimp v. Allaman*, 442 Pa. Super. 365, 659 A.2d 1032 (1995).

ii. Dispute and Compromise. The law encourages the amicable and immediate resolution of bona-fide disputes as to the location of a boundary. Therefore, if a boundary *is* in dispute but the adjoiners nevertheless agree to recognize a consentable line, they need not wait 21 years before their agreement becomes effective; it can become effective immediately. *Jedlicka v. Clemmer*, 450 Pa. Super. 647, 677 A.2d 1232 (1996); *Plott v. Cole*, 377 Pa. Super. 585, 547 A.2d 1216 (1988); *Niles v. Fall Creek Hunting Club*, 376 Pa. Super. 260, 545 A.2d 926 (1988). The requirements for establishing a boundary by "dispute and acquiescence" are (i) a dispute as to the location of the boundary, (ii) the establishment of a line in compromise, and (iii) consent by both parties to give up their respective claims inconsistent with the compromise. 7 **Summ. Pa. Juris. 2d** *Adjoining Landowners* § 22:39.

11. The law also seeks to quiet title even when adjoining owners do not or cannot resolve a dispute as to boundary between them. This is the foundation of the doctrine of adverse possession. The law imposes an obligation to act upon a party who, by the open and notorious acts of the other, has been dispossessed of the area in dispute.

i. The claimant must prove actual, exclusive, visible, notorious, distinct, and hostile possession of the land continuously for 21 years (although there is much overlap among those elements). *Conneaut Lake Park v. Klingensmith*, 362 Pa. 592, 66 A.2d 828 (1949); *Brennan v. Manchester Crossings*, 708 A.2d 815 (Pa. Super. 1998), *appeal denied*, 556 Pa. 683, 727 A.2d 1115 (1998). The claimant has the burden of proving each element by credible, clear, and definitive proof. *Stevenson v. Stein*, 412 Pa. 478, 195 A.2d 268 (1963).

ii. The doctrine is embodied within the statute governing actions in ejectment, which must be commenced within 21 years. 42 Pa. Cons. Stat. § 5530.

iii. Adverse possession vests absolute fee ownership in the claimant, *Philadelphia Electric Co. v. City of Philadelphia*, 303 Pa. 422, 154 A. 492 (1931), whose title is marketable, *Plauchak v. Boling*, 439 Pa. Super. 156, 653 A.2d 671 (1995). Whether the title is *insurable* (by a reputable and responsible title-insurance company), however, is a different matter.

iv. It is sometimes said that title acquired by adverse possession can be lost only in the way in which one can lose title acquired by deed, such that the adverse possessor will not lose the title, after

the 21st year, by "neglecting to keep up the possession." *Plauchak v. Boling*, 439 Pa. Super. 156, 653 A.2d 671 (1995) (citing *Schall v. William Valley Railroad Co.*, 35 Pa. 191 (1860)). Despite that maxim, if the party in possession subsequently relinquishes possession, the title theretofore acquired will be lost as to any third-party grantee or lien creditor acquiring an estate or interest without knowledge of the adverse possession *unless* the adverse possessor had recorded a "statement of claim" within six months after leaving possession. 68 Pa. Stat. §§ 81, 85.

v. Adverse possession can prove to be an awkward and unwieldy tool for resolving *boundary* disputes, as opposed to *title* disputes. Whereas most ownership disputes regard an entire previously subdivided and separately existing tax lot, most boundary disputes regard a lesser subparcel that has not theretofore been recognized as having a distinct existence.

Query: If an adverse possessor claims exactly half of previously unsubdivided one-acre parcel, having fenced off that half, and never made a claim as to the remaining half acre, will title successfully acquired by the adverse possession extend beyond the half acre claimed? Is it clear, in other words, that an adverse possession can accomplish the same thing as a consentable line: change a boundary line, effectively subdividing a property? There does not appear to be any express, definitive judicial acknowledgment that adverse possession can be used as a form of subdivision, but that possibility is nonetheless implicit in many reported cases.

Curio: One common-pleas court decision reasons that a single room in an apartment building can be acquired by adverse possession. *Neumann v. Walters*, 39 Pa. D. & C.3d 312 (C.P. Chest. 1981).

12. An adverse *user* of land who does not have or claim the right to have sole possession of the land, and whose use does *not* preclude the real owner from using the land, cannot acquire title by adverse possession. However, if such a use continues for 21 years, it can establish an "easement by prescription." *POA Co. v. Findlay Township Zoning Hearing Board*, 713 A.2d 70, 551 Pa. 689 (1998); *Loudenslager v. Mosteller*, 453 Pa. 115, 307 A.2d 286 (1973); *Soderberg v. Weisel*, 455 Pa. Super. 158, 687 A.2d 839 (1977); *Tricker v. Pennsylvania Turnpike Commission*, 717 A.2d 1078 (Pa. Commw. 1998), *appeal denied*, 559 Pa. 684, 739 A.2d 547 (1999). However, a prescriptive easement cannot be acquired through unenclosed woodlands. 68 Pa. Stat. § 411.

13. "Permission" will defeat a claim to an easement by prescription, but the permission must be established by affirmative evidence; the permission will not be presumed from the circumstances; "absence of objection" is not permission. *Orth v. Werkheiser*, 305 Pa. Super. 576, 451 A.2d 1026 (Pa. Super. 1982); *Tarrity v. Pittston Area School District*, 16 Pa. Commw. 371, 328 A.2d 205 (Pa. Commw. 1974), *final decree entered*, 18 Pa. Commw. 175, 335 A.2d 839 (Pa. Commw. 1975).

14. A letter "granting permission" will not necessarily prevent a claim of adverse possession. If the recipient responds with her a letter indicating that she does not need the "permission" because it's really her property, the ejectment clock will begin ticking again. As once court explained this principle, the adverse claimant's "subsequent action of disseizing or open disavowal of the true owner's title" can render the permission ineffectual and re-start the SOL clock. *Flannery v. Stump*, 2001 PA Super. 307, 3__, 786 A.2d 255, 260 (Pa. Super. 2001) (citing *Moser v. Granquist*, 362 Pa. 302, 304-05, 66 A.2d 267, 268 (Pa. 1949). *See also Roman v. Roman*, 485 Pa. 196, ___, 401 A.2d 351, 363 (Pa. 1979); *Recreation Land Corporation v. Hartzfeld*, 2008 PA Super. 76, __, 947 A.2d 771, 775 (Pa. Super. 2008). 22 STAND. PA. PRAC. § 120:224; 25 AM. JUR. 2D. *Easements and Licenses* § 59 ("[t]o transform a permissive use into an adverse use, . . . there must be a distinct and positive assertion of a right hostile to the owner, which is brought to his or her attention").

IV. APPLYING THE RULES AND PRINCIPLES TO SEVERAL COMMON BOUNDARY DISPUTES

Diagnosis precedes prognosis. Boundary disputes come in many strains, and some call for treatments that are dramatically different than those indicated for others. Several of the most common are described below.

1. **Problem**: Inconsistency of Legal Description(s). Examples:

   Internal inconsistency: A metes-and-bounds description employs multiple methods to describe land, but they are inconsistent: The surveyor expresses the acreage of land but provides courses and distances that, when plotted, define a parcel containing more or less than the acreage stated.

   External inconsistency: A deed sets forth a precise course and distance, and it specifies that the line so defined ends at a permanent monument, but in fact the monument is located in a different direction and/or at a different distance from the preceding location.

Possible Cure: Apply the "hierarchy" of interpretive rules summarized above as Proposition 6 in Section III. In the first example above (internal inconsistency), the course-and-distance calls will prevail over the area expressly stated. In the second example (external inconsistency), the corner established by the permanent boundary will prevail over the corner described by course and distance.

2. **Problem**: Lost or Stolen Monuments. Example: A deed uses course-and-distance calls that each extend from and to tangible landscape features (*e.g.*, a willow tree, a hedgerow), most of which are eventually removed from the landscape.

   Possible Cure: Retrace the survey starting with the most reliable remaining monument. If all tangible monuments have been lost, retrace the survey from the point of beginning (which can almost always be determined without the placement of a monument) using just the course-and-distance specifications.

3. **Problem**: Ambiguity of Description. Example: A deed specifies that a line defined by course and distance extends to the northeast corner of "Yasgur's Farm," but there are two Yasgur brothers and they both happened to own adjoining farms just south of the line described.

   Possible Cure: Conveyancers often employ multiple methods of identifying the same land in a single instrument. The most common method was the use of a recital, immediately after the primary description, usually beginning "BEING THE SAME PREMISES" and then setting forth the recording information for the conveyance to the grantor, which could be inspected for information further identifying the property. The legal description that had been used in the preceding deed can often resolve boundary ambiguities in the subsequent deed.

4. **Problem**: Obvious Mistake of Original Surveyor's Measurement. Example: The course-and-distance calls in an old subdivision plan of a hilly terrain calls for corners exactly 66 feet apart, but the monuments set by the surveyors are all slightly less (in varying amounts) than 66 feet apart.

   Possible Cure: Honor the monuments; ignore the calls; retrace the steps of the original surveyor. This is a classic case calling for invocation of the rule that monuments control course-and-distance calls, even when it's clear that the surveyors' measurements were wrong. The rule arose in the days when the principal tool of surveyors was an apparatus comprising two poles connected at the bottom with a chain of 100 metal links

measuring 66 feet (the apparatus looking much like a longer version of the chains used to measure first downs in football games today). Surveyors carried them out into the field and literally stretched them along the ground. Inaccuracies of measurement were common — particularly when the chains were stretched along hilly terrain, as the chains naturally measured the lay of the land rather than the Euclidean line between two points in space.

5. **Problem**: Monument Inconsistent With Rest of Description. Example: A deed indicates that a course-and-distance call will end at an old oak tree. The measure actually leads to an old maple tree, but there's an old oak tree about 25 feet away. The remainder of the calls refer to artificial monuments, and the boundary conforms to those monuments only if the maple tree is substituted for the oak tree.

   Possible Cure: Allow the course-and-distance call to prevail over the monument, notwithstanding the ordinary priority. The priority scheme is a tool to determine consent, and inferior calls may supplant superior calls when adhering to the hierarchy would clearly violate the parties' intent. (Here, the evidence establishes that the original surveyor simply mistook a maple tree for an oak tree.)

6. **Problem**: Inconsistency Between or Among Descriptions. Example: The legal description of deeds to three adjacent properties define boundaries that clearly overlap, leaving the impression that the surveyors for the respective tracts either ignored or defied each other.

   Possible Cure: Invoke the doctrine of senior rights: first in time, first in right — even if investigation reveals that the surveyor who placed the monuments for the first tract was the least accurate in effectuating the subdivision.

7. **Problem**: Chaotic description. An ancient hand-written description proves impossible to transcribe/decipher accurately. The best efforts yield a chaotic boundary description that doesn't "close" (*i.e.*, it doesn't end where it begins).

   Possible Cure: Pass the buck: Retain a professional land surveyor who is skilled in the principles of boundary retracement. The principles that professional surveyors have developed over the centuries through work in the field are far more developed and nuanced than the principles articulated in the case law. By and large, the surveyors' principles are consistent with the principles recognized in the law, and the courts respect them. For an exhaustive and authoritative summary of them, *see* Knud E.

Hermansen (P.L.S., P.E., Ph.D., J.D.), **Boundary Retracement Principles and Procedures for Pennsylvania** (Pa. Soc'y of Land Surveyors 4th ed. 1998).

8. **Problem**: Unilateral Ignorance or Mistake as to "Actual" (Record) Boundary: Example: Ira Zenthat purchases a lot in a new subdivision without purchasing a survey. His understanding of the boundaries of the lot is based solely upon a quick walk around the lot with a salesperson who had pointed to landscape features that approximated the corners. For five years after the purchase, Ira mows, grades, and tends to the land he believed to be his own, never checking his deed to retrace the surveyor's steps. The next year the lot next to him is sold, and his neighbor promptly erects a fence along what proves to be the boundary described in the deeds to both of the adjoining lots. The fence cuts off a quarter acre of the land that Ira had always treated as his own.

   Possible Cure: None. Ira's mistake is fatal. His unilateral mistake as to the actual boundary of his land, and his actions in having treated the now fenced-off land as his own for six years, cannot inure to the detriment of his new neighbor.

9. **Problem**: Mutual Ignorance as to "Actual" (Record) Boundary — Type I. Example: Same as No. 8 above, except that Ira's new neighbor makes the same mistake that Ira had made, purchasing the lot without ordering a survey and based solely upon the same misunderstanding (based upon the same salesperson's saddleback description), and she doesn't realize it until five years after moving in. Consequently for that five-year period she, too, assumes that the boundary is approximately along the edge of Ira's lovely landscaping, and she never sets foot on the area of ultimate dispute other than to commend Ira occasionally on his horticultural skill. She finally realizes her mistake because her fence contractor suggests that she obtain a survey, which she does, and she immediately instructs the contractor to erect the fence along boundary described in the deeds.

   Possible Cure: Still none (for Ira). His mistake is still fatal.

10. **Problem**: Mutual Ignorance as to Location of Boundary — Type II. Example: Adjacent landowners never consult with a surveyor and never attempt to retrace the steps of the surveyor who fixed the boundary between them when the land was first subdivided. They share a general sense as to where the boundary line is, and, without ever discussing the matter, they each conduct their activities in accordance with that understanding for 15 years. One then retains a surveyor and realizes that her lot, as described by the deeds, extended about 20 feet onto her

neighbor's. She promptly erects a fence along the deed line, and the fireworks begin.

Possible Cure: Allow the fence to stand. The use has not continued for 21 years, so no consentable line had been created by "recognition and acquiescence," and there was never a meeting of the minds to effect a consentable line under the "dispute and compromise" approach.

11. **Problem**: Mutual Ignorance as to Location of Boundary — Type III. Example: Same as in No. 11 above, except that, rather than discovering the mistake in year 15, it is discovered in year 25.

Possible Cure: Remove the fence or relocate it to the boundary that had been honored for more than 21 years. Classic "recognition and acquiescence" establishment of a consentable line.

12. **Problem**: Mutual Ignorance as to Location of Boundary — Type IV. Example: Adjacent landowners share a mistaken belief as to the location of the boundary between them as described in their deeds. They honor that mistaken boundary, without ever discussing the matter, for 15 years. One of them then sells his land, delivering a deed that uses a metes-and-bounds description that (were one to walk it off with a compass and tape measure on the ground) clearly reflects the description in the prior deeds. However, the new owner, too, never bothers to retain a surveyor or try to follow the deed description on her own. Ten years later she realizes where the deed situates the boundary: it is 10 feet closer to her house than the boundary that the parties had been honoring out of ignorance. She promptly erects a fence along that consensual boundary,

Possible Cure: The fence can stay. The use of the benefitted land by successive owners *can* be tacked to establish a consentable line by recognition and acquiescence, despite the fact that deeds passing during the prescriptive period clearly conflict with the boundary so recognized.

13. **Problem**: Adverse Possession — Type I. Example: Adjoining owners disagree as to the location of the boundary between them, and they are unable to agree upon a consentable line through dispute and compromise. The owner of Blackacre puts up a hostile front, defiantly erecting a large and expensive fence where she believes the boundary to be and grading and landscaping the disputed area to match the rest of her parcel. The owner of Blueacre isn't happy about that one bit, but he's old, frail, poor, and otherwise lacking in the resources to fight. The use continues for 25 years, when the old man dies and the land passes by devise to his only relative: a wealthy and resourceful nephew who immediately moves to

the property, hires a surveyor, discovers the discrepancy between the fence and the boundaries described in the deed, and files suit.

Possible Cure: Blackacre prevails; the fence stays. Classic adverse possession.

14. **Problem**: Adverse Possession — Type II. Same as No. 13 except that, immediately after the fence was erected (in the very first year), the old man sent his neighbor a certified letter along these lines:

> *Dear Ms. Blackacre:*
>
> *Welcome to the neighborhood. I'm your neighbor, and I hope we can become good friends.*
>
> *I see that you have put up a fence. I've taken a look at your deed and mine (copies enclosed), and it looks like your contractor put the fence in the wrong place. The actual boundary is about 20 feet closer to your home.*
>
> *I know it's an expensive fence, and I'd hate to make you have to incur the expense of having to move it if it isn't in my way. And at the moment I have no plans to use the area you've cut off. I'm old and frail, and I have a tough time maintaining the rest of Blueacre.*
>
> *So I'm sending you this note just to let you know that, for the time being, you have my permission to use the portion of my yard, that you've cut off. Just maintain it and leave the landscaping as it is, more or less, now.*
>
> *Of course, there may come a time, and it may happen soon, when I'll need that portion of my property. If that happens, I'll let you know right away so that you have as much time as possible to remove your fence and relocate your lawn furniture and swing-set and anything else you have put there.*
>
> *Sincerely,*
>
> *Aloysius Blueacre*

Ms. Blackacre promptly fires back a letter in which she disagrees that the fence is in the wrong place, states that she does not need Mr. Blueacre's permission to use her own land, and tells Mr. Blueacre that, if he really thinks he owns the land in dispute, he'll just have to bring a lawsuit to prove his case.

Mr. Blueacre never responds to the letter, never sends a letter rescinding his "permission," and never files suit.

Possible Cure: The fence can stay where it is. Despite Mr. Blueacre's gesture in giving her "permission" to use the land in dispute, her possession of the land after that point was clearly hostile, not permissive. Mr. Blueacre's cause of action in ejectment arose the moment he received Ms. Blackacre's response to his letter, rejecting his "permission," and the statute of limitations for bringing that action has, after 21 years, barred that claim.

15. **Problem**: Adverse Possession —Type III. Example: Same as No. 14, except that Ms. Blackacre never responds to Mr. Blueacre's note. They barely speak at all. Mostly, she just smiles and waves as she drives by on her tractor.

Possible Cure: The fence will probably have to go, if the nephew files suit (and knows about the "permission" slip), because the evidence seems to establish that Ms. Blackacre's use *was*, in fact, permissive, and therefore no cause of action arose to trigger the statute of limitations for bringing an action in ejectment. However, it is perilous to assume that one has established the "permissive" nature of a seemingly adverse use. Caution almost always commends bringing suit in ejectment against a possibly adverse possessor who has not expressly, irrefutably, solemnly, and in writing acknowledged that she understands that she is being "permitted" to use land that belongs to someone else.

16. **Problem**: Adverse Use (without Possession). Example: Jack Russell has a pack of energetic terriers who need lots of daily play time when they can romp, dig, race, and hunt groundhogs. He lives next to Sleepyacre, a much larger tract owned by a kindly old couple who love animals. They voice no objection whenever Jack's terriers escape and fan out frenetically around Sleepyacre. The pack always returns to Jack, exhausted, after an hour or so. Jack begins to let the dogs out to do that each morning, as a matter of routine, and still the owners of Sleepyacre say and do nothing. This continues for years, and eventually Jack begins a business breeding and raising terriers for resale. Business booms. Sleepyacre is sold 25 years later, and the new owners immediately announce that they will not allow the tradition to continue. They point out to Jack that there are public green acres just a few blocks away, where many residents run their dogs. They also point out that Jack, as a successful businessman, could easily afford to buy his own open land. They also demand that Jack provide proof that the former owners of Sleepyacre expressly consented to the dog romp, which Jack is unable to do.

Possible Cure: Jack may be able to establish that he has acquired a prescriptive easement over Sleepyacre to run his dogs, *despite* the facts that (i) no express consent had ever been given to the dog romp, (ii) it was not strictly necessary for Jack to continue running his dogs on Sleepyacre, and (iii) the dog romp was never inconsistent with the use of Sleepyacre by its former owners (*i.e.*, the romp never prevented them from using and enjoying their property as they wished).

V. PROCEDURAL NOTES

Historically, boundary disputes have been litigated either through actions in ejectment (when the plaintiff was not in possession), which were governed by 12 Pa. Stat. § 1543, or actions to quiet title (when the plaintiff was in possession), which were governed by 12 Pa. Stat. § 1545. In 1946 the Supreme Court of Pennsylvania adopted the new sets of rules that, as amended, govern ejectment actions and quiet-title actions, respectively, today: Ejectment actions are governed by Rules 1051-1058, and quiet-title actions are governed by Rules 1061-1068.

Although the Court simultaneously adopted new rules for ejectment actions and new rules for quiet-title proceedings, the Court had a broader objective with regard to the latter proceedings: It sought "to unify into one single procedure all of the diverse procedures by which clouds on title were formerly tried." *White v. Young*, 409 Pa. 562, 566, 186 A.2d 919, 921 (1963). The question thus arises: Did the Court intend to perpetuate the practice of allowing only parties in possession of property to bring quiet-title proceedings?

The better answer is no. "There are certain cases where an action of ejectment will not lie, [and] thus an action to quiet title may be brought, even where a plaintiff is not in possession of the property at issue." 4 **Goodrich Amram** § 1061(b). The issue of "possession" simply is not relevant to some types of quiet-title claims, and therefore a claimant asserting such a claim would have no reason — or right — to demand ejectment.

That out-of-possession plaintiffs were *not* relegated to ejectment actions and *could* commence quiet-title actions under the 1946 rules is consistent with the provisions of section (b) of Rule 1061 ("Rule 1061(b)"). That section lists four circumstances in which quiet-title proceedings are appropriate:

> (b) The action may be brought
>
> (1) to compel an adverse party to commence an action of ejectment;
>
> (2) where an action of ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document,

> obligation or deed affecting any right, lien, title or interest in land;
>
> (3) to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or
>
> (4) to obtain possession of land sold at a judicial or tax sale.

Of those four provisions, only the first provision presumes that the plaintiff is in possession of the property (because only then would it be appropriate "to compel an adverse party to commence an action in ejectment"). The remaining three clearly do not. Indeed, the fourth applies only when the plaintiff is *out* of possession and seeks "to obtain possession of land sold at a judicial or tax sale."

Within the last several years, notwithstanding the events and arguments outlined above, the concept that only parties in possession may bring quiet-title actions has reemerged in the case law. That concept got a ringing endorsement from the Supreme Court itself, when it handed down *Siskos v. Britz*, 567 Pa. 689, 790 A.2d 1000 (2002).

In *Siskos*, the Court stated that determining whether a quiet-title claimant is in possession of the property is a "jurisdictional prerequisite" to the trial court's authority to proceed. The Court then quoted with approval a passage from a lower-court in *Plauchak v. Boling*, 439 Pa. Super. 156, 163, 653 A.2d 671, 674 (1995):

> "Permitting an out-of-possession plaintiff to maintain an action to quiet title is impermissible because it constitutes an enlargement of the plaintiff's substantive rights as defined by statute, and thus exceeds the court's jurisdiction to proceed."

567 Pa. at 702, 790 A.2d at 1008.

On its face, the language from *Plauchak* quoted in *Siskos* bars all claims by out-of-possession plaintiffs. A careful reading of *Siskos* and of the case law it cited, however, establishes that the *Plauchak* quote should not be applied, literally, to preclude *all* quiet-title claims by out-of-possession plaintiffs. Instead, Plauchak should be applied only to quiet-title claims brought under Rule 1061(b)(1), because that is the only provision within Rule 1061(b) that logically requires that the plaintiff be in possession of the property.

Indeed, in *Siskos* itself, just two paragraphs before the quotation to *Plauchak*, the Court acknowledged that it is sometimes "appropriate" for out-of-

possession plaintiffs to bring actions under provision (2) of Rule 1061(b). *Id.* at 701, 790 A.2d at 1008. Likewise, the case upon which *Plauchak* relied was explicit:

> "We do not here intimate that possession is a jurisdictional prerequisite in all actions initiated under Rule 1061. Where a plaintiff is out of possession, *but where an action in ejectment will not lie*, an action under Rule 1061(b)(2) has been found proper."

Sutton v. Miller, 405 Pa. Super. 213, 223 n.5, 592 A.2d 83, 88 n.5 (1991) (emphasis added).

It is, of course, true that only "in possession" quiet-title plaintiffs can base standing on Rule 1061(b)(1), because they must be in possession to give the defendant the power (if justified by law) to eject them. And it is true that Rule 1061(b)(2) applies "when an action in ejectment will not lie." And it is true that an action in ejectment against the plaintiff will not lie when the plaintiff is out of possession. But that is only <u>one</u> situation in which an action in ejectment will not lie. It also will not lie <u>when the issue of possession is simply irrelevant to the action</u>.

It will be interesting to see whether courts citing *Siskos* are misled by the breadth of the quotation plucked from *Plauchak* or whether, instead, they realize that — as a matter of logic, principle, and precedent — some plaintiffs should not be required to prove that they are in possession of the property affected by their quiet-title claims.

A subsequent decision by the Superior Court was interesting, and disappointing, in that regard: It cited *Siskos* as though its problematic "jurisdictional prerequisite" passage had pertained only to *ejectment* actions rather than quiet-title proceedings generally. *See Wells Fargo Bank v. Long*, 2007 Pa. Super. LEXIS 2636, at 7 (Pa. Super. Aug. 22, 2007) (stating that in *Siskos* the high court had established that "the issue of possession is inextricably linked to jurisdiction in an action in *ejectment*") (italics supplied here). But the Supreme Court in *Siskos* and the Superior Court in *Plauchak* had both discussed possession as an element in quiet-title claims, not ejectment claims, and in *Wells Fargo* the latter court missed an opportunity to explain that the earlier discussions had been overly expansive.

More recently, the United States District Court for the Middle District of Pennsylvania accepted uncritically the concept that only "out of possession" plaintiffs have standing under Rule 1061(b)(2). <u>Pennsylvania Game Commission v. Thomas E. Proctor Heirs Trust</u>, 1:12-CV-1567 (M.D. Pa. July 24, 2014). The plaintiff game commission had failed to allege that it did not possess the property and (because the real-property rights at issue were mineral rights) did

not allege that it did not have the property "in its grasp." The court therefore held that it could not bring a claim under Rule 1061(b)(2). But the court also concluded that the plaintiff did have standing at least one other provision of Rule 1061(b): (1061(b)(4), which authorizes quiet-tile actions to obtain possession of property sold at judicial or tax sales; there had been a tax sale in 1908 of the unseated land (i.e., land in which the mineral rights had not be separately addressed). (That was a curious holding, because the game commission was not trying to "gain possession" of the mineral rights.) The fact that the court felt that Rule 1061(b)(4) was available to the plaintiff made it unnecessary for the court to reconsider its earlier assumptions that only "out of possession" plaintiffs can base quiet-title standing on Rule 1061(b)(2).