"Just the Basics" Series:

Neighbor Versus Neighbor

Avoiding or Resolving Disputes Regarding the Use or Ownership of Properties in Proximity

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I. Adverse Possession

1. **Essential relationship to ejectment:** A claim of title by adverse possession arises upon the expiration of the time within which the defendant could have brought an action in ejectment against the claimant. The statute of limitations for ejectment is 21 years. 42 Pa. Cons. Stat. § 5530.

2. **Nature of title acquired:** Title acquired by adverse possession is title in fee simple absolute, *Philadelphia Electric Co. v. City of Philadelphia*, 303 Pa. 422, 429,154 A. 492, 495-96 (1931), and it is marketable, *Plauchak v. Boling*, 439 Pa. Super. 156, 170, 653 A.2d 671, 678 (Pa. Super.1995). (Whether the title is insurable, however, is a different matter. The mere running of the limitations period for bringing an action in ejectment is not enough. A title company will generally require that the claimant to obtain an order entered in a quiet-title proceeding.)

3. **Finality of title acquired:** As a general rule, 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, 170, 653 A.2d 671, 678 (Pa. Super. 1995) (citing *Schall v. William Valley Railroad Co.*, 35 Pa. 191, 206 (1860)). But note: A title acquired by adverse possession 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.

4. **Elements (a mneumonic device):** Always Expect Defendants' Very Nasty Comments Here (AEDVNCH):

A Actual

ED Exclusive & Distinct

VN Visible & Notorious

C Continuous

H Hostile

Conneaut Lake Park v. Klingensmith, 362 Pa. 592, 594, 66 A.2d 828, 829 (1949); *Brennan v. Manchester Crossings*, 708 A.2d 815. 817 (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, 482,195 A.2d 268, 270 (1963); *Brennan*, 708 A.2d at 817.

5. **The efficacy of letters purporting to grant "permission" (and defeat adversity):** 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").

6. **Litigation dilemma (making sense of *Siskos*):** In 2002, the Supreme Court of Pennsylvania handed down a decision that quoted with approval this passage from *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."

Siskos v. Britz, 567 Pa. 689, 702, 790 A.2d 1000, 1008 (2002). On its face and out of historical context, *Siskos* says (i) the very first thing that a court must do in a quiet-title action, as a "jurisdictional prerequisite" to reaching the merits of the dispute, is determine whether the plaintiff is in possession of the property, and (ii) the court must allow the case to proceed only if the court determines that the plaintiff is, in fact, in possession of the property. The sole remedy of a party "out of possession," it seemed to follow, was to proceed with an action in ejectment.

Siskos makes sense only if it is interpreted far more narrowly than words used in the decision literally allow. Supplying historical context helps clarify this.

Before 1946, land-ownership disputes in Pennsylvania had 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. The statutes were superseded by the separate sets of procedural rules, effective in

1946, for ejectment actions, Rules 1051-1058, and quiet-title actions, Rules 1061-1068.

Although the Court simultaneously adopted new rules for ejectment actions and new rules for quiet-title actions, 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."

The quote from *Plauchak* doesn't distinguish between the various types of quiet-title proceedings. But just two paragraphs before its passage from *Plauchak*, the *Siskos* opinion had 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 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 recent 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*, 934 A.2d 76, 89-79 (Pa. Super. 2007) (stating that in *Sisko*s 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.

7. **Adverse non-exclusive possession:** Although an adverse *user* of land who does not have or claim the right to have *sole possession* of the land cannot acquire title by adverse possession (because her use does *not* preclude the record owner from using the land), her use may ripen into an "easement by prescription" if it continues for 21 years. *POA Co. v. Findlay Township Zoning Hearing Board*, 551 Pa. 689, 700 & n.13 (1998), 713 A.2d 70, 76 & n.13 (1998); *Loudenslager v. Mosteller*, 453 Pa. 115, 116, 307 A.2d 286, 286 (1973); *Soderberg v. Weisel*, 455 Pa. Super. 158, 164, 687 A.2d 839, 842 (Pa. Super. 1977); *Tricker v. Pennsylvania Turnpike Commission*, 717 A.2d 1078, 1082-1083 (Pa. Commw. 1998), *appeal denied*, 559 Pa. 684, 739 A.2d 547 (1999). (Prescriptive easements are also addressed in the "Easements" section below.)

8. **Adverse possession and boundary disputes:** The doctrine of adverse possession can prove to be awkward and unwieldy as a 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.

II. Animals

1. **Principal regulatory mechanism: local ordinances.** Ordinances either prohibit or limit animal ownership and activity in countless ways; a few:

- by prohibiting ownership of specific species (e.g., hogs) of categories of species (e.g., livestock)
- by specifying that animals may not be allowed to roam "at large"
- by regulating the amount of noise (either by duration, decibel level, or time of day) animals may make
- by regulating odors caused by animals or by their conditions of their care
- by requiring the immediate removal of animal droppings
- by requiring that animals be leashed (or, more specifically, maintained on leashes not longer than a specified maximum)
- by prohibiting "nuisance" activities generally

2. **Other sources of restrictions:**

- State regulation (e.g., "Exotic Wildlife Possession Permit" issued by the Pennsylvania Game Commission)
- Subdivision, planned-community, and homeowner-association documents
- Condominium documents
- Leases
- Deeds

3. **Breed-specific dog prohibitions invalid in Pennsylvania.** 3 Pa. Stat. § 459-507-A(c). Restrictions must be dog-specific (e.g., prohibiting individual animals that have been shown to be dangerous); they may not prohibit ownership of specific breeds (e.g., pit bulls).

4. **"Vicious propensity."** An animal's owner is liable where "it appears that the animal had the preexisting vicious propensity to do the particular injurious act complained of, and, where it further appears that the owner had knowledge thereof at a time prior to the act." *Quinlan v. Stewart*, 54 Pa. D. & C. 2d 175, 179 (C.P. Lehigh 1971).

5. **Not "attractive nuisances."** The "attractive nuisance" doctrine, as embodied in the Restatement (Second) of Torts § 339, regards "artificial conditions upon the land," which should not be interpreted to include the presence of animals. *Quinlan*, 54 Pa. D. & C. 2d at 178.

III. Boundary Disputes

1. **Intent is paramount.** When resolving conflicts between two or more expressions of a boundary, intent is paramount. 7 Summ. Pa. Juris. 2d, *Adjoining Landowners* § 22:22.

2. **Proof of intent.** Intent is ordinarily determined the parties' writing, but other evidence may be received if necessary, and in special cases intent can be implied. *Doman v. Brogan*, 405 Pa. Super. 254, 263-64, 592 A.2d 104, 108-09 (1991).

3. **Heirarchy of calls.** Some calls are more reliable than others, and the law observes a hierarchy to resolve disputes between them:

- Natural monuments (e.g., bank of a stream, precipice of a ledge)
- 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)
- Courses (*i.e.*, directions)
- Distances
- Quantity of land, which is considered even less reliable when stated as being "more or less" (or with other words of approximation)

"[I]f the original marks of [a] survey, or any of them, are found on the ground, they must govern; but, if they are wanting, then resort must be had to adjoinders." *Jackson v. Lambert*, 121 Pa. 182, 190, 15 A. 502, 503 (1888).

4. **Flexibility of rules.** The rules of priority are not absolute.

5. **Implying intent.** In special cases intent may be implied.

- Boundary extending to a public road implies an intent to convey to the center of the road. *Dellach v. DeNinno*, 862 A.2d 117, 119 (Pa. Super. 2004).
- Boundary extending to private road implies an intent to convey only to the edge of the road, but with an easement over the road.
- Boundary extending to a navigable watercourse extends to the natural low-water mark, but boundary extending to a nonnavigable watercourse extends to the center of the watercourse. *Miles Land Co. v. Hudson Coal Company*, 246 Pa. 11, 16-17, 91 A. 1061, 1063 (1914); *Smoulter v. Boyd*, 209 Pa. 146, 151, 58 A. 144, 146 (1904) (concluding that rule pertaining to non-navigable watercourses applies when the watercourse itself is used as the call and not when the parcel is defined by metes and bounds).

IV. Consentable* Lines

1. **General concept:** Adjoining owners can, through words or action, create a "consentable" boundary: An agreed-upon boundary that literally supersedes and changes the boundary as defined by the land records.

2. **Types of consentable lines:** 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, 326, 812 A.2d 558, 561 (2002); *Lilly v. Markvan*, 563 Pa. 553, 566, n1, 763 A.2d 370, 371n1 (2000); *Corbin v. Cowan*, 716 A.2d 614, 617 (Pa. Super.1998); *Moore v. Moore*, 2007 Pa. Super. 61, __, 921 A.2d 1, __ (Pa. Super. 2007); *Plauchak v. Boling*, 439 Pa. Super. 156, 653 A.2d 671, 675 (1995); *Plott v. Cole*, 377 Pa. Super. 585, 593, 547 A.2d 1216, 1221 (1988); *Inn Le'Daerda, Inc. v. Davis*, 241 Pa. Super. 150, 162, 360 A.2d 209, 215 (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, 319, 286 A.2d 370, 371 (1972); *Sorg v. Cunningham*, 455 Pa. Super. 171, 178, 687 A.2d 846, 849 (1997).

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* "At common law, this term is usually spelled 'consentible.' *See, e.g., Black's Law Dictionary* 277 (5th ed. 1979). However, the correct usage in Pennsylvania is 'consentable.' *Webster's New Universal Unabridged Diction* 388 (2d ed. 1983)." *Plauchak v. Boling*, 439 Pa. Super. 156, 161 n.2, 653 A.2d 671,673 n.2 (Pa. Super. 1995).

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, 328 n.5, 812 A.2d 558, 562 n.5 (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, 165, 653 A.2d 671, 675 (Pa. Super. 1995).

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, 370, 659 A.2d 1032, 1034 (Pa. Super. 1995).

ii. Dispute and Compromise. The law encourages the amicable and immediate resolution through compromise of bona-fide disputes as to the location of a boundary. 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; *Jedlicka v. Clemmer*, 450 Pa. Super. 647, 653-54, 677 A.2d 1232, 1235 (Pa. Super. 1996); *Inn Le'Dearda v. Davis*, 241 Pa. Super. 150, 162, 360 A.2d 209, 215 (Pa. Super 1976).

A. Most of the cases articulate the three elements without also indicating that the parties must also honor the compromise for 21 years (or for any requisite period). This suggests that the line

becomes effective immediately. But at least two other cases have added that the title up to the line does not become "complete" or "binding" until the line has been honored for 21 years. *Plauchak v. Boling*, 439 Pa. Super. 156, 168, 653 A.2d 671, 677 (Pa. Super. 1995); *Plott v. Cole*, 377 Pa. Super. 585, 592, 547 A.2d 1216, 1220 (Pa. Super. 1988).

B. It may be possible to reconcile the rulings by treating a dispute-and-compromise consentable line as being binding upon the disputing/compromising parties immediately, by estoppel, but not upon the world until 21 years have passed. This was the holding in *Newton v. Smith*, 40 Pa. Super. 615, 616, 1909 WL 4042 *1 (Pa. Super. 1909) (quoted in *Niles v. Fall Creek Hunting Club*, 376 Pa. Super. 260. 267, 545 A.2d 926, 930 (Pa. Super. 1988).

V. Easements

1. **Easements recognized at common law.** Pennsylvania common law recognizes at least four types of easement:

i. **Easement created by express (written) instrument.** The expression may be either a grant of an easement or an exception or reservation of the easement when the servient tenement is conveyed. 1 Ladner Pennsylvania Real Estate Law § 5.02. "Mere non-use, no matter how long, will not result in extinguishment of an easement created by deed. *Brady v. Yodanza*, 493 Pa. 186, 189 n.2, 425 A.2d 726, 727n.2 (1981) (citing Baptist Church in the Great Valley, 406 Pa. 620, 629, 178 A.2d 583, 5__, (1962), and *Graham v. Water Power Corp.*, 315 Pa. 572, 575, 173 A. 311 312 (1934). Granting language can appear either in a deed that conveys a fee title or in a separate instrument granting just the easement. *Graham v. Safe Harbor Water Power Corp.*, 315 Pa. 572, 573, 173 A.311, (1934).

ii. **Easement arising by necessity upon a severance of title.** An easement is created when (i) a previously united title (ii) is severed and the severance (iii) creates one or more parcels that cannot be used without an easement over some or all of the retained parcels. *Graff v. Scanlan*, 673 A.2d 1028, 1032 (Pa. Commw. 1996). *See also Borstnar v. Allegheny County*, 332 Pa. 156, 159-160 (1956) (easement must actually be necessary, not merely

a convenience); *Tricker v. Pennsylvania Turnpike Commission*, 717 A.2d 1078, 1082-83 (Pa. Commw. 1998).

iii. **Easement created by implied reservation upon a severance of title.** "Where an owner of land subjects part of it to an open visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." *Bucciarelli v. DeLisa*, 547 Pa. 431, 437-438, 691 A.2d 446, 448-49 (quoting *Burns Manufacturing v. Boehm*, 467 Pa. 307, 313-14, 356 A.2d 763, 767 (1976) (quoting *Tosh v. Witts*, 381 Pa. 255, 113 A.2d 226 (1955), explaining that "[e]asements by implied reservation are based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use")). **Restatement of Property** § 476 lists considerations that courts should use in determining whether an easement should be implied. Although Pennsylvania has never formally adopted that section, our courts have frequently made productive reference to it. *See Bucciarelli v. DeLisa*, 547 Pa. 431, 438, 691 A.2d 446, 449 (1997); *Tricker v. Pennsylvania Turnpike Commission*, 717 A.2d 1078, 1081 n.6 (Pa. Commw. 1998).

iv. **Easement created by prescription (related to title acquired by adverse possession):** An easement acquired through use (nonexclusive) that is (i) adverse, (ii) open, (iii) notorious, (iv) continuous, and (v) uninterrupted for 21 years. *See also Tricker v. Pennsylvania Turnpike Comm'n*, 717 A.2d 1078, 1081 (Pa. Commw. 1998); *POA Company v. Findley Township Zoning Hearing Board*, 551 Pa. 689, 700 n.13, 713 A.2d 70, 76 n.13 (1998); *Lewkowicz v. Blumish*, 442 Pa. 369, 371, 275 A.2d 69, 70 (1971); *Pagon v. Flati*, 27 Phila. 214, 2___ (C.P. Phila. 1994) (burden of going forward as to "adverse" element can be satisfied by showing that plaintiff used easement whenever he chose (without permission or objection from defendant).

But note: A prescriptive easement cannot be acquired through unenclosed woodlands. 68 Pa. Stat. § 411.

2. **Statutory easement.** An easement can be created through the procedure prescribed by Pennsylvania's Private Road Act, 36 Pa. Stat. Ann. §§ 2731 et seq.. (This act is discussed in the separate "Private Roads" section below.)

3. **Property right (easement appurtenant) or personal right (easements in gross)?** An "easement appurtenant" is an interest in land that inures only to the benefit of a dominant tenement (and cannot be assigned other than as part of a conveyance of the dominant tenement). An "easement in gross" is a personal

right as to which there may be no dominant tenement (and which can sometimes — depending on the nature of the easement and the way it was created — be assigned to third parties without any conveyance of land). *Brady v. Yodanza*, 493 Pa. 186, 189, 425 A.2d 726, 727 (1981); *Miller v. Lutheran Conference & Camp Ass'n*, 331 Pa. 241, 249, 200 A.646, 650-51 (1938); *Southall v. Humbert*, 685 A.2d 574 (Pa. Super. 1996); *Ephrata Area School District v. County of Lancaster*, 886 A.2d 1169, 1174 (Pa. Commw. 2005). Though dicta in several early questions suggested that easements in gross are not assignable, the Supreme Court of Pennsylvania has concluded that "[t]here does not seem to be any reason why the law should prohibit the assignment of an easement in gross. *Miller*, 331 Pa. at 249-50, 200 A. at 651 (1938).

3. **Conveying an existing easement.** An easement appurtenant will pass with any written conveyance of the dominant tenement, even if the instrument of conveyance does not contain the common "appurtenances" clause, unless the instrument expressly excepts or reserves the easement. 21 Pa. Stat. § 3.

4. **Unilateral relocation of easements.** A principle that is gaining momentum throughout the country, although it has not been accepted in every jurisdiction that has considered it, is that the owner of a servient tenement should in some situations be allowed to relocate an easement unilaterally. The leading decision in Pennsylvania is *Soderberg v. Weisel*, 687 A.2d 839 (Pa. Super. 1997), in which the Superior Court concluded that equity may compel relocation of easement, at the expense of the easement owner, if such would (i) effect no substantial interference with the easement holder's use and enjoyment of right of way and (ii) advance interest of justice. *Soderberg* involved an easement that had been acquired by prescription rather than by express grant. The *Soderberg* opinion focuses on that difference and mades it clear that the ruling does not extend to easements by express grant.

Note: Although the *Soderberg* court didn't cite it, Restatement (Third) or Property § 4.8 adopts a liberal rule that is consistent with the decision.

VI. Encroachments

1. **Strict legal standard.** "In the absence of an easement or agreement, no person has the right to erect buildings or other structures on his or her own land so that any part, however, small, will extend beyond his or her boundaries and thus encroach on any adjoining premises." 7 Summary of PA Jurisprudence § 22 (citing 1 Am. Jur.) 2d. *Adjoining Landowners* § 119. "It is a fundamental maxim of law which states that an owner of realty has a cause of action in trespass upon his lands, and it is not necessary for the landowner to allege any actual damage as an

element of the cause of action. 3 P.L.E. Trespass § 6. There is no need to allege harm in an action for trespass, because the harm is not to the physical well-being of the land, but to the landowner's right to peaceably enjoy full, exclusive use of his property." *Jones v. Wagner*, 624 A.2d. 166, 169 (Pa. Super. 1993).

2. **Availability of principle *de minimis non curat lex*.** Historically, the fact that an encroachment is *de minimis* has been considered to be irrelevant as a matter of law, because an encroachment, no matter how small, creates unmarketable title); a minor encroachment (e.g., wall extending "an inch and a fraction" over a boundary), like a major encroachment, must be corrected upon demand. *Pile v. Pedrick*, 167 Pa. 296, 297-98, 31 A. 646, 647 (1895). See also *Ochroch v. Kia-Noury*, 497 A.2d 1354, 1356 (Pa. Super. 1985); *Dodson v. Brown*, 70 Pa. Super. 359, 3___ (1918) (from the standpoint of the law, it makes no difference whether the object encroaches by a fraction of an inch or by several feet; any measurable encroachment is considered a trespass). But one Pennsylvania appellate decision holds otherwise: *Yeakel v. Driscoll*, 321 Pa. Super. 238, 242-44, 467 A.2d 1342, 1344, 1345 (Pa. Super. 1983) (majority held that where fire wall between twin homes encroached on the owner's property by two inches, the doctrine of *de minimis* would prevent relocation; Judge Brosky, dissenting, claimed that majority failed to follow *Pile*) (citing *Bristol-Myers Co. v. Lit Brothers, Inc*., 336 Pa. 81, 90, 6 A.2d 843, 848 (1939)). (The court in *Ochroch* attempted to reconcile *Yeakel* with the earlier decisions that refused to apply the *de minimis* principle, and concluded that the court in *Yeakel* had been influenced by other equitable considerations.)

3. **Resort to other equitable principles?** Several Pennsylvania cases have recognized that equity may temper application of the strict legal principle. *See, e.g.*, *Baugh v. Berdoll*, 227 Pa. 420, 76 A. 207 (1910); *Hunter v. Greenya*, 4 Lycoming 64, 6__ (1953); [*Damario v. Miller*, 44 Berks 43, 4__, (1951); [*Bailey v. Heiser*, 45 Schuylkill. L.R. 180, 18__] (1950). But one must not assume that either the expense of removing an encroachment or the damage the removal might cause to the land are relevant to the equity analysis. *Ochroch v. Kia-Noury*, 345 Pa. Super. 161, 497 A.2d 1354 (1985) (citing *Ventresca v. Ventresca*, 182 Pa. Super. 248, 252-53, 126 A.2d 515, 518 (1956), and *Dodson v. Brown*, 70 Pa. Super. 359, 3___ (1918)). The courts have suggested that, instead, the only principles relevant in equity are laches, inducement, acquiescence, inadvertence, or mistake. *Baugh v. Berdoll*, 207 Pa. 420, 422, 76 A. 207, 208 (1910).

> Examples of cases applying principle of laches: *Trumpeter v. Boeshore*, 9 Leb. C.L.J. 115, 11___ (1962) (where the parties obtained title from a common grantor, and plaintiff knew of the encroachment at the time of his purchase, but did not commence an action until ten years later, the plaintiff is guilty of laches and equity will not enforce his claim); *Barndollar v. Groszkiewicz*, 102 Pitts. L.J. 315, 3___, (1954) (where plaintiffs waited more than a year to seek removal of an

encroaching wall, they were guilty of laches and could only recover damages for the permanent trespass).

4. **Remedies.**

A. When an encroachment is "reparable," the plaintiff's measure of damages is the lesser of the cost to repair the injury and the value of the property subject to the encroachment. *Commonwealth v. United States Mineral Products Co.*, 2002 Pa. Commw. LEXIS 865, at *20 (Pa. Commw. Ct. Oct. 16, 2002) (citing *Kirkbride v. Lisbon Contractors*, 385 Pa. Super. 292, 298, 560 A.2d 809, 812 (Pa. Super. 1989) (citing *Rabe v. Shoenberger*, 213 Pa. 252, 257-58, 62 A.2d 809, 812 (Pa. 1989), and *Wade v. Groves*, 283 Pa. Super. 464, 483, 424 A.2d 902, 911 (Pa. Super. 1981) (citing, *inter alia*, decisions of the Supreme Court of Pennsylvania dating back to 1883))).

Query: If a stone wall encroaches slightly but equally on two adjacent parcels owned by different third parties, one of the adjacent parcels being considerably smaller and considerably less valuable than the other, does the rule above (which limits a plaintiff's monetary damages to the value of the property) mean that the owner of the larger and more valuable parcel can recover considerably more than the owner of the smaller parcel — even if the encroachment equally impairs the value of the parcels (or does not impair the value of either parcels)?

B. When the encroachment is "permanent," the plaintiff's damages are the amount by which the encroachment diminishes the value of the property. *Rabe v. Shoenberger Coal Co.*, 213 Pa. 252, 256, 62 A.845, 855 (Pa. 1906); *Wade v. S.J. Groves & Sons Co.*, 283 Pa. Super. 464, 483, 424 A.2d 902, 911 (Pa. Super. 1981); *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 1997 Pa. Commw. LEXIS 395, at *39, 700 A.2d 1038, 1053 (Pa. Commw. 1997).

C. An owner may lose the right to contest or obtain relief from an encroachment due to prescription, or the doctrine of consentable lines. *Bussier v. Weekey*, 4 Pa. Super. 69, 7__ (Pa. Super. 1897); *Schneck v. Podrasky*, 23 D. & C.2d 260, 265 (C.P. Cambria 1960). (Easements by prescription are discussed separately in the "Easements" section below. Consentable lines are discussed in the section below devoted to them.)

VII. Fences

1. **Statutes.** Pennsylvania's statute regulating the construction of division fences and mandating that adjoining owners share their expense, 29 Pa. Stat. § 41, was (like similar statutes in almost every other state) intended principally to resolve disputes over trespassing livestock. *See Fogle v. Malvern Courts*, No. 97-2132 (Pa. Super. Oct. 3, 1997), *aff'd*, PICS No. 99-0079 (Jan. 20, 1999) (refusing to impose upon a defendant-neighbor the obligation to share the cost of the plaintiff's division fence, because the fence was obviously not constructed to maintain livestock).

2. **Other sources of regulation.**

- Zoning ordinances, regulating the height, location, construction, or appearance of fences.
- Subdivision, planned-community, and homeowner-association documents (e.g., architectural-design committees)
- Adjoining-landowner agreements.

3. **Spite fences.** Spite fences are subject to the same statutory, regulatory, community, and contractual controls. In addition, they are prohibited by statute, 53 Pa. Cons. Stat. §§ 15171-15176: a fence over four feet in height, built "maliciously" and "for the purpose of annoying the owner or occupant of the adjoining premises," constitutes a private nuisance, § 15171, and a misdemeanor punishable by fine and/or imprisonment, § 15172.

But note: One court of common pleas court has declared the act to be unconstitutional for vagueness and for its use of an unreasonable classification. *Commonwealth v. Szaluga*, 60 Pa. D. & C.402, 407, 95 Pitts. L.J. 355, 3___ (C.P. Allegh. 1947).

VIII. Nuisance

1. **Rodney King's admonition: Just get along.** Courts are reluctant to get involved in disputes between neighbors that do not involve a physical trespass. Both the civil and the criminal laws assume that we will all "try to get along" without involving the courts or the cops.

- *Schneck v. Podransky*, 23 Pa. D. & C. 2d 260, 26__ (C.P. Cambria 1960): No equitable relief will be available to a party

who can easily resort to self help (viz., trimming back overhanging tree branches); court admonished parties, "in a spirit of neighborliness and good will, [to] reasonably discuss methods of eliminating the sources of friction" between them).

- *Commonwealth v. Maerz*, 879 A.2d 1267, 1272 (Pa. Super. 2005): Yelling from across the street is not the kind of "disorderly conduct" contemplated by 18 Pa. Cons. Stat § 5503(a)(2), which proscribes "unreasonable noise" made with the intent to cause disorder.

2. **The reality.** Neighbors often resort to the courts seeking to stop conduct of neighbors or to abate the conditions of neighboring properties, and the courts have recognized that the conduct or conditions can amount to either a <u>private nuisance</u> or a <u>public nuisance</u>.

A. <u>Private Nuisance.</u> Pennsylvania courts have adopted the principles encompassed within the <u>Restatement (Second) of Torts</u>:

§ 821D: private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.

§ 822: a nontrespassory invasion of property (such as sound, smoke, vibration, etc.) will be a nuisance if the behavior is (i) intentional and unreasonable or (ii) unintentional and negligent, reckless, or abnormally dangerous.

§ 825: an invasion of another's interest is "intentional" if the actor (i) acts for the purpose of causing it or (ii) knows that it will result, or be substantially certain to result, from the conduct.

§ 826 an invasion of another's interest is "unreasonable" if (i) the gravity of the harms outweighs the utility of the actor's conduct <u>or</u> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

B. <u>Public Nuisance.</u> A public nuisance is an unreasonable interference with a right that is common to the general public, offending or annoying the community as a whole. A court can enjoin a public nuisance at the behest of a citizen or group of citizens who demonstrate that they have suffered injury greater than that suffered by the public generally. *City of*

Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882, 907 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002)).

3. **Objective Standard.** Whether conduct or conditions amount to a nuisance is determined by considering whether reasonable persons in the locality would regard the conduct or conditions as offensive, annoying, and/or intolerable. *Karpiak v. Russo*, 450 Pa. Super. 471, 476, 676 A.2d 270, 273 (Pa. Super. 1996). *See also Hannum v. Gruber*, 346 Pa. 417, 426, 31 A.2d 99, 103 (1946) (courts must employ reasonableness standards of locality); *York v. Wertz*, 2 D. & C. 2d 759 (C.P. Lycoming 1955) (court must consider whether conduct or conditions "would annoy a person of ordinary sensibility").

4. **Other sources of nuisance regulation.**

- Zoning ordinances. (Courts sometimes consider conduct violating a zoning ordinance to be a nuisance "per se.")
- Subdivision, planned-community, and homeowner-association documents
- Condominium documents
- Leases
- Deeds
- Adjoining-owner agreements

5. **One neighbor's delight is another's nuisance.** There is little limiting the imagination of plaintiffs and their lawyers in arguing that a particular conduct or condition constitutes a nuisance.

- trash accumulation
- noxious or offensive odors
- nudity or obscene displays
- extensive structural disrepair
- fallen fruit, leaves, or limbs
- weeds, lack of yard care
- excessive noise
- exotic animals (e.g., tigers)
- excessive nighttime lighting
- drug use
- businesses allegedly attracting crime
- blight (general disrepair)

6. **Ancient lights (air and view).** There is no common-law right to the continued enjoyment of a view or air flow from a particular direction.

Maioriello v. Arlotta, 364 Pa. 557, 559, 73 A.2d 374, 375 (1950). Complainants must find another basis for objecting to the obstruction: zoning ordinances, deed restrictions, or adjoining-owner agreements.

7. **Obnoxious, offensive, and unfriendly neighbors.** Sometimes neighbors just don't like each other, and they can make their feelings plain. They may shout obscenities, stare or sneer incessantly, videotape each other, or engage in other conduct precisely (and obviously) to offend, insult, or annoy. Here, however, is where Rodney King's admonition is most naturally invoked; there is little or no recourse for neighbors who just can't get along. This is particularly true with regard to competent adults; one of them must throw a stick or stone before the other can get through the courthouse door. But query whether name-calling and verbal assaults would be sufficient to support a claim for intentional infliction of emotional distress if they are directing at children or at persons known to be mentally and emotionally fragile.

IX. Private Roads

1. **Pennsylvania's Private Road Act, 36 Pa. Stat. § 2731 *et seq*.** Enacted in 1836, Pennsylvania's Private Road Act served for more than 170 years to ensure that no land in the Commonwealth was completely landlocked: It permitted a court, upon petition by an owner of landlocked land, to establish by decree (through a form of condemnation) a private road (easement), up to 25-feet wide, across adjoining lands to free a landlocked parcel. During that time the Act survived repeated constitutional challenges, one court explaining that "the right of the legislature to establish . . . private ways leading to highways[] has never been seriously doubted in Pennsylvania." *Waddell's Appeal*, 84 Pa. 90, 93-94 (1877). *See also L.T.C. Services, Inc. v. Kamin*, 639 A.2d 926, 928, 162 Pa. Commw. 547, 550 (Pa. Commw. 1994), appeal denied, 115 S. Ct. 13111 (1995). And the Legislature showed no inclination to dilute the remedies available to landlocked owners under the Act.

All that changed on September 2010, when the Supreme Court of Pennsylvania — without declaring the Act unconstitutional per se — abruptly announced that the Act could be invoked only when the petitioner could establish that the public would be the "primary and paramount beneficiary" of the private road. *In re Opening a Private Road for the Benefit of Timothy P. O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) ("*O'Reilly II*") (reversing the Commonwealth Court decision, 954 A.2d 57 (Pa. Commw. 2008 ("*O'Reilly I*")). Effectively *O'Reilly II* established that enforcement of the Act *would* be unconstitutional unless the petitioner could establish that the public (as opposed to the petitioner alone) would be the principal beneficiary of the road.

The Supreme Court remanded the case back to the Commonwealth Court for further analysis, which remanded the matter to the trial court to allow the petitioner to attempt to comply with the public-benefit standard that the Supreme Court had announced. 22 A.3d 291 (Pa. Commw. 2011) ("*O'Reilly III*"). The trial court did so, and (following discovery and a hearing), sustained the preliminary objections of the adjoining owner and dismissed Mr. O'Reilly's petition. He appealed, and the Commonwealth Court reluctantly affirmed in a per curiam decision. 100 A.3d 689 (Pa. Commw. 2014). Several of the judges filed concurring opinions to express their reservations about the Supreme Court's analysis but their sense that they were bound to conclude that the trial court, on remand, had correctly applied the analysis.

It is still too early to assess the extent to which, or to identify with confidence the circumstances under which, petitioners under the Private Road Act will be able to establish that the public will be the "primary and paramount beneficiary" of the relief they seek.

2. **Process.**

A. The owner of the landlocked parcel commences the proceedings by presenting a petition asking the court to appoint a board of viewers. 36 Pa. Stat. § 2731. The petition must clearly delineate the path of the desired road. *O'Reilly II* establishes that the board must also articulate the way in which the public would be the "primary and paramount" beneficiary of the road (although this requirement is not (or not yet) incorporated into the Act).

B. The board views the property to determine whether the road is "necessary" and, if so, what the width of the road should be. § 2732. (*See* ¶ 4 below re the "necessity" standard.) The board must consider (i) the shortest distance for accomplishing access, (ii) the best ground for laying the road, (iii) the steps that would cause the least injury to public property, and, to the extent practicable, (iv) the petitioner's preferences. § 1735.

C. An owner of land over which the private road would pass may apply to the court for permission to install and maintain a swinging gate across the road, whereupon the board considers whether the gate could be constructed and maintained "without much inconvenience" to the petition. §§ 2733-2734.

D. The owners are entitled to compensation, to be determined in the same manner as compensation in a public-road condemnation, and the petitioner(s) must pay the compensation in full before the road is opened. § 2736.

E. Other parties who want to use the private road may petition the court for permission to do so, whereupon the court will determine what the petitioner should contribute to the costs of constructing and maintaining the road. § 2761.

F. If the road isn't opened within five years after the order confirming it, it is void and the rights revert back to the owner. § 2738.

G. The roads must be maintained by the petitioner and by the petitioner's heirs and assigns. § 2735

3. **Necessity.** The petitioner need not establish that her parcel is completely landlocked, but she must be motivated by more than a desire to make her passage to a public highway more convenient. *In re Pocopson Road*, 16 Pa. 15, 1__ (1851); *Application of Little*, 180 Pa. Super. 555, 559, 119 A.2d 587, 589 (Pa. Super. 1956). While "mere inconvenience" is not sufficient to warrant relief, relief from an extremely difficult and burdensome passage is warranted. *Lobdell v. Leichtenberger*, 442 Pa. Super. 21, 26, 658 A.2d 399, 402 (Pa. Super. 1995). *See also Graff v. Scanlan*, 673 A.2d 1028, 1033 (Pa. Commw. 1996) (describing standard as "strictest necessity"). A road will not be opened on behalf of landowners "who voluntarily create their own hardship." *Id.* But the act of buying land that the buyer knows to be landlocked does not constitute a voluntarily imposed hardship that would prevent the buyer from satisfying the strict necessity standard. *In re Private Road in Monroesville Borough*, 204 Pa. Super. 552, 556, 205 A.2d 885, 886-887 (Pa Super. 1965).

4. **Other matters.** When access to a public road could be achieved in various ways, each involving passage across a separately owned neighboring lot and each requiring approximately the same overall area of condemnation, the petitioner can freely choose among them, and the respondent chosen may not add other respondents.

X. Trees

1. **Right to exercise self help.** A landowner always has the right to cut away branches or roots protruding onto his property from a tree growing on an adjoining lot, regardless of whether those branches constitute a nuisance or cause him harm. *Jones v. Wagner*, 425 Pa. Super. 102, 112, 624 A.2d 166, 171 (Pa. Super. 1993); *Schneck v. Podrasky*, 23 D. & C. 2d 260, 263 (C.P. Cambria 1960); *Covey v. Apfel*, 72 Pa. D. & C. 420, 421 (C.P. Erie 1949). In fact, the ready availability of self help led the court in *Schneck* to suggest that the injured party has no cause of action at law (i.e., no reason to involve the courts).

- But be careful: Trimming trees that are *not* on your property, without the owner's, is a trespass, and there is precedent for awarding "the highest compensatory damages, measured by the severest rule" (even when the trespasser believed, erroneously, that he had permission). *Huling v. Henderson*, 161 Pa. 553, 559, 29 A. 276, 278 (1894).

- And at least one state (California) has rejected the argument that a landowner's right to cut encroaching branches and roots back to the boundary is so "absolute" (despite the use of that word in the state's case law) as to immunize the landowner from liability for injuries (e.g., the death of the tree) resulting from the landowner's negligence in cutting back the branches and roods. *Booska v. Patel*, 24 Cal. Rptr. 4th 1786 (1994). Although research on 11/14/14 found no Pennsylvania-court citations to *Booksa*, the reasoning of that decision has gained some acceptance among commentators (such as the author of Nolo Publishing's "Nutshell" *Neighbor Law Treatise* (6th ed.), who applies it with regard to injuries caused to neighbor's trees (Ch. 3) and encroaching branches and roods (Ch. 4)).

2. **Enjoining the offense.** If the branches to constitute a nuisance or cause the adjoining landowner "sensible" (*i.e.*, substantial) harm, he may not only exercise "self help" but may also seek a mandatory injunction to abate the nuisance. *Ludwig. v. Creswald, Inc.*, 7 Pa. D. & C. 2d 461, 463 (C.P. Montg.1956).

3. **Tort liability.** If the owner of a tree knows or should know that the tree is in an "unreasonably dangerous" condition, the owner may be liable in tort for injury that the tree causes to a neighbor. *Barker v. Brown*, 236 Pa. Super. 75, 78-80 (Pa. Super. 1975) (refusing to limit such liability to owners of trees in "unnatural" condition, and, at least with regard to trees growing in "urban or residential areas," abandoning **Restatement of Torts** § 840, which would exonerate owners for "natural conditions" that invade a neighbor's use and enjoyment of land);

4. **Trees adjoining highways.** At least one trial court has concluded that, even outside of urban areas, a possessor of land is subject to liability to persons using a public highway for physical harm resulting from the possessor's "failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of a tree on the land near the highway." *Wynkoop v. Luke*, 67 Pa. D. & C. 4th 536, 544 (C.P. Armstrong 2004) (employing a balancing test rather than the straightforward rule of Restatement (Second) of Torts § 363(1) that "neither a possessor of land, nor a vendor, lessor or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land").

5. **No easement.** The owner of tree whose branches and roots extend beyond a boundary for more than 21 years does *not* thereby acquire a "prescriptive easement," because the owner cannot fulfill the "open and notorious" requirement. *Koresko v. Farley*, 844 A.2d 607, 612-13 (Pa. Commw. 2004) (court also noted policy considerations and the trend of the law in other jurisdictions). This ruling resolved a question that the Superior Court of Pennsylvania had posed, as dictum, in the *Jones* case cited in ¶ 1 above.