

CONSENTABLE BOUNDARY LINES IN PENNSYLVANIA

John Eichlin, Clarion University of Pennsylvania
Frank Shepard, Clarion University of Pennsylvania
Jerry Belloit, Clarion University of Pennsylvania

ABSTRACT

The most commonly seen methods of acquiring ownership of real estate are by contract, inheritance using a will, and by a gift. Not so commonly seen additional methods of acquiring property are by adverse possession and consentable boundary line. This paper will examine and contrast the requirements for acquiring property through adverse possession and through consentable boundary line. The emergence of consentable boundary lines as a more common legal remedy for acquiring ownership of real property will also be illustrated and explored in light of recent Pennsylvania Appellate Court decisions.

ADVERSE POSSESSION

Adverse Possession is a doctrine that is deeply rooted in our law. Simply put, it is the acquisition of another person's property for one's own use. Two tenets are the basis of this doctrine. First, one who has been in possession of real property for an extended period of time, maintaining it, improving it, and claiming it as his own, should be secure in its ownership. Second, the owner who fails to object to the possessor, who over an extended period of time, has maintained the property, improved it, and claimed it as his own, may not further claim the property as his own.¹

The Doctrine of Adverse Possession is embodied in the law, legislatively, under the statutes of limitation. These statutes bar legal actions to recover or establish the legal owner's title to real property upon the expiration of specified term of time. In Pennsylvania, the term of time is 21 years. Thus, the owner of real estate must commence within 21 years an action or proceeding for the possession of real property.²

The Pennsylvania Supreme Court observed in 1855:

"In order to give title under the Statute of Limitations, the possession of the disseisor must not only be actual, but it must be visible, notorious, distinct, hostile, and continued for the period of 21 years: Hawk v. Senseman, 6 Ser. End R. 21; Adams v. Robinson, 6 Barr 271. This doctrine has been so constantly repeated by our courts,

and so generally acted upon by the people, that it has become a rule of property that cannot be changed without a manifest disregard of the principle of stare decises, producing in its result an alarming violation of the right of property, and of disastrous disturbance to the quiet of the community.³

All of the above elements must exist or the possessor will not acquire title from the owner of the disputed tract. Further, as the Doctrine of Adverse Possession is deemed an extraordinary remedy, the burden of proving the required elements is by credible, clear and definitive proof.⁴

Possession must first be actual. This must be some overt act that is inconsistent with the right of the real owner. The following acts have been held, by Pennsylvania Courts, to have established actual possession: constructing buildings, taking up residence, erecting a fence, cultivating crops, and clearing the land.⁵ The payment or non-payment of taxes on the real property is not in and of itself determinative of possession.⁶ Further, all subsurface rights such as minerals would not be subject to claim of possession.⁷

The possession of the real estate must be continuous. This possession must be uninterrupted for the entire statutory 21 year period.⁸ The possessor, however, need not be the same individual over the entire period of time, but may be in succession. This is termed "tacking of interests". In order for possession to be tacked, there must be privity between the successive occupants of the

property. Privity refers to a succession of relationship to the same thing, whether created by deed or by acts or by operation of law. However, a deed does not itself create privity between the grantor and the grantee as to the land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land and uses it in connection with that conveyed. Rather, acceptance of a deed describing boundary lines confines the premises conveyed to the area within the boundaries, and such a deed does not convey inchoate rights acquired by incomplete adverse possession. Each possessor must have claimed title to the property in dispute, and have purported to include it.⁹

The possession must be visible and notorious. The possessor must be open in his use of the real estate and demonstrate exclusion of the true owner.¹⁰

The possession must be distinct and exclusive. The possessor must do so alone, or with a cotenant, not possess in common with others.¹¹ The possessor must assert acts as appropriate to true ownership.¹²

Lastly, the possession must be hostile. He must claim the property as his home and open to all, including the true owner.¹³ Thus, possession by permission of the owner would not be hostile. Possession may still be hostile, however, even though the possessor and the state is mistaken in the belief as to the ownership of land, provided all of other elements of adverse possession exist. The Court may, therefore, infer the element of hostility.¹⁴ Further, hostility does not imply ill will, but rather holding the property against the interests of others.¹⁵

CONSTABLE BOUNDARY LINES

The Doctrine of Consentable Boundary Lines, while perhaps not as well known as adverse possession, is nonetheless well rooted in our law.¹⁶ "Where a line has been clearly established and the parties on each side take possession or surrender possession already held up to that line, it becomes binding, under the application of the Doctrine of Estoppel.¹⁷ The Doctrine of Consentable Boundary Lines is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation.¹⁸

Just as with the Doctrine of Adverse Possession, Consentable Lines is embodied in our law, statutorily, mandating actions and

proceedings to be commenced within 21 years for possession of real property.¹⁹

There are two requirements for the establishment of a binding consentable line, thus entitling the possessor to acquire title to real property:

1. Each party must have claimed and occupied land on his side of the line as his own; and
2. Such occupation must have continued for the statutory period of 21 years.²⁰

The case of *Zeglin v. Gahagen* provides an excellent history of the case law evolution of this doctrine.²¹

Under the Doctrine of Consentable Lines, there are two theories upon which a boundary may be established:

1. By dispute and compromise; and,
2. By recognition and acquiescence.²²

Under the dispute and compromise theory, a consentable line is established by agreement between the owner and possessor.²³ Consentable line established by recognition and acquiescence occurs when the possessor possesses another's real property of which the owner is aware but fails to object?²⁴ As the Court in *Zeglin* noted, acquiescence in the context of disputed boundaries denotes past conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user.²⁵

Therefore, where visible boundaries have existed for the period set forth in the Statute of Limitations, 21 years, title will vest in the possessor, either by compromise or acquiescence in the disputed property provided here is clear and convincing evidence.²⁶

ADVERSE POSSESSION AND CONSENTABLE LINES CONTRASTED

The Courts have noted that the doctrinal roots of Consentable Lines are grounded in the theory of adverse possession.²⁷ However, the Doctrine of Consentable Lines is distinguishable from adverse possession in several ways. Firstly, a consentable line may be established based upon the

mistake as to the location of the property lines. Adverse possession, however, may ordinarily not be established on the basis of a mistake. While possession of the property up to a line may constitute adverse possession of the true owner's real property, the intent of the possessor may not necessarily be hostile.²⁸ Put another way, adverse possession requires the intent of the possessor to hold the property against the record holder; that the possession be hostile. Acquiescence, on the other hand, denotes passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interest against the claim of the possessor.²⁹ Under the Doctrine of Adverse Possession, it may be material whether possession was due to ignorance or mistake. With consentable lines, it is not.³⁰

The other distinction between the two doctrines concerns the tacking of claims by successors. Privity of estate is a prerequisite to tacking under adverse possession. "The only method by which an adverse possessor may convey a title of certified adverse possession is to describe in the instrument of conveyance by means minimally acceptable for conveyance of realty that which is intended to be conveyed."³¹ With respect to consentable line, however, tacking may be established by successive owners by privity of possession.³² As the Court in *Zeglin* noted, "The circumstances of unified use, and the physical transfer of possession of the disputed tract, and continued adverse use thereof and of the conveyed tract as incorporated and unified whole, show the parties intended to transfer not only the title to the conveyed tract, but also the possession to the disputed area whose use was integrated with conveyed tract, notwithstanding the omission from the deed of any mention of the disputed area."³³

THE EMERGENCE AND ILLUSTRATION OF THE CONSENTABLE LINES DOCTRINE

The Supreme Court case of *Zeglin*, appears to have firmly established the Doctrine of Consentable Lines as a separate and distinct remedy in acquiring title to real property as opposed to the Doctrine of Adverse Possession.

A recent Superior Court case illustrated the use, and perhaps even the extension of the Doctrine of Consentable Lines. In *Wells v. Schaffer*,³⁴ the facts are as follows: A property dispute existed between two adjoining land owners in Clearfield County,

Pennsylvania. Each party claimed ownership of approximately 2.2 acres of land located between their respective properties. The area in question is in a rural part of the county with a structured development, camp home on a foundation, campground area, septic systems and water lines and a brick lined pond all of which were installed and maintained by Wells and his family since 1967. The surrounding land owners, including Schaffer, had never actually occupied any areas directly adjacent to the subject developed areas of Wells', with large wooded areas and significant distances between the subject property boundary and the neighboring owner's structure. Schaffer had become the owner of approximately 122 acres located adjacent to the subject area by purchasing a neighboring property. Wells is the owner of 1.5 acres that is located to the north of the property owned by Schaffer. Wells had received the 1.5 acres of property along with the additional 2.2 acres of disputed property from his parents. Prior thereto, the Wells family had a camp home and other structures on the property that they occupied, maintained, and continuously used from 1966 through the present. Mr. Schaffer and his predecessor had been the record title holder of the subject area, although Wells and his predecessor had actually occupied and maintained the area in question. Wells commenced use of the disputed property by first asking permission from an individual he thought, mistakenly, owned the property. Wells cleared the trees and brush, built a pond, lined with bricks, and continued to maintain the disputed area down to Laurel Run Creek. There was no fence erected.

The Trial Court found in favor of Wells. On appeal, the Superior Court affirmed with a dissenting opinion. The Court held that Wells' visible act of possession and construction of permanent structures on the land negated any inference contrary to them claiming ownership of the disputed property. That is, the issue of Wells obtaining permission, either from the true owner or one he believed to be the true owner, was immaterial given his visible acts asserting ownership. Further, the Court found that there was no requirement that the parties expressly agree to a boundary line. Provided that the true owner never objected to Wells' presence on the disputed land until after the statutory period of 21 years, acquisition by consentable lines existed.

Lastly, while there was no fence erected, nor any other markers established, such as bushes or utility poles, a consentable line, nonetheless,

existed between the two properties. The boundary line was marked by a creek and the edge of woods, to which Wells cleared trees and brush, mowed and maintained.

The dissent objected to the majorities application of the Doctrine of Consentable Lines. Specifically, the dissent noted that in this case, there was no clearly marked boundary line. There was no fence, row of trees, row of bushes, or utility pole, all of which had existed in precedential cases. The dissent opined that applying the Doctrine of Consentable Lines in this instance, where there is no clearly delineated line or border, is improper. Moreover, the dissent observed that this case was one of adverse possession improperly converted into a boundary by acquiescence case due to the inability of Well's to tact their possession of the land onto their predecessor in title's possession. The dissent, therefore, believes the majority has improperly extended the use of the Doctrine of Consentable Lines.

SUMMARY

There is no question but that acquiring title to another's real property by either adverse possession or consentable lines is contentious. The existence and emergence of the Consentable Lines Doctrine as enunciated by the Supreme Court in *Zeglin*, and then subsequently applied by the Superior Court in case of *Wells*, indicates its expanded use as a legal remedy in property boundary disputes.

John Eichlin is an associate professor of law at Clarion University of Pennsylvania. He received his Juris Doctorate from the University of Akron School of Law. His other areas of research interests are family law and constitutional law.

C. Frank Shepard is an assistant professor of business law at Clarion University of Pennsylvania. He received his J.D. from University of Akron School of Law. His research interests are in the application of law to the function of the society.

Jerry D. Belloit is a professor of finance and real estate at Clarion University of Pennsylvania. He received his Ph.D. in Real Estate and Urban Analysis from the University of Florida. His other research interests are real property law, financial institutions, and urban analysis.

ENDNOTES

-
- ¹ Id., at § 4.02
- ² 42 Pa. C.S. § 5530 (2005).
- ³ Hole v. Rottenhouse, 25 Pa. 491 (1855).
- ⁴ Stevenson v. Stein, 412 Pa. 478, 195 A2d 268, 270 (Pa. 1963).
- ⁵ Myers v. Beam, 551 Pa. 670; 713 A2d 61 (1998).
- ⁶ Green v. Schmach, 16 Pa. Super. 26 (1901).
- ⁷ Daniel v. Adolf, 89 Pa. Super 69 (1926).
- ⁸ Kamminski Brothers, Inc., v. Geasri, 237 Pa. Super. 478 (1975).
- ⁹ Watkins v. Watkins, 2001 Pa. Super 128, 775 A2d 841, 846-47 (Pa. Super. 2001).
- ¹⁰ Robin v. Brown, 442 Pa. 369 (1971).
- ¹¹ Conneaut Lake Park, Inc., vs. Klingensmith, 362 Pa. 592 (1949).
- ¹² Lyons v. Andrews, 226 Pa. Super. 351 (1973).
- ¹³ Green v. Simpson, 49 Pa. Super. 334 (1912).
- ¹⁴ Id., Endnote 6 at 671.
- ¹⁵ Zeglin v. Gahagen, 571 Pa. 321, 812 A2d 558 (2002).
- ¹⁶ Consentable Lines in Pennsylvania, 54 Dick. Law Review 96 (1949).
- ¹⁷ Morrison v. Howell, 37 Pa. 58 (1860).
- ¹⁸ Id., Endnote 17 at 98.
- ¹⁹ Id., Endnote 2.
- ²⁰ Jedlicka v. Clemmer, 450 Pa. Super 647, 677 A2d 1232 (1996).
- ²¹ Zeglin v. Gahagen, 571 Pa. 321, 812 A2d 558 (2002).
- ²² Plott v. Cole, 377 Pa. Super 585, 547 A2d 1216 (1988).
- ²³ Beals v. Allison, 161 Pa. Super 125, 54 A2d 84 (1947).
- ²⁴ Miles v. Pennsylvania Coal Co., 245 Pa. 94, 91 A2d 211, (1914).
- ²⁵ Id., Endnote 21 at 562.
- ²⁶ Plauchak v. Boling, 439 Pa. Super 156, 653 A2d 571 (1995).
- ²⁷ Niles v. Fell Creek Hunting Club, Inc., 376 Pa. Super 260, 545 A2d 926 (1998).
- ²⁸ Tamaqua Underwear Co., v. Adams, 105 Pa. Super 339, 161 A. 416 (1932)
- ²⁹ Vlachos v. Witherow, 383 Pa. 174, 118 A2d 174 (1955).
- ³⁰ Id. Endnote 21 at 325.
- ³¹ Baylor v. Soska, 540 Pa. 435, 658 A2d 743 (1995).
- ³² Id. Endnote 21 at 325.
- ³³ Id. Endnote 21 at 325.
- ³⁴ Wells v. Schaffer, 872 A2d 282, 2005 Pa. Super 577 (2005).