Pennsylvania Law:
Dispute Resolution including Judicial and NonJudicial Clearance Alternatives

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PREFACE

This is the sixth or seventh Pennsylvania Boundary Law Seminar presented by NBI over the last decade. The written seminar materials presented herewith are the very best the speakers were able to prepare within the writing assignment time frame allotted. These materials are also substantially different in many instances from those previously presented in this program. This is so because NBI and Westlaw® ("West") have entered into a working relationship with regard to seminar presentations and program materials. To that extent NBI has obtained a limited blanket release from Westlaw® for its faculty members and speakers to reprint certain copyright materials without first securing a copyright release.

This seminar is the first of what we hope are many where the program material is directly tied to and prepared in the style of one or more of the Westlaw® Texts. In this case the seminar program has been prepared using a format similar in both style and terminology to that chosen by a mentor, Professor Joyce Palomar, Judge Haskell A. Holloman Professor of Law, University of Oklahoma College of Law, Author of Patton and Palomar on Land Title, 3d Ed. (WestGroup, 2003). The readers will note the I have frequently cited to that text and others, using the terminology more often employed in the various real property and title insurance treatise dealing with deed construction, boundary law and description issues. For that reason some of the chapters in the seminar material have been slightly changed as to form and content from that disclosed in the seminar flier mailed earlier. Please know that all the materials are being covered but in a more coherent and less convoluted manner that originally advertised. This is partly the fault of the printer and partly the fault of myself because I could not meet the mailing deadline. The only way to correct the error is by way of this preface.

Adverse possession, acquiescence, boundary agreements, estoppel, ejectment, parol agreements, prescriptive rights, quiet title proceedings, have all been relocated to Chapter III which I've renamed "Determination of Boundaries by Express or Implied Agreement or by Statutory Proceeding". I know of no major property text that refers to these items as Unwritten Title Transfers. They clearly fall with the category of transfers elsewhere referred to as Involuntary Transfers of Title. These labels are in part or entirely founded upon legal theory, doctrine, and principles of real property law that serve as the underlying foundation for either mutual contractual agreements or the basis of legal adjudication of competing rights, in which case they are resolved by judicial review, findings of fact, statutory proceedings and case law. In each and every case where competing parties cannot resolve their disputes by agreement it is necessary that the litigants go to court and obtain a judicial determination of their respective rights.

That is where the program erred in its title. Make no mistake, you can resolve boundary disputes by express or implied agreement without any court intervention. But that would only cover half the seminar. The other half of the seminar deals with such things as Statutory and Remedial Proceedings, Procedural Rules, the Regularity of Proceeding as to Form and Content and Practice Suggestions when litigation is the only alternative, including, inter alia, the affect of Laches, Statutes of Limitation, Titles Standards and Marketable Title Acts upon such Court Proceeding. The Seminars more correct title should have been shown as Pennsylvania Boundary Law: Dispute Resolution including Judicial and Non-Judicial Clearance Alternatives. That covers all the bases included in the seminar agenda and addressed to varying degrees in the various treatise cited in the library references set forth in the program materials.
# PENNSYLVANIA BOUNDARY LAW:
DISPUTE RESOLUTION INCLUDING JUDICIAL AND NONJUDICIAL CLEARANCE ALTERNATIVES

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THE ROLE OF LAND SURVEYING ON BOUNDARY DISPUTE RESOLUTION

Alan J. Bommentre Jr.

[ Removed by the author’s request ]
UNRESOLVED BOUNDARIES

Presented by William C. Hart

NB Contents of this material date back to the NBI 1997 Pennsylvania Boundary Law Seminar presented in January of 1997 originally chaired by Robert Lane Esq. The materials have been revised at various times by both Paul J. Trefz and Alan Bultovitz. Out of respect for the prior authors I have largely, with one exception, left the material intact. That exception relates to Item 3 of the original material entitled Written Documents and Intention of the Parties. I have intentionally moved that material Seminar Agenda item VI herein. That section was identified in the NBI flier as Resolution of Boundary Dispute and will be discussed by Mr. Rosenwald. I have also added a supplement to Seminar Agenda item VI entitled Rules of Construction for Ambiguous Descriptions and Boundaries. This material may be identified more closely with and related to the format and terminology used in the various major treatise therein cited. Ed.
Unresolved Boundaries

A. Introduction

This material should be viewed as a general introduction to the entire seminar agenda. It will serve to highlight certain issues dealt with a greater detail elsewhere in the seminar materials.

Ownership of land is frequently characterized as good written title with the right of possession. Disputes over who is the owner of a parcel of land, then, result from conflicts over title and possession. Such disputes usually occur when one party has title and the other possession, or when the title to certain land is ambiguous.

B. Conflicting Title Elements

1. Right of Possession

a. Scrambling Possession: the right of possession of land is considered to be incident to the ownership of it. Thus, a party has the legal right to possession of all of the land that he owns. When the amount of land is in doubt, i.e., when neither party is able to prove that he is conclusively entitled to possession, this is referred to as “scrambling possession”. Scrambling possession frequently is a result of conflicting claims over the property boundary line between adjoining landowners. In such a case, the amount of land owned and thus the amount of land that may rightfully be possessed is uncertain as well.


Use and enjoyment of land is a possessory right and may belong to a tenant. Milan v. City of Bethlehem, 372 Pa. 598, 94 A.2nd 774 ((1953)).

Regardless of whether requirements for adverse possession are met, person in possession of land has a claim to it that is superior to that of any other claimant except the rightful owner. Bums v. Mitchell, 252 Pa. Super. 257, 381 A.2nd 487 (1977).

Ordinarily, use of land for recreational purposes, such as hunting and fishing, does not show actual possession, but where recreational use is extensive and apparent, as where systematically conducted for commercial purposes, it can be sufficient to show possession. Seven Springs Farm, Inc. v. King, 235 Pa Super. 450, 344 A.2nd 641 (1975).
b. Judicial Solution: the courts do not determine who has the right to possess the disputed area of land; to do so would be to answer the wrong question. Instead, the courts, using a variety of doctrines (including consent able line, acquiescence, estoppel and adverse possession) determine what the proper boundary line should be thereby solving the problem of who has the right to possession. Once the boundary line is established, each party has the right to possess up to that line.

c. Property on the Boundary Line: while courts will not decide who has the right of possession to property before they have determined the ownership of the property, courts general rule (in this situation) is that the parties have the right to possess property on the boundary line jointly, and that an action will lie in trespass for any party’s interference with the right of the other party to the peaceful enjoyment of that property.

d. Party Walls: a party wall is a wall situated on the boundary line of two adjoining landowners which is used by both parties for the support of each party’s respective building. Both parties are considered to own such a wall, and both ownership interests are subject to the other party’s right to use the wall to support the party’s structure. Party walls may be authorized by statute, or build pursuant to an agreement of the parties or may occur as a result of a deed of severance.

(1.) Statute certain municipalities (Philadelphia, for example) provide by statute that a property owner may build a party wall half on his property and half on that of the adjoining landowner without having to compensate such adjoining landowner for the taking of his property) and without being subject to an action in trespass) as long as the thickness of the party wall is no more than required by the particular dimensions, and the function of the building.

(2.) Agreement: in the absence of a statute granting the right to construct a party wall on the property of an adjoining landowner, an agreement to that effect will be recognized by the courts as legal and binding. The courts interpret agreements to build party walls in a manner consistent with other fundamental legal doctrines. For example, in keeping with the doctrine of estoppel, a parole license to build a party wall will become irrecoverable after licensee has built the party wall in reliance upon the agreement. Similarly, in keeping with basic contract interpretation doctrine, in interpreting agreements to obstruct party walls, the courts will try to effectuate the intent of the parties.
(3) Deed of Severance: where the owner of land subdivides his property into parcels, using the wall of a building thereon as a monument to mark the boundary line, the property line extends to the middle of such wall, and the wall is considered to be a party wall.

2. Junior and Senior Rights

a. Creation of Senior Deed: when a grantor conveys part of his property, tow new parcels result: the conveyed parcel and the property remaining. Since equity requires that the conveyed parcel contain all of the property in the grantor’s deed, it becomes the senior deed. As the senior deed, such deed controls any inconsistency in any other deeds to adjoining property either held by grantor or conveyed by grantor subsequent to the time of grantee’s taking. All later conveyances by the grantor are junior to the earlier grants, but senior to any possible claims of the grantor.

When there is a conflict between boundaries described in deeds from the same grantor, the deed first executed has priority and the grantee named therein has superior title. Wysinski v. Mazzotta, 325 Pa. Super. 128, 474 A.2d 680 (1984 – Senior warrant’s official boundaries will not be extended to satisfy a junior warrant’s call to adjoin it. Anderson v. Litke Family Ltd. Partnership, Pa. Super. 748 A.2d 737 (2000).

b. Older Surveys Control Later Surveys: in general, older surveys control more recent (junior) surveys. This is because the older survey is presumably close in time, and therefore in accuracy, to the original grant, the original monuments and/or the original survey lines.

In this case of conflicting surveys, title is determined by older survey. Hanna v. Stone 88York 145 (1975); Saenger v, Bonelli, 65 Berks 53 (1972).

c. Subdivision Maps and Senior Rights: parcels created by the filing of a subdivision map in accordance with statute are neither senior nor junior to any other parcel located on the same subdivision map because a subdivision map filed in accordance with statute creates equal rights amongst all of the landowners. This is true; even though the development might sell particular parcel prior to or after it sells a second parcel, because all of the parcels are deemed to be created at time of filing the subdivision map.

d. Elimination of Senior Rights: senior rights may be eliminated by:
(1) The determination of a court of competent jurisdiction as to the true boundary line between adjoining landowners:

(2) The establishment of a consent able line (a parol agreement) by the parties; or

(3) The acquiescence of the adjoining landowners in a boundary line between them.

3. **Written Documents and Intention of Parties**

This material has now been moved to Seminar Agenda Item VI entitled RULES OF CONSTUCTION FOR AMBIGUOUS DESCRIPTIONS AND BOUNDARIES. It is incorporated into what was identified in the seminar flier as VI. Boundary Disputes R Resolution.

C. **Subdivision**

1. **Introduction – Creation of New Parcels of Land**

Parcels of land are usually created in one of two ways:

a. **Subdivisions**: parcels are created by platting, monumenting and getting the approval of the appropriate government agency. This all takes place prior to the sale of any parcels.

b. **Individual**: Parcels are conveyed one at a time by written description after a survey of the land involved.

2. **Protracted v. Surveyed**

a. **Protracted Lots**: the boundary lines of protracted lots are determined by surveying the outer boundaries of the entire subdivision and then locating the parcels of land or lots by drawing them on a subdivision map rather than laying monuments to mark them on the ground. Thus, the overall parcel is surveyed but the lots of sub-parcels within the whole are not surveyed, and are simply divided on paper without the benefit of an original survey.
b. Surveyed Parcels: subdivisions can be determined by a survey of the actual property; some ordinances require a survey in order to record a development subdivision map. If a survey is required, the surveyor should place the monuments and marked the lines in order to conform to the indication on the subdivision map. If such original monuments and lines are placed, they will control over any ambiguity in the subdivision map.

c. Record of Subdivision Map: subdivision maps are frequently required by statute to be recorded with the Recorder of Deeds in the proper Pennsylvania County. Failure to so record a subdivision map can result in penalties imposed by law.

d. Effect of recording Subdivision Map: upon filing of the subdivision map, all streets and public grounds on such maps become part of the official map of the municipality, which fixes their boundary lines. Some municipalities, for example, Philadelphia, have vested their Board of Surveyors with the authority to change such fixed boundary lines by use of special ordinances. This procedure involves petitioning the Council of the City of Philadelphia for a special ordinance authorizing the Board of Surveyors to change such boundary lines.

4. **Controlling Elements**

In case of conflicts or uncertainty over the boundary lines within a subdivision, the following principles should be followed:

a. Intent of the Parties: the courts will always seek to effectuate the intent of the parties.

b. Differences in Methodology:

   (1) Protracted Subdivision: monuments and measurements indicated on the subdivision map control the dimensions of the internal lots. The external boundaries are determined by the calls on the subdivision map as well, unless there are original survey lines on the ground, in which case they control.

   (2) Surveyed Subdivision: the original monuments and survey lines control the indications on the subdivision map for both the internal and the external boundary lines.
c. Priority of Calls: control of original monuments in conflict are to be determined in accordance with the following priority:

(1) original natural monuments;

(2) original artificial monuments;

(3) the monument in agreement with distance, bearing, and area descriptions;

(4) if no monuments are called for or extant, distance, bearing and area will control.

c. Effect of Subdivision on Rights of Adjoining Landowners: parcels of land designated on a subdivision map are all, equal in interest to each other. The effect of this is that no senior or junior rights are attributed to adjoining landowners holding deeds that reference such a subdivision map.

e. Effect of an Error in Measurement:

(1) First Principle – Error Placed Where Error Occurred: if an error would obviously defeat the intention of the parties (for example, if lots were intended to be parallel to each other in a north-south direction and perpendicular to other lots in an east-west direction and to distribute the error over all of the lots would destroy this configuration, the error, if possible, should be corrected in only the lot where it occurred.

(2) Last Resort – Proportional Interests if the error cannot be placed where it occurred, each subdivided lot will be given a proportionate interest in any excess or deficiency with the subdivision.

Recourse to this proportionality principle, however, should only be taken if there are no other means of determining to which parcel any excess property should belong; it is a doctrine of last resort, and as such, the principle of proportional distribution will not have priority over any other method of determining to which parcel the excess or deficiency should be applied. Thus, the obvious intention of the parties, the original lines and/or monuments set upon the ground would control the erroneous plat designation. If there was no survey, or the lines were never run on the ground or were lost, the map must control, and if there is no indication as to which parcel the property is a part, all will share in the execs or the deficiency in pro rata shares.
D. Ethical Considerations

Many of the questions that arise as a result of unresolved boundaries are sought to be answered by surveys. As a result, surveyors frequently are caught in the middle of disputes.

1. **Ownership of Land**: surveyors do not determine who owns a parcel of land; that is the job of the courts. They surveyor’s job is to locate the boundary on the basis of the physical evidence (the monuments and survey lines), written evidence (the deed), or, if need be, oral evidence (testimony or reputation evidence).

2. **Approximate Boundary Lines**: surveyors have an obligation to perform an appropriate and proper survey of the property in question, and, as a result, should not give approximate or inexact boundary lines.

3. **Disagreement between Two Surveys**: if a later survey differs from an earlier one, it is the obligation of the surveyor to disclose the discrepancy, even if the earlier survey was performed by the same surveyor. Surveyors indicate boundaries based on their evaluation of all of the evidence available at the time of the survey, and such evidence changes. The surveyor is obligated to disclose the discrepancy, and attempt to reconcile it, if possible.

4. **Obligation to search the title**: This matter has been overlooked in the presentation of past NBI Boundary Seminars in Pennsylvania. At the very least it is deserving of mention. I somewhat disagree with item I stated above because, while the courts may eventually be the finder and trier of fact and final determiner of who owns title when the parties are unable to resolve their differences and become litigious, it is the title examiner who first reviews the title and determines from a search and examination of the public records if there are any title objections that need to be resolved, such as boundary line disputes. It all begins with the search, the accuracy thereof and the skill of the title examiner in recognizing and identifying risk. While there is no Marketable Title Act in Pennsylvania, as discussed in the previous section, the rules governing the conduct of title searches are found in 40 P.S. 910-7 which imposes upon an insurer of title the duty to make a reasonable search of the records and disclose the results of that search, which would necessarily require the disclosure of and any title defects or objections to title. What constitutes a reasonable search of the records is an issue in and of itself. Title Insurance underwriters publish their own guidelines for the period of the title search there agents should perform.
For further information in this regard see: Patton and Palomar on Land Titles, 3d. Ed, (2003), Chapter 2, Methods of Land Title Insurance, Title Examination Standards and Period Covered by Title Examination, sec 52-53, pp 197-198 n.10 citing the author.
Determination of Boundaries by Express or Implied Agreement or by Statutory Proceeding

William C. Hart

NB Portions of these materials were prepared in 1994 by Bruce K. Fenton of Pepper, Hamilton & Scheetz. They were revised by Robert D. Lane, Jr. of Morgan, Lewis & Bockius LLP in 1998. They were substantially revised by William C. Hart in December of 2005.
Determination of Boundaries by Express or Implied Agreement or by Statutory Proceeding

A. Determination of Boundary by Express or Implied Agreement

Occasionally examining counsel will find among the public records a determination of boundary description by general agreement by and between the parties other than that which is set forth in the grants or deeds of record. When such an agreement exists, the line agreed upon becomes the true boundary the same as would have been the case if it had formed a part of the description(s) in the grants or deeds of record signed by the parties. Perkins v. Gay, 3 Serg. & Rawle 327 (Pa. 1817). Generally speaking, when adjoining owners have occupied their lands for a considerable period of time up to a line visibly marked by monuments, fence or other indicia of boundary location, and have mutually recognized the line as a boundary either by oral agreement or by acts of acquiescence, the law construes that they have made a contract establishing that boundary and will not permit the parties or their grantees to repudiate the line. See Dimura v. Williams, 446 Pa. 316, 286 A.2d 370 (1972).

1. Boundary by Agreement.

Application of the doctrine of boundary by agreement is dependent on a finding that the parties mutually agreed on the location of the boundary that had been uncertain or disputed. The courts have generally required proof of four factors to justify establishment of a new boundary line based agreement, to wit:

There must be uncertainty or dispute;

Library References:
Palomar, Patton and Palomar on Land Titles, Chapter 4, Sec. 162 citing the encyclopedias and West's Key No. Digests;
Anno., Establishment of Boundary Line by Oral Agreement or Acquiescence, 69 A.L.R. 1430 (1930) and 113 A.L.R. 421 (1938);
Natelson, Modern Law of Deeds to Real Property, Chapter 8, Sec. 8.4;
Backman/Thomas, A Practical Guide to Disputes Between Adjoining Landowners, Chapter 8, Boundary Disputes, Sec 8.07-8.08;
Ladner on Conveyancing in Pennsylvania, Chapter 9, Sec. 9.04(c)
There must be an agreement setting a specific line as the boundary;

The agreement must be executed by acts of the parties in occupying the adjoining lands up to the agreed boundary; and

The boundary must be recognized by the parties for a substantial period of time, often to the applicable time period for acquiring title by adverse possession.

**Element of the Doctrine**

(i) **Uncertainty**

In order to qualify for recognition of a boundary by agreement, there must be an uncertainty or a dispute regarding the true boundary line. Proof of this factor is crucial because it is the justification for the application of the doctrine of boundary by agreement. First, it serves as the excuse for relaxing the normal conveyancing rule requiring a writing to satisfy the statute of frauds. Second, settlement of the dispute or uncertainty is also viewed as satisfying the requirement of consideration under the law of contracts.

(ii) **Disputes-Adjoining Landowners**

Normally the statute of frauds would prevent any deviation from the record boundary unless a written conveyance from one adjoining owner changed the boundary by transferring a portion of property to the neighboring owner. Under the doctrine of boundary by agreement, courts reason that they are not recognizing an oral conveyance in violation of the statute of frauds. Rather, as a settlement of an uncertain or disputed boundary line, the court is merely upholding a practical determination by the parties as to the true boundary between their adjoining properties. The
parties have refined the boundary line by their actions. The courts have enforced oral agreements under this doctrine by indulging in the fiction that, because there is uncertainty, the agreement merely defines the actual boundary rather than transfers land from one party to another. Boundary agreements are more akin to arbitration determinations and are therefore in a unique category supported by public policy. Compliance with the statute of frauds that is traditionally required of all agreements transferring interest in land is justifiably relaxed to encourage this form of dispute resolution. The requirement of dispute or uncertainty is necessary to justify this analogy because there cannot be arbitration without a dispute.

Another contractual requirement—that the agreement be supported by consideration—is satisfied by the dispute or uncertainty requirement. By agreeing on a boundary, each party surrenders its right to assert its position in a more formal context. The agreement is supported by adequate consideration based on each party’s willingness to compromise its claim in order to eliminate the uncertainty or dispute. If there were no uncertainty, then the party whose property area is diminished by recognition of the agreed boundary line has received nothing in exchange for the asserted agreement. Thus, the requirements for a valid, enforceable contract are not satisfied because of the lack of adequate consideration.

The required uncertainty or dispute is not present if the parties know the true boundary or if they mistakenly think they are marking the actual boundary in conformity with the record description. A boundary agreement based on a subjective mistake is not enforceable. In contrast, even though the agreed boundary is not correctly located, it may become the recognized boundary under the doctrine of boundary by agreement if the parties intentionally identified the new line because of a recognized uncertainty or dispute regarding its correct location. Succinctly stated, the
boundary can be set by agreement only if the parties know the agreed line is in fact not the actual, record boundary.

(iii) **Agreement Form and Limitations**

The required agreement may be either express or implied and either written or oral. The agreement between the parties is what determines the actual location of the boundary.

There are limitations regarding which parties are capable of entering into a binding boundary by agreement. First, the parties must be adjoining property owners holding title in fee. If there are joint owners, one of them cannot enter a boundary agreement that binds the other concurrent owner[s] or a mortgagee with a valid lien interest in the property. Nor can a tenant's agreement be effective as against the landlord.

(iv) **Actual Occupation Up to the Agreed Boundary**

In order to qualify for recognition of a boundary set by agreement, the parties must take steps in accordance with the agreement. The act of taking possession up to the limits of the agreed boundary line serves an important evidentiary purpose. It verifies the location of the line as determined by the parties under the agreement. It also serves as part of the evidence that an agreement actually exists. In some ways the actions represent part performance of the agreement further justifying recognition of the agreement as an exception to the strictures set by the statute of frauds.

(v) **Time Period**
Like other doctrines of prescription, one of the necessary elements under the doctrine of boundary by agreement is the long-term recognition and acceptance of the agreed line as the boundary between two properties. Title by adverse possession, easements by prescription and the establishment of a new boundary line by agreement or acquiescence are all designed to serve policies of repose. After sufficient passage of time, the law gives recognition to the benefits of quieting titles in accordance with existing circumstances even though the true, record owner or affected property loses prior rights. The doctrines are designed to reduce conflict, to avoid stale claims based on aging evidence, and to encourage efficient use of property.

Many jurisdictions require the same time period for boundary by agreement as their statutes of limitation set for title by adverse possession. Pennsylvania is one of those states. Some require an even greater period, particularly when the period necessary for satisfying the adverse possession doctrine is relatively short. Others merely require an unspecified long period to pass without objection by the parties to the established boundary line.

2. **Boundary by Acquiescence**

The Theoretical basis of boundary by agreement and boundary by acquiescence are similar but not identical. The differences are important in defining the elements of each of these boundary resolution rules. Boundary by agreement is premised on a contractual theory and requires an express agreement between the parties. Since that doctrine is based on contract law, the agreement can be defeated by lack of consideration.

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A. Determination of Boundary by Express or Implied Agreement
B. Statutory and Remedial Proceedings; Court Proceedings to Clear Title
C. Procedural Rules in Boundary Line Disputes
D. Practice Suggestions & Checklist for Boundary Line Litigation [V1.G]
Boundary by acquiescence, though it has some of the same elements, is founded on public policy considerations similar to the justification for adverse possession. Boundary by acquiescence has its own unique requirements that differ from the other doctrine primarily because it does not require proof that the location of the boundary arose from an agreement. The elements of this doctrine usually include:

- Occupation up to a visible line marked definitely by monuments, fences, walls, or buildings; and
- Mutual acquiescence in the line as a boundary;
- For a long period of time;
- By adjoining owners.

Because no agreement is required, this doctrine does not have the same contractual foundation as boundary by agreement. Boundary by acquiescence, rather, is actually akin to prescriptive theory in which rights are created by operation of law. Thus, in boundary by acquiescence, satisfaction of contractual consideration requirements need not be shown, and the statute of frauds does not pose a problem.

Pennsylvania recognizes the doctrine of Boundary by Acquiescence. Under the general rule, adjoining owners of land, who, for a period of time (usually the equivalent to the statute of limitation) mutually recognize a common boundary line between them, are thereafter precluded from claiming otherwise, i.e., that the boundary line previously agreed to is not the true boundary line. See: Miles v Pennsylvania Coal Co., 245 Pa. 94, 91 A 211 (1914); Adams v. Tamaqua Underwear Co., 105 Pa. Super 399, 161 A 416 (1932). If the predecessors in title previously agreed to such a boundary line it is binding upon their successors in interest [Jedlicka v. Clemmer, 677 A2d 1232 (Pa. Super. 1996).
In order for the doctrine to apply two elements must be present. Acquiescence requires evidence of (i) either an uncertain boundary or a dispute between the parties as to what the proper boundary is and (ii) that the adjoining landowners recognize and acquiesce in the common boundary. If the two criteria have been met, and the statute of limitations has passed, the boundary line is deemed conclusive, even if established as the result of a mistake as to where the true boundary line is.

See, Anno., Establishment of Boundary Line by Oral Agreement or Acquiescence, 69 A.L.R. 1430 (1930) and 113 A.L.R. 421 (1938)

3. Doctrine of Consentable Line

There is also in Pennsylvania the The Doctrine of Consentable Line, which while related to the doctrine of Boundary by Acquiescence is to be distinguished. The Doctrine of Consentable Line is a rule of repose for the purpose of quieting title and discouraging confusing and vexations litigations. Plott v. Cole, 547 A.2d 1216 (Pa. Super 1988).

a. **Definition:** a boundary or division line between estates assented to or expressly agreed upon by the parties owning separate adjoining estates.

b. **Title Rule:** if a boundary line is unknown and/or in dispute and if the parties agree on a line that differs from the course and bearing in the record description, the boundary agreed upon becomes the true boundary regardless of the location of the written/recorded property line. ______________, 40 Pa. Super 625 (1909).

c. **Elements Necessary to Find a Consentable Line**
There are two ways in which a boundary may be established through consentable line: (i) by dispute and compromise or (ii) by recognition and acquiescence. [See Niles v. Fall Creek Hunting Club, Inc., 376 Pa. Super 260, 267, 543 A2d 926, 930 (1988); Elsesser, “Consentable Lines in Pennsylvania”, 54 Dick.L.Rev (1949). This has been stated alternatively ad follows. In order to establish a consentable line, there must be evidence of (i) a dispute with regard to the location of the common (recorded) boundary line between adjoining owners; (ii) the establishment of a line in compromise of the dispute; and, (iii) he consent of both parties to that line and the surrender of any claims inconsistent therewith Jedlicka v. Clemmer, 677 A.2d 1232 (Pa. Super,1996); Shimo v. Allaman, 659 A.2d 1032 (Pa. Super. 1995).

d. Requirements for establishing a Consentable Line

There are six requirements for establishing a binding consentable line:

1. Dispute or Uncertainty of location: For a consentable line to be enforced by the courts there must exist a dispute with regard to the location a common boundary line;
2. Establishment and Recognition of New Line: there must be evidence of the establishment of a new line by both parties in compromise of the dispute; and
3. the consent of both parties to that line and the giving up their respective claims which are inconsistent therewith.
4. Payment of consideration. The courts have held there to be the following types of consideration, beyond monetary
consideration, by parties to a consentable line: (i) the intentional surrender of a claim to that part of the land that was in dispute or uncertain; (ii) the cessation of hostilities by reason of the establishment of the new boundary line; and (iii) where doubt exists as to the lines location, the consideration is the forbearance of the doubt. Haoey v. Detweiler, 35 Pa. 409 (1860).

5. Possession is a requirement for a finding that a boundary has been set by a consentable line. If adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for the period of time prescribed by the statute of limitations [21 years], they are precluded from claiming that the boundary line thus recognized is not the true one. See Adams v. Tamaqua Underwaer Co., 105 Pa. Super. 339, 161 A. 416 (1932); See generally, 12 Am. Jur. 2d. Boundaries 85-90.

6. Full Disclosure and Good Faith: These are required because each party to the agreement, acting in the spirit of compromise, should be protected from the other’s bad faith.

7. Intention: The parties must intend to do more that locate a preexisting boundary line; they must intend to create a new one.


In Pennsylvania, the Statute of Frauds [33 P.S. 1 et seq.] is not implicated by an agreement to fix a consentable line because the statute is considered a rule of conveyance and therefore requires a writing only to create an interest in land. Since the fixing of a
boundary line by the doctrine of consentable line does not transfer title to land but merely fixes the location of that which is already owned but whose boundary is uncertain, the Parol Agreement merely fives definiteness to that which has already been created. Haoey v. Detweiler, 35 Pa. 409 (1860); Beals v. Allison, 161 Pa. Super. 125, 54 A.2d 84, 85 (1947).

f. Persons Bound
Where a disputed, uncertain, or unascertainable boundary is settled by a consentable line, the parties thereto will be bound by it. An agreement on a particular point in conjunction with measurements from that point control, even when in conflict with monuments or measurements on the ground. This is one of the exceptions to the rule that monuments control and is one of the reasons that full searches should be ordered and obtained. Where a consentable line is followed by occupation, it is binding on both the parties to the agreement and those claiming under them. Dawson v. Coulter, 262 Pa. 566 (1918), hold that the extent of the grantee’s interest is limited to that of the grantor. As such, subsequent transferees are bound to respect the boundary line even if actual notice of the fixing of the boundary not present on the public record.

g. Non-Consentable Lines Fixed by Agreement
The Superior Court, In Peals v. Allison, 161 Pa. Super, 131 (1947), stated that not every line assented to by parties is a consentable line. The court found that a line recognized by both parties that has been used in common by both of the parties cannot be a consentable line as there was no dispute to be resolved. Instead, the court found that the parties had established, by parol agreement, a building line. Such a line marks the boundary between the two
parties but is also subject to easements of common use between the two.

4. **Practical Location**

One must distinguish the rule of practical construction, which is a method of inferring or determining the intent of the parties at the time of the transaction, from other doctrine by which the enforce *subsequent* resolutions of uncertain boundaries [See Natelson, *Modern Law of Deeds to Real Property*, 8.4, p 172 n.2 citing Anno: 7 A.L.R. 4th 53 (1981)]. A “practical Location” is an actual designation by the parties, on the ground, of the monuments called for by the deeds of record. *See Caduto v. Mariatti*, 113 Pa. Super 314, 173 A. 770 (1934). Evidence of “practical location” may only be received to clarify an ambiguity; it may never be used to overcome clear, concise unambiguous words in a deed, and it may not be used to create an ambiguity.

5. **Title by Parol Agreement**

See Doctrine of Consentable Line above.

6. **Boundary by Estoppel**

Definition of Estoppel: estoppel in the context of a boundary line dispute is no different from equitable estoppel, which involves precluding one party from contesting the circumstances created by one parties conduct when that conduct has induced another to affect a change in his/her/it’s position.

As with other doctrines based on estoppel, courts are willing to prevent hardship to one who has justifiably relied on representations of another. The doctrine may be invoked to protect a party who would otherwise face...
a substantial loss because of acts of reliance induced by another’s representations. In the case of boundaries, the act often involves erecting an improvement that encroaches across the boundary separating the parties’ properties.

If true owner of the property know that his neighbor is making improvements that will abut an existing fence line which the parties have erroneously considered as the actual boundary line, then the true owner may later be estopped from asserting a boundary claim that shows the true line running through his neighbor’s newly constructed building. Under certain facts, a boundary may be established by the acts or representation of the original title holder. Even if the record title describes a different boundary line, detrimental reliance on the original title holder’s misstatements of the boundary location may give rise to a boundary by estoppel.

The elements of boundary by estoppel are:

- Knowledge: The party whose rights or acts sought to be estopped must have knowledge or, or reasonably should have known of the facts in question;
- Representations by the true owner that the mutually accepted line is the true reasonable boundary;
- Reasonable reliance by the neighbor on those representations. Examples of reliance include, inter alia, the erection of substantial improvements on the property; substantial change in position of boundary and/or the rights of third parties being impacted
- Substantial cost detrimentally incurred by the neighbor.
In most cases recognizing boundary by estoppel, the true owner must have
know that his representations were erroneous or must have been grossly
negligent in making them.

7. **Blurring Amongst the Doctrine; Examples**
The various doctrines set forth above are not altogether distinct. The
courts all too often confused them or fail to distinguish them. There is
legitimate reason for this. Courts are both the finder of law and trier of
fact. Courts frequently divide the interpretative responsibility in land
descriptions cases. Many courts in the third circuit and the Atlantic
Reporter series hold that a deed's meaning and sufficiency are held to be a
matter of law, while application of the meaning to the surface of the earth
is a matter of fact. Where the language of a deed is unambiguous then its
construction is a matter of law. But where an ambiguity exists the
intention of the parties becomes a question of fact. It is between the
determination of a matter or law or a matter of equity that the doctrines
become blurred [See Natelson, 8.6, supra.]. I have attempted to define
them as they should be understood. However, case law rarely makes such
clear distinctions. The following are examples of how the courts have
combined these doctrines.

(i) **Difference Between Practical Location and Consentable Line**
[Parol Agreement]

(a) A practical location exists when both parties mutually designate
what they believe to be the true division line. This designation may
exist by reason of the discovery of location of existing natural or
artificial monumentation, such as a rock wall or fence or survey
markers. In the case of rural land it may date back to antiquity.
(b) A parol agreement is an agreement to accept the line designated, whether it is the true line or not. This agreement may simply be an acknowledgement of the line rather than an act designation the line.

(c) To that extent a parol agreement also differs from the doctrine of consentable line, i.e., the acknowledgment of a line is less than assenting to a new line as marked.

(ii) Difference Between Consentable Line & Acquiescence Doctrine

In Adams v. Tamaqua Underwear Co. 105 Pa. Super 339, 161 A. 416 (1932) the court held that 30 years was enough time for a division fence to become a consentable line fixing the true boundary, even though the fence was not exactly upon the survey line. In reaching this decision, the court seems to suggest that acquiescence in a boundary line for a period of time greater than that of the statute of limitation would support the conclusion that a consentable line will result, even if the character of the boundary marker would not normally rise to that necessary for a finding of a consentable line.

(iii) Difference between Consentable Line Doctrine [Parol Agreement] and Estoppel

Where an agreement to establish a consentable line is followed by the parties thereto taking or surrendering possession already held up to such line, the line becomes binding and the parol agreement acts like an estoppel in order to preclude either party from

(iv) **Difference Between Consentable Line and Adverse Possession**

If the parties to a consentable line take possession to that line and hold such possession for a period of 21 years, the title becomes complete by adverse possession. See *Miles v. Pennsylvania Coal Co.*, 245 Pa. 94 (1914)

8. **Mutual Mistake**

If the true boundary line is later discovered, under this doctrine the parties to an agreement to create a consentable line may elect to void the consentable line. However, unilateral mistake by one party will not void an agreement to create a consentable line so long as there was no fraud, concealment or unfair dealing by the other party.

To the extent that a defect in a deed is the result of a mutual mistake, a suit to reform the instrument would be available. *Doman v. Brogan*, 592 A.2d 104 (Pa. Super 1991).

In the event of mutual mistake or reformation it may be for a jury to decide issues concerning consentable lines. Examples of these issues include whether all the elements necessary to create such a line have been shown, and if so, what is the location of that line. See Practice Aids, item D at the end of this chapter. *See also* item 9 following B.5 beginning at page 30 entitled *Reformation of Instruments*.
B. Statutory and Remedial Proceedings Employed to Determine Boundary Line Changes; Title Claims

There are a number of judicial proceedings used to resolve title boundary disputes, correct title boundary closure objections or correct actual boundary description defects. These are noted below together with certain concurrent and pre-requisite legal considerations, commentary and distinctions as noted with more particularity. While this may read a bit cumbersome there necessary inclusion shall become readily apparent.

B.1 Statutory & Court Proceedings to Clear Title

Treatise Reference:
Palomar, Patton and Palomar on Land Titles, Sec. 461, Involuntary Transfers of Title;
Thompson on Real Property, Thomas Edition, Chapter 82, 82.08(e);
Hall, Searches & Titles in Pennsylvania: Ch. V, Sec 347-352, Methods of Curing Defects; Ch. VI, Validating and Curative Statutes.

Below we shall discuss various transfers of title generally referred to as involuntary transfers or conveyances, i.e., transfers made pursuant to statutory or judicial authority without the cooperation or consent of the record owner. Involuntary conveyances include

1. execution sales in which the real property is conveyed by the sheriff as a result of a sale pursuant to a writ of execution;
2. judicial sales made by a sheriff, or fiduciary pursuant to a court order authorizing sale of the property;
3. conveyances by court officials by way of direct order of the court without sale, such as in a divorce proceeding);
4. transfers made by order of the court without other form of conveyance;
5. non-judicial sales, such as a non-judicial foreclosure of a mortgage or deed-of-trust, by which the title is conveyed by a statutorily-designated entity to the purchaser at the sale.
NB Throughout the remainder of this discussion on involuntary conveyances we will be making reference to same a judicial means to clear land titles. However, as noted in B.3 below, there is an important distinction to be made between execution sales and judicial sales which distinction, for the most part lies outside the scope of this seminar but nonetheless remains worth of mention.

Returning once again to the subject of Statutory & Court Proceedings to Clear Title, sometimes when the parties become adversarial and cannot reach, as between themselves, an equitable resolution of the disputed matter the best way to clear a title problem is to do something affirmative, such as removing the title objection through court proceedings designed, e.g., to remove a trespasser through ejectment or remove an encroachment, such as the fence or wall, by initiating an action to quiet title.

Judicial methods for resolving issues determining marketability of title and of procuring the discharge of encumbrances on real estate include the following Schedule of Methods to procure decisions on real estate title, i.e., e.g., to wit:

**When the party is in possession of the land:**
- By action in Assumpsit;
- By action for Adverse Possession;
- By Quiet Title Action;
- By Declaratory judgment action in lieu of a quiet title action. NB many times this can be used to expeditiously resolve a limited claim or question regarding title to the property or to remove a cloud on title;

**When the party is not in possession of the land:**
- By action of Ejectment;
• By action for Specific Performance;
• By action to set aside a Fraudulent Conveyance

Schedule of Methods to obtain Court Orders discharging liens, charges and encumbrance from Real Estate include:
• By Proceedings in the Court of Common Pleas [Pa.] or the Superior Court [NJ];
• By Proceeding in the Orphans’ Court [Pa.] or the Surrogates Court [NJ];
• By Proceedings in the U.S. District Court

B.2 Dependence upon Validity of Judgment or Decree

Library Reference:
C.J.S. Executions, Sec 306; Judicial Sales Sec. 76
West’s Key Notes Digest, Execution 275 (2); Judicial Sales 36;
Palomar, Patton and Palomar Clearing Land Titles, Sec. 464

A judgment or decree that appears valid on its face that consequently receives the benefit of statutory presumptions regarding jurisdiction and regularity or proceedings may, in fact be invalid due to jurisdictional defects in the proceedings. Therefore, the purchaser of a title derived from such proceedings should examine the record closely to determine if the underlying judgment is valid. The validity or involuntary conveyances depends entirely upon the regularity of the underlying proceedings and the judgment or decree. If the either are lacking, defective or invalid, the conveyance, together with and intermediate writ or sale, is void, and no title passes to the purchaser whatsoever. *Harris v. Harris*, 428 Pa. 473, 239 A.2d 783 (1968), *Union Transfer Co. v. Lea*, 1885 WL 11674, 4 Walk. 487 (Pa. 1885). This is much the same conclusion reached by the courts when reviewing Tax sales that are irregular or improper as to form and content. [See Chapter on Tax Sale in *The law of Titles in Pennsylvania*, 4th Ed.].
Full compliance with state court procedures is necessary to ultimately satisfy title insurer’s underwriting standards prior to insuring a conveyance or mortgage of the property in reliance upon court proceedings.

B.3 Distinction Between Execution Sales and Judicial Sales

462 Library References:
C.J.S. Executions Sec. 239-240; Judicial Sales 2-5, 11;
West’s Key No. Digest, Executions 242; Judicial Sales 1 et seq.
Palomar, Patton and Palomar on Land Titled, 3rd Ed., Sec

In the case of an execution sale (emphasis mine), the sheriff of a deputy sells pursuant to the authority of the writ and title passes without judicial confirmation. Gross v. Simsack, 364 Pa. 72 A.2d 103 (1950) (Circumstances distinguished). A judicial sale is made pursuant to an order of court. Petition of Acchione, 425 Pa. 23, 227 A.2d 816 (1967). No conformation is required, Pennsylvania R.C.P. 3135. An execution sale is made by an officer of the law pursuant to the power conferred by the statute and by the writ, but a judicial sale is made by the court, or by a direct agent of the court. Armour v. Cochrane, 66 Pa. 308, 1871 WL 10928 (1871). Sale on general execution is a statutory method of enforcing payment of a personal judgment for money out of any nonexempt property of the debtor, while a judicial sale is based on an order for the sale of specific property. It is judicial sales that we are concerned with in this NBI Boundary Law Seminar Agenda.

B.4 Title Company Obligations in the event of a tender of Claim Upon Insurer

The question remains whether the title insurance company can simply pay the policy limits to the insured to avoid any obligation to either defend the insured or fix the defect in title. While no court in Pennsylvania has
directly addressed this issue in the context of title insurance, the Superior Court has indicated in the context of a liability policy that “the insurer ha[s] no duty to defend the insured once its liability limits had been reached by settlement or judgment after the insurer had defended the claims in good faith.” Maguire v. Ohio Cas. Ins. Co., 602 A.2d 893 895 (Pa. Super 1992), appeal denied 615 A.2d 1312 (Pa 1992); see also Stewart Title Guaranty Co. v West, 676 A.2d 953 (M.D.App. 1996) (indicating that title insurance company may pay insured for loss up to amount of policy limit.). Alternatively, where a claim is tendered to a title insurance company relating to the question of boundary line location the title insurance company could resort to judicial proceedings to fix the defect in title through litigation.

Most title insurance policies provide that the title insurance company has the discretion to determine the appropriate course of action to take upon receipt of a notice of a claim. I would suggest that the title insurance company should first find out if the defect in title can be resolved through voluntary execution of a deed, mortgage or any other document. This option is most likely less expensive and arduous than the ones listed below.

Nonetheless, once the title insurance company decides to fix the title defect by litigation, the policy usually obligates the insured to fully cooperate in the prosecution of the case. If the insured fails or refuses to fully cooperate in the litigation, the title insurance company will then have a defense under the policy and the insured could be prevented from collecting on the claim against the title insurance company in the future.

B.5 Successful Conclusion of Action Regular as to Form and Content Establishes a new Muniment of Title
As stated in section B.2 above, underlying any title litigation at law or in equity are a number of legal doctrines that give rise to the regularity of the proceeding resulting therein. For example, an action for adverse possession must have as a pre-requisite thereto the actual fact of an adverse claim to land legally held by another. The “Muniment of title” created by the successful prosecution of such an action in a court of competent jurisdiction upon satisfaction of the statutory requirements serves to acknowledge the creation of an estate not accompanied by a written transfer of title. Each of the estates discussed below and/or the litigation undertaken to establish their existence are the direct result of Matters, Interests, Rights or Claims Disclosed by the Condition of Occupancy of the Land over a period of years that ripen into actual fee title if the plaintiff prevails. In these proceedings, the statute of frauds in not applicable because there is no instrument in writing signed by the party to be charged. If there were, the claim to the underlying estate or interest could not exist.

As noted above, where the parties cannot agree between themselves, either by oral or written agreement or by acts of acquiescence, the location of a common boundary, the limits of a grant or deed and its boundaries may be determined by a court of competent jurisdiction by actions in ejectment, suits to quiet title, arbitration or other judicial proceeding. This section will examine those in effect in Pennsylvania. A judgment fixing boundaries, not appealed from, is conclusive as against the parties and their heirs and assigns.

B.5 Court Proceedings Available in Pennsylvania

The following causes of action are available, in Pennsylvania and elsewhere, to litigants, including a title insurance company, when faced with a dispute involving defects in title. Note that the legal doctrine underlying the claim or
right need not be accompanied by written instrument but the conclusion, as
determined by a court of competent jurisdiction, appears in the written form of an
order or decree. Thus, the term "unwritten transfers of title" is a bit of misnomer
because the doctrines are based on written theory and enforced via court order.

1. **Action to Quiet Title**

An action to quiet title is governed by the Pennsylvania Rules of Civil
Procedure. Pa. R.C.P. 1061 et seq. [NB The same statute applies to an
action for declaratory judgment.] An action to quiet title may be brought to:

1. compel an adverse party to commence an action of ejectment;
2. 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. 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. obtain possession of land sold at judicial or tax sale.

Pa. R.C.P. 1061 (b) (1-4). The title insurance company must file the action
in the county in which the property is located. Except when Rule 1061(b)
(4) of the Pennsylvania Rules of Civil Procedure applies, the plaintiff must
actually be in possession of the property in order to bring an action to
(holding that possession is a jurisdictional prerequisite). It is important to
include as defendants all parties who have an interest in the real estate who will be in any way affected by the determination.

2. Action in Ejectment

An action in ejectment is available to prevent possessory interference with a property owner’s title. Often an ejectment action will be initiated by the record owner who asserts the claim against an encroaching neighbor. In such Cases the neighbor the affirmative defense that his possession was justified because a different boundary should be recognized under one of the established boundary doctrines, i.e., e.g., agreement, acquiescence or estoppel. On the other hand, the plaintiff in an ejectment action may be asserting rights based in agreement, acquiescence or estoppel that give the plaintiff superior title even as against a neighbor claiming under true, record title. In this situation, the boundary that had served as the plaintiff’s claim will have been breached by the encroaching defendant.

A party who is entitled to bring an action in ejectment must be diligent in asserting these rights or face the possibility that the title rights may eventually lost to another under the doctrine of title by adverse possession.

An action in ejectment is specifically governed by the Pennsylvania Rules of Civil Procedure. PA. R.C.P. 1051 et. seq. Such actions are generally brought when the party is not in possession of the property. In addition to seeking to regain possession of the property, the plaintiff may include in the complaint a claim for rents, profits or any other damages which arise from the defendant’s possession of land.

3. Trespass
Any interference with the right of possession may be attacked under a trespass action. Here the rights may be asserted by the record title owner relying on a boundary established in accordance with the record description(s). Timely assertion of these rights may prevent establishment of a different boundary line under the doctrines of boundary by agreement, acquiescence or estoppel.

NB Once rights have shifted under one of the boundary doctrines to a line that differs from the boundary line that is based on the record title, the record title owner may find himself liable as a trespasser for ignoring the practical location of the boundary. Trespass liability may give rise to an award of damages or a decree enjoining any further continuation of the trespassory activity.

4. **Lis Pendens**

To protect the insured’s interest in the property, the title insurance company should index any action filed on the insured’s behalf as a lis pendens against the property. A lis pendens places third parties on notice of the insured’s rights in the property. It may only be filed in an action where title to real property is involved.

5. **Adverse Possession; Acquisition of Title by Adverse Possession Generally:**

Title may be acquired through adverse possession by one who is not the legal owner of the land if that person can establish that the possession was actual, open, visible, notorious, continuous, hostile, exclusive and under a claim of right.
Color of Title:

One may acquire title by adverse possession either under color of title (a written document conveying the title to the premises which either through lack of title in the grantor or a defect in the document does not legally pass title) or, in absence of statutory or case law to the contrary, without color of title. However, it is generally more difficult to establish adverse possession without color of title. Examples of documents which may create "color of title" are void or voidable deeds, wills and defective judgments.

Adverse Possession Without Judicial Determination Generally Not Insurable:

Because of difficulties in establishing title through adverse possession and the potential of litigation when insuring title derived through adverse possession, it is the general policy of the Company not to insure such titles until the title so acquired is established by a decree or judgment of a court of competent jurisdiction, in which action all necessary and proper persons are made parties and the appeal period from such decree or judgment has expired.

Special Circumstances: Requirements

Contact the Home Office of your title underwriter if you believe circumstances warrant the insuring of title derived through adverse possession. Any such request should include the following information:

a) Appropriate statutory and/or case law.
b) The factual basis establishing adverse possession. This should include such information as the use to which the property has been put, if the property is walled or fenced, duration of the possession, the amount of land affected and improvements constructed by the party claiming adverse possession.

c) Whether affidavits can be obtained, the contents of the affidavits and the parties executing the affidavits.

d) The party paying the real estate taxes and the number of years paid.

e) Whether there are instruments of record or other circumstances which would indicate that the possession was by consent or permission and therefore not adverse.

f) Whether the possession is under color of title or without color of title.

g) If the claim is under color of title, the nature of the instrument constituting color of title. Additionally, does the instrument cover all of the land in question or only a portion thereof?

**Government Entities:**

It should be kept in mind that one can generally not obtain title by adverse possession against a governmental entity.

NB See also: Bayse, *Clearing Land Titles*, 2d ed., *Marketable Title, Statutes of Limitation*, sections 37 and 56
Specifics as to Pennsylvania

In order to acquire title by adverse possession in Pennsylvania, the litigant claiming title to the real property must prove that his or her possession of the property is:

1. actual;
2. continuous;
3. visible and notorious;
4. exclusive; and
5. hostile.


6. Prescriptive Rights

This cause of action is very similar to adverse possession. The sole distinction between the two is that with adverse possession the plaintiff must possess the real property as though he or she owns the property, whereas in prescription the plaintiff must only use the property as an easement user. Under Pennsylvania law, a prescription is created by:

1. adverse;
2. open
3. notorious;
4. continuous and uninterrupted use of the property for a period of twenty one (21) years.
See e.g., *Ashe v. Sprung*, 375 A. 2d 83 (Pa.Super. 1977). Unlike adverse possession, the plaintiff is required to establish that the use is exclusive.

7. **Bona Fide Purchaser for Value Without Notice**

Recording statutes in Pennsylvania protect the interest of bona fide purchasers of real property who are without notice of adverse claims to the property by awarding such purchasers priority over an unrecorded interest of an earlier claimant. 21 P.S. 351. To defeat the plaintiff’s potential status as a bona fide purchaser, the defendant must either show that the plaintiff had actual or constructive notice of the unrecorded interest. *Poffenberger v. Goldstein*, 776 A.2d 1037 (Pa. Cmwlth. 2001) (stating that to be deemed a “bona fide purchaser” of real property, one must pay valuable consideration, have no notice of the outstanding rights of others, and act in good faith); *Long John Silver’s Inc. v Fiore*, 386 A. 2d 569 (Pa. Supper 1978) (holding that either actual or constructive notice is sufficient to prevent a subsequent purchaser from acquiring status of bona fide purchaser). Constructive notice is not limited to instruments of record. Instead, the plaintiff is also charged with what could have been learned by inquiry.

There are circumstances where a party can take good title to real property even though he or she has knowledge of another interest on the property. If the party purchases the real property from a bona fide purchaser, the party may take title clear of adverse claims even though the party actually knew of the claims prior to purchasing the property. See *Roberts v. Estate of Pursley*, 718 A.2d 837 (Pa. Super 1998) (citing *Thompson v Christie*, 20 A. 934 (Pa. 1890)). The purpose of this rule is to prevent stagnation of real property and to protect the bona fide purchaser’s interest in the
property. Id. In the absence of this rule, the bona fide purchaser would be unable to convey the property.

8. Notice and Service of Process

Under the earlier U.S. Supreme Court Mullane and Mennonite decisions, as later applied by the Pa. S. Ct. you should bear in mind that actual notice of any of the foregoing proceedings must be served all lienholders and other parties in interest to enable them to safeguard their property.

9. Reformation of Instruments

If the court is convinced by the evidence that a boundary described in an instrument of conveyance does not match the intent of the parties, either party may be entitled to reformation of the instrument. The equitable power of a court is available to correct a mutual mistake so that the described boundary matches the intended boundary of the property. The there leading cases on Reformation of Instruments and its limitation are Kutsenok v. Kutsenok, (S.Ct 1964), Dudash v. Dudash, (Pa. Super. 1983) which expanded the doctrine and, Regions Mortgage v. Muthler, (S. Ct. 2005).

In Kutsenok, supra, the Supreme Court acknowledged, inter alia, that courts of equity have the power to reform an instrument where there has been a showing of fraud, accident or mutual mistake. Additionally, a deed may be reformed when a mutual mistake in the description is made, even where one of the parties denies that a mistake had been made. The subsequent Dudash, supra, decision by the Superior Court expanded the doctrine of reformation to encompass unilateral as well as mutual mistake stating: "[R]eformation of a deed may also be made by a court of equity when there has been a mistake by one party with (emphasis mine)
knowledge of that mistake by the other party. A party seeking reformation on the basis of such unilateral mistake may be granted relief if the party against whom reformation is sought has such knowledge of the mistake as to justify an inference of fraud or bad faith.” The Superior Court acknowledged that “proof of the mutual mistake must be clear and positive. A party who seeks reformation of the ground of mutual mistake must establish in the clearest manner that the intention proffered as the basis for reformation of the deed.”

The Regions, supra, Court, aside from reaffirming the two prior decisions, also distinguished them when it rejected the argument in equity and instead focused on the legal definition of a “mutual mistake” holding “... a mutual mistake is one in which each party misunderstands the other’s intent ... [or a] mistake that is shared and relied upon by both parties to a contract. This illustrates the importance of proper drafting techniques.

C. Procedural Rules in Boundary Disputes

1. Parties

The necessary parties in a boundary dispute action are the adjoining landowners whose properties are adjacent to the disputed boundary. Any other parties who have any interest in the properties must also be joined or the resulting judgment settling the boundary dispute will have no binding effect on them. Thus, lien holders, purchasers under executory contract, remaindermen, or joint owners are all proper and necessary parties to these actions under the Mullane and Mennonite decisions. A prior owner or grantor who no longer has any interest in the properties alongside the boundary in question is not a necessary party but I suggest you determine if he/she/it still has liabilities under general warranties or special warranties. In order to bring an action for determination of a boundary, a
purchaser under contract must generally join the vendor who has retained title as a joint plaintiff. Similarly, a life tenant must be joined by the remainderman as plaintiff or must name the remainderman as a party defendant.

2. **Burden of Proof**

The plaintiff has the burden of proof and therefore must establish the boundary by the preponderance of the evidence. There is no requirement to prove the case beyond a reasonable doubt. If a defendant raise an affirmative defense such as mutual mistake, fraud or estoppel, the burden of proof to establish that defense rests on the defendant.

The complaint should contain a description of the properties and an allegation regarding the true line or that it is uncertain or disputed. If the plaintiff is attempting to establish a different line from that which is established under a recorded conveyance, that line should be clearly described. If a boundary by agreement or acquiescence is asserted as a defense to an action in ejectment or trespass, the defendant has the burden of proving the elements required to qualify under such doctrines. The boundary by agreement or acquiescence must be raised as an affirmative defense.

Several presumptions are commonly recognized by courts in boundary dispute cases. Thus, if a boundary line has been marked by a fence or other clear designation for a long period of time without objection from either adjoining owner, the line is presumed to be the true boundary line. Such a presumption obviously helps the party who has the burden of proving the element of acquiescence. The party claiming against that apparent line must overcome the presumption with clear and convincing evidence.
D. Practice Aid: Analysis of Boundary Dispute and Checklist

1. Have the required elements for boundary by agreement been satisfied?
   a. Was the agreement reached in order to settle a dispute or
      uncertainty as to the true boundary line?
   b. Did the parties reach an agreement setting the boundary?
   c. Have the parties acted by occupying their respective properties
      up to the agreed upon boundary line?
   d. Has the agreed boundary line existed for a sufficient period of
      time?

2. Has the required elements for boundary by acquiescence been
   satisfied?
   a. Have the parties occupied their properties up to the asserted
      boundary line?
   b. Has the owner, who had the opportunity to object, failed to
      challenge the asserted line?
   c. Has the asserted boundary line existed for a sufficient period of
      time?

3. Have the required elements for boundary by estoppel been satisfied?
   a. Did the record owner, either by declaration of by assertion,
      represent that another line should be the boundary?
   b. Was a neighboring landowner justified in relying on the record
      owner’s representation?
   c. Did the neighbor incur substantial detrimental costs?

4. Have the procedural rules for an action asserting the practical location
   of boundaries been satisfied?

   a. Is the plaintiff the proper party?
      (1) Is the party asserting the practical location of the
          boundaries the owner of one of the adjoining fee interests?
b Is the defendant the proper party?

(1) Have all parties with and interest in the property, including contract purchasers, joint owners and lien holders, been joined as party defendants so that a judgment establishing the boundary is binding on each of them?

(2) Is the adjoining land owned by a government which is exempt from the application of the doctrine of boundary by acquiescence?

c Is the action timely?

(1) If a legal remedy is being sought, is the action brought within the applicable statute of limitations for property actions?

(2) If an equitable remedy is being sought, is there a statute of limitations that applies?

(3) If an equitable action is being sought, does the doctrine of laches apply?
  (a) Was the action commenced within a reasonable time?
  
  (b) Did the defendant undergo an adverse change in situation during any delay?

d Does the complaint allege the elements necessary to justify a claim for relief?

(1) In an action based on boundary by agreement:
  
  (a) Has an agreement been reached establishing the practical location of the boundary line?
  
  (b) Was the agreement made to settle a dispute or uncertainty regarding the boundary location?
  
  (c) Have the parties occupied the properties up to the practically located boundary?
(d) Has sufficient time elapsed showing acceptance of the boundary by the parties?

2. In an action based on boundary by acquiescence?
   (a) Have the parties occupied the properties up to the practically located boundary?
   (b) Have the parties demonstrated mutual acquiescence to the new boundary by their acts or statements, or by their silent failure to assert rights in relation to the record title’s boundary?
   (c) Has a sufficient time elapsed showing acceptance of the boundary by acquiescence?

3. In an action based on boundary by estoppel:
   (a) Has the record title owner made representations regarding the location of the boundary?
   (b) Has the adjoining owner acted in reasonable reliance on the boundary representations?
   (c) Have the acts resulted in substantial detrimental costs to the adjoining owner?
   (d) Has the record title owner known about the adjoining owner’s acts or, has the record title owner been grossly negligent in failing to stop the adjoining owner’s acts of reliance?

**e. What is the Plaintiff’s burden of proof?**

1. Has the plaintiff asserted the elements necessary to justify relief thereby shifting the burden of proof to the defendant?

2. Is the plaintiff entitled to the presumption that a long-marked boundary is the true boundary?

**f. Have Available Defenses been Raised?**
1. Did the parties know the true boundary line so the necessary dispute or uncertainty justifying a boundary by agreement is lacking?

2. Did either party mistakenly think the line was being located on the actual recorded boundary line? If so, the boundary by agreement may be unenforceable because it was based on mistake.

g. Have Appropriate Causes of Action been brought seeking available remedies?

1. Either damages or injunction may be available in an action for trespass or ejectment.

2. Either party may seek a decree of specific performance to enforce a boundary set by agreement;

3. In order to establish a title that would be marketable, a party may bring an action to quiet title;

4. In order to correct mistaken boundary description in deeds, a party may seek reformation of an instrument to effectuate the intent of the parties;

5. Statutory proceedings as discussed above are available in Pennsylvania to a party seeking to establish the proper location of a boundary line.

NB Parts of the foregoing material were incorporated in Hart, The Law of Titles in Pennsylvania and were re-printed with the permission of the authors James H. Backman and David A. Thomas to their text entitled A Practical Guide to disputes Between Adjoining Land Owners. Appropriate credit is hereby given in accordance with all national and international copyright accords regarding duplication of material for education purposes.
E. Bar of Encumbrances by Laches, Statutes of Limitation, & Marketable Title Acts

Library Reference:
3 American Law of Property, sec. 11.48 (Casner Ed. 1952);
Bayse, Clearing Land Title, Ch. 5;
Burke, Law of Title Insurance, 3d. Ed sec. 3.07;
Gosdin, Title Insurance, A Comprehensive Overview, 2d Ed. pp. 56-58, n 153;
Maupin, Marketable Title to Real Estate;
Palomar, Title Insurance Law, sec. 5-18.1; Patton and Palomar on Land Titles, sec. 563;
Reeve, Guaranteeing Marketability of Title to Real Estate (1951);’
Thompson on Real Property, Thomas Ed., McCormack, Title Insurance, Ch. 93.03(a)(4)
Thompson on Real Property: Second Thomas Ed., Chapter 92.06;

 Marketable title acts are like statutes of limitation in that they bar a claim not recorded within a designated period and, they are in the nature of curative acts, because they are remedial in character and may be relied upon as a cure or remedy for such imperfections of title as fall within their scope.

A total of 19 states have adopted some form of comprehensive “ Marketable Title Act” that combine the features of curative acts and statutes of limitation. The theory behind such acts is that when one or more persons have owned a record title to land for a significant period of time, old claims or interests that are inconsistent with such ownership should be extinguished. The act(s) purportedly clear away old claims and make it easier to establish a marketable title if there is a recent muniment or root of title and a search of the record discloses there are no adverse claims filed within a specific time frame, usually 40 years. The acts are designed to primarily address the question of ancient liens or claims and to promote simplified transfer of property. Under this theory, claims and/or documents may appear of record that are invalid because statutory time limits have expired. For example, there are a substantial series of statutes of limitations barring ancient mortgages that should be consulted. Some of the more common objections would also UCC fixtures fillings, judgments and court orders, mechanics’ liens, real estate taxes and assessments, federal tax liens, inheritance taxes and fractional interests arising by reason of a former owner’s death. Some states have gone farther than others and have adopted statutes which invalidate or render unenforceable covenants and
restrictions after a specified period of time. The one exception to the acts intended effectiveness may be easements.

F. Relying Upon Title Standards and Recommended Practices

In approximately 30 States the Real Property Section of the State Bar Association has drafted Title Standards as guides to the question of marketability of title, outlining the standard rules and procedures governing the question of title in real estate transactions as determined by real estate practitioners. These differ from marketable title acts in that they have not been sanctioned by the state legislature and passed into law. Nonetheless, every attorney, title examiner and underwriter should be familiar with these standards, for they often contain an exposition of the local law and set forth customs that other lawyers in the transaction are likely to insist upon as governing the deal.

These standards review and declare the law applicable to commonly recurring situations. They do not undertake to address issues which may be controversial among competent and knowledgeable counsel. Such standards set forth many circumstances that, under the title standards, warrant the waiver of a title objection. The value of such standards are increasingly realized. The problem of title defects and irregularities are frequently a matter of opinion. How serious these irregularities are may vary from one examiner to another. Many would be "passed" by one examiner if he or she were confident the next examiner would do the same. Title Standards are intended to serve that purpose. In those jurisdictions where they are in use and relied upon by custom, objections to title are only made when irregularities and defects in title are of such character that they are likely to expose the purchaser or lender to the hazard of adverse claims or litigation, and not when a technical defect gives no one an enforceable claim against the owner or the property. However, the existence of such standards does not have the binding effect of law unless they are formally adopted by the legislature and passed into law. Bar standards do not have the same force and affect as marketable title
acts. A contractual stipulation that encumbrances be determined by the state bar standards was held inapplicable to defects of title.

For further discussion of these clearance alternatives see the references above set forth.
HANDLING RIGHT-OF-WAY PROBLEMS

Carl S. Primavera

Revised by Lawrence S. Rosenwald, Esquire
HANDLING RIGHT-OF-WAY PROBLEMS

A. Highways, Roads and Streets

1. Town, County, State, etc.

   a. Local governmental subdivisions have no direct power to
      build or improve roads; any such activity is conferred upon
      them by statute.

   b. There are detailed statutory provisions for the
      establishment of roads and highways by governmental
      subdivisions.

   c. The General Road Law of 1836^ provides for laying out of
      public roads.

   d. Roads that have been surveyed, laid out and
      opened by developers in a subdivision are made a part of the
      township through a dedication process.

   e. Procedure under General Road Law:
      (1) Petition to the Court of Quarter Session
          for appointment of viewers.
      (2) Only one road may be contained in such a
          petition.
      (3) The petition must definitely state the beginning
          and ending points of the proposed road.

11/36 P.S. Section 1781,
(4) The viewers must observe the ground and make a report to the court stating whether the desired road is necessary for public or private use. If the court approves the report, the court must state the width of the road and, during the next term of court, the whole proceeding must be answered on record, at which point the road is a lawful public road, highway or private road.\textsuperscript{117}

f. County commissioners and township governing authorities are authorized to lay out and open roads. However, roads in townships may still be laid out, widened, changed or vacated under the provisions of the General Road Law.

g. Township roads are established under procedure similar to the General Road Law. The township authority must file a report of the proposed action to enact an appropriate ordinance, which report is similar to the report of the viewers under the General Road Law, and petition the court for review of the ordinance.

2. **Rights of Abettors**

The owner over whose land the road is laid retains the ownership of his or her land subject to the rights of

\textsuperscript{117} 14./36 P.S. Section 1832

\textsuperscript{117} Boundary Law [Pa.]

IV - Handling Right-of-Way Problems

PHO2/219380.1

NBI Boundary Law Seminar March 2006
Lawrence S. Rosenwald Esq. Supplement
Lawrence S. Rosenwald, P.C.
1310 Penn Center Plaza
15th and JFK Blvd. Philadelphia, PA 19102
the public use the land. The abutting owner does not surrender the entire title to the land taken for the road but reserves rights above and below the surface that do not interfere with the use of the road.

B. **Control, Supervision and Management**

A public road may only be closed by proceedings to vacate. Townships do not have the power to vacate roads and may vacate a township road only by ordinance and not merely by failure to maintain the road. Generally, the vacation of public roads is within the jurisdiction of the Court of Quarter Session.

C. **Abandonment, Discontinuance and Vacation**

D. **Easements**

1. **Types** There are two kinds of easements: an easement appurtenant and an easement in gross.

   a. An easement appurtenant is a liberty, privilege or advantage which the owner of a piece of land has in the land of another. For an easement appurtenant to exist, there must be two tracts of land. One is called a dominant tenement, which has the benefit of the easement, and the other is the servient tenement, which is subject to the easement right.

   15/Phillips v. Dunkirk, 78 Pa. 177 (1875)

b. An easement in gross is a mere personal right in the land of another. It is personal in that it is not appurtenant to other land.

2. **Classification of Easements**
   
   a. **Affirmative Easement**: the holder of an affirmative easement has the right to enter upon the servient tenement.

   b. **Negative Easement**: the holder of a negative easement does not have the right to enter upon the servient tenement; however, the holder may compel the party in possession of the servient tenement to refrain from engaging in certain activity upon the servient tenement. A negative easement is generally thought of as a negative covenant.

3. **Creation of Easements** There are four ways in which an easement may be created:
   
   a. **Express grant**: an easement created by an express grant must comply with the formalities of a deed.

   b. **Reservation**: an easement by reservation is created when the owner of a parcel of land conveys the parcel but reserves the right to continue to use the parcel for a specific purpose.
c. **Implication:** an easement by implication occurs when it is clear that the intention of the parties was to create the easement. Generally an easement by implication is found where the grantor in conveying a portion of a parcel fails to provide for access to remaining un conveyed land.

d. **Prescription:** an easement by prescription occurs where long continued use creates the reasonable assumption that the use was legally obtained. Analogy is made, to adverse possession and the statute of limitations applicable thereto.

4. **Assignability of Easements**
   a. An easement appurtenant is considered incident to the possession of the dominant tenement and as such may be conveyed with the dominant tenement.
   b. An easement in gross is generally not transferrable since it is regarded as purely personal to the original grantee.

5. **Termination of Easements** In general, when an easement is created for a particular purpose, it comes to an end upon the cessation of that purpose. To the extent that the parties original intention was to provide for a natural termination of the interest, such limitation will control.
a. **Termination on Specific Conditions:** the easement may terminate upon the occurrence of a specific event, e.g., an easement granted so long as no high-rise building is constructed on the property.

b. **Unity of ownership:** if the owner of the dominant and servient estate come together in one person, the easement is extinguished.

c. **Release:** the easement may be terminated by release of the owner of the easement.

d. **Abandonment:** where the actions of the owner of the easement demonstrate an intention to permanently abandon the easement. An oral expression of such intention to abandon is not sufficient to cause an abandonment.

e. **Estoppel:** where the conduct or assertions made by the owner of an easement create a change in position by the owner of the servient tenement based upon the reasonable reliance of the assertions made by the holder of the easement.

f. **Prescription:** when the owner of the servient tenement uses the property as though no easement existed, for the prescriptive period. This is analogous to adverse possession.
E. Prescriptive Rights

The requirements for easement by prescription parallel those established for adverse possession. The law provides that it is an ancient and unquestioned law that to acquire an easement by prescription, the exercise of possession must be adverse, open, notorious and uninterrupted. Adshead v. Sprung. 375 A.2d 84 (1977). The Supreme Court of Pennsylvania has held that a prescriptive easement will be upheld only if there is clear and positive proof of its existence. Pittsburgh & L.E.R.R. Co. v. Stowe Township. 96 A.2d 892 (1953). Additionally, the burden of proof is always upon the claimants. Stevenson v. St. 195 A.2d 2 68 (1963). The use of easement by prescription is limited as to its character and extent to the use by which the right was established. Stevenson v. Commonwealth, 23 Pa. D. & C. 368 (1960).

More is required to establish an easement by prescription than an occasional use for some extraordinary occasion. See, generally, the discussion concerning easements in Volume 12 of the Pennsylvania Legal Encyclopedia.

F. Utilities

1. Easements, rights-of-way, and other interests in favor of utilities and authorities.
2. Acquisition of those interests by condemnation and other means.

3. Using, enjoying and maintaining interests in favor of utilities and authorities.

4. Extinguishment, termination and abandonment of interest running in favor of utilities and authorities.

G. Case Studies
WATERS AND WATER COURSES IN PENNSYLVANIA

"Riparian" (as defined in Ballentine's Law Dictionary, 2nd Edition) is derived from a Latin word "riparius" meaning "of or belonging to a bank of a river." A distinction is made between those whose lands abut upon a lake and those whose lands abut upon a river. In the former they are known as littoral owners and in the latter as riparian owners. For practical purposes the term riparian will include anyone whose lands are bounded by or positioned on or along a watercourse, irregardless of the manner or designation of the watercourse, whether it be called a bay, lake, pond, river, stream, run or creek.

In using the term "riparian" such will, unless otherwise stated, be taken to mean those waters of the ordinary flow and underflow of a watercourse. When such waters rise above the line of highest ordinary flow they are to be regarded as flood waters or waters to which riparian title and rights do not attach.

DISTINCTION BETWEEN WATERCOURSES AND SURFACE WATER

A "watercourse" is defined as "a stream of water, usually flowing in a definite channel having a bed and sides or banks and discharging itself into some other stream or body of water." It must present to the eye at a casual glance, the unmistakable evidence of the frequent running of water, but it need not flow continually.

Distinction must be taken between a regular flowing stream of water which at certain times or seasons is dried up and those occasional bursts of water which at times of freshets and storms descent from the hills. The former is considered to be a watercourse, having a definite channel or bed and sides or banks ultimately emptying into another body of water. The latter is considered "surface water" which is water usually created by rain or snow and which follows no definite course and has no substantial or permanent existence and does not constitute a watercourse. Thus mere drainage over the general surface of land is very different from
continuous flow in a definite channel or bed.

Thus the interest that an insurer of title has or surveyor determining boundary lines has will be in watercourses and not surface waters and paths of drainage thereof.

**IMPORTANCE OF CONCEPT OF WHAT IS NAVIGABLE OR NON-NAVIGABLE**

The riparian rights and title to land abutting thereon are dependent upon whether a particular watercourse is considered navigable or non-navigable.

Historically the source of much of our law with regards to riparian title to real estate is derived from the British Common Law. In the British Isles the rivers are inconsiderable in volume; in fact there are very few places in Great Britain which are more than 75 miles from the sea. Such rivers are of little value for purposes of navigation except where they are affected by the ebb and flow of the tide.

[Note that this concept is important in New Jersey where any land now or heretofore flowed by tide belongs to the State.] From this it resulted naturally that royal or public streams, the beds of which belonged to the Crown, came to be distinguished from private streams, the beds of which belonged to the owners of the banks, by reference to the presence or absence of tidewater.

On this continent the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds and in some instances thousands of miles above the reach of tidewater. The Common Law definition was unsuited to this state of things and seems never to have been adopted in Pennsylvania nor for that matter by the Federal Government. On the contrary navigability in fact was made the test by which the character of a stream as public or private was to be determined, and the great but tideless rivers of the state were held to be navigable rivers and public highways, belonging to the state, and held for the use of all her citizens.

Bodies of water are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in customary
modes of trade and travel on water.

On the consideration of the actual capacity and utility for the purposes of navigation, and hence the ultimate determination as to where riparian title lines will be settled, numerous, specific waters and rivers have been declared to be navigable and/or non-navigable in whole or in part by federal and state statutes and judicial decisions; the United State Army Corps of Engineers; the United States Coast Guard; and the Pennsylvania Department of Forest and Waters.

**TITLE TO PROPERTY ON NAVIGABLE WATERCOURSES IN PENNSYLVANIA**

Before delving into this interesting area, a short discussion of the role that "meander lines" play in ascertaining title lines to riparian lands is in order. "Meander lines" are those lines run in surveying particular portions of the public lands which border on navigable rivers, not as boundaries of the tract but for the purpose of defining the sinusitis of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows that the watercourse, and not the meander line as naturally run on the ground, is the boundary. Thus a meander line is not a boundary, unless it is laid out as a metes and bounds description in a conveyance.

**The general rule is that the Commonwealth owns the land underlying its navigable waters in trust for the public.** However, such ownership is subject to the paramount right of control by the Federal Government over commerce with foreign nations and among the several states. Ownership by the Commonwealth of submerged lands extends to the ordinary low water mark. Low water mark as used in this connection means the height of the water at ordinary stages of low water unaffected by drought and unchanged by artificial means.

Title to land on navigable waters extends to the low mark as it exists naturally and the riparian owner has no property right, title or interest as a landowner beyond the low water mark. In searching and checking title from prior deeds and records of conveyance and surveying riparian shores and banks of navigable waters, it is most important to determine the high water mark or line. This is so because a riparian owner's title to land between the high and low water mark is qualified in that it is subject to control and regulation by the State
and Federal governments for the use and benefit of the public and its right of navigation. The common right of the public to use navigable waters for navigation is superior to other rights in the water and such is not confined to the main channel but extends over the entire surface of the water from shore to shore, subject only to natural and lawful artificial obstructions. However, this public right does not extend beyond the foreshore, that is, the high water line, except where a temporary use is made of the shore or bank in case of peril or emergency or where the right has been acquired by agreement, grant or prescription.

However, a riparian owner has the right of access to navigable waters in front of his land, distinct from and in addition to the general right of the public to use such waters or to use the beach and such right is compensable in damages if interfered with. However, a riparian owner may use the land between the high and low water marks for such purposes as do not interfere with navigation, but he has no right to erect permanent structures thereon which will interfere with the right of the public without express authority.

Some important considerations in determining the ordinary high water mark of navigable waters (as for all practical purposes, this would be the utilitarian limit to a riparian owner’s absolute, free control of riparian lands) are the characters of the bank or shore at a particular site in issue, and if it is difficult to ascertain the line of ordinary high water at this site, recourse may be had to other sites along the same stream.

There is a rather interesting test for determining the ordinary high water line of navigable waters. It is called the "vegetation test." It is useful where there is no clear, natural line impressed on the bank of a navigable stream. This test for a navigable stream’s ordinary highwater mark means not that part within such line where all vegetation has been destroyed by water covering soil, but that soil has been covered by water for sufficient periods of time to destroy its value for agricultural purposes. But if there is a clear line, as shown by erosion or other easily recognized characteristics such as shelving, changes in the character of soil, destruction of terrestrial vegetation and litter, these determine the line of ordinary high water.

Since the Commonwealth is the owner of the bed and land below the low water mark of navigable waters, it has the power to grant to others its lands under navigable waters limited by the public trust under which such land is held.

But any rights, titles and interests granted by the Commonwealth in the bed of any navigable watercourse
within or on its boundaries may be declared void whenever such interest becomes or is deemed derogatory or inimical to or fails to serve the best interests of the public or the Commonwealth. See 32 Purdon’s Statutes, Sections 675 et seq. The jurisdiction to void such grants is vested in the Department of Forests and Waters and it should be consulted to determine the current status of such grants.

It should be noted that where a navigable body of water forms its boundary, the Commonwealth may have title to the underlying land up to the middle of the body. This, of course, depends upon historical considerations where the original dividing line may have given one state more or less than one-half the width of the navigable river or lake.

Title of a riparian owner on navigable waters does not extend to islands opposite his land. Rather, islands in navigable waters are deeded to be the property of the Commonwealth. However, the Commonwealth, like any land owner, can grant or convey such islands to private individuals or entities. Thus, the owner of an island situated in navigable waters granted by the Commonwealth has title to the ordinary high water mark absolutely, unless the instrument states otherwise. Between that line and the ordinary low water mark, his title is qualified and his riparian rights are subject to control and regulation by the State and Federal governments.

There are certain natural actions which cause additions and/or deletions to the banks, beds and boundaries of riparian lands. These are variously known as accretion, avulsion and lentication.

Title by accretion is the title which the owner of land on the border of a stream or other navigable watercourse acquires to the addition made to his land by the imperceptible action of the water. The key to the addition is a "natural change" because the doctrine of accretion does not extend to land created by artificial causes such as the filling in of land once under water. Along the same line, where a navigable stream is diverted from its ordinary channel by artificial means, the land thus left dry does not vest in the riparian owner by accretion. In the case of accretion to an island whether it be owned by the Commonwealth or held under grant from the Commonwealth, the owner thereof is entitled to the land added thereto by accretion to the same extent as the owner of riparian land on the shore of the mainland.

"Reliction" is defined as the land uncovered by a gradual subsidence of water. "Avulsion" is the opposite of
accretion and reliction; it being the sudden and perceptible loss or addition to land by the action of water or otherwise. Thus, the same rules that apply to accretion also apply to reliction. Avulsion does not change or alter the riparian owner’s title.

TITLE TO PROPERTY ON NON-NAVIGABLE WATERCOURSES IN PENNSYLVANIA

As has been discussed earlier herein, unless a particular watercourse has been declared to be navigable in whole or in part by the Federal Government, its Agencies or Courts or by the Commonwealth, its Agencies or Courts, it will be deemed to be non-navigable and as such our discussion of boundary lines of riparian owners can proceed from that point.

As was said earlier herein, what applied to meander lines on navigable watercourses also applies to non-navigable watercourses, i.e., a meander line is not a boundary line, unless it is laid out as a metes and bounds description in a conveyance or deed.

The basic rule to remember is that the owner of land bordering on a non-navigable watercourse owns the soil to bed thereunder to the thread thereof, i.e., his title extends to the middle of the stream. Thus, a grant by the Commonwealth of land bounded by a watercourse not declared navigable by law passes the land to the middle of the same.

This leads to the next consideration, what is the status of title to the bed or bank of a non-navigable watercourse subsequently declared navigable. The general rule is that such declaration does not, of itself, take from the owner title to the bed of the watercourse. In order to divest the owner’s title, the proper action as provided by law must be followed, that is, notice, condemnation and compensation. However, this is not within the scope of this discourse.

In a fact situation where a person owns land on both sides of a non-navigable watercourse, he is entitled to the whole bed of the stream within the boundaries of his land.
Islands on non-navigable watercourses present a peculiar problem. Basically, if an owner has title to land on both sides of a stream, as said before, he owns the bed thereunder and this means that he owns all islands and flats arising above the bed and waterline. But where there are separate or different owners on both banks, then it becomes necessary to locate the middle line or thread thereof.

The rule in such instances is that an island which is divided by the thread of a river or stream is held by the owners of the banks in severalty, the dividing line running as if there were no island. If the island lies on one side of the dividing line, it belongs to the owner of the bank on that side.

In the fact situation where an island is divided by the thread of a non-navigable stream and the banks on either side are owned by different owners and the channel thereof shifts as to the determination of who owns any new land arising therefrom or land to one side thereof, the legal principles are not well settled in Pennsylvania. However, most of the American jurisdictions use the following rules, namely:

*That where, by a sudden or violent change, the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected and remain in their original position.*

*But where the change is gradual and imperceptible, whether caused by accretion or reliction, the boundaries shift with the shifting of the channel or shore. Thus, if the land of the riparian owner is increased, he is not accountable for the gain and if it is diminished, he has no recourse for the loss. See Philadelphia Company v. Stimson.*

The above rules do not apply where the body of water or the watercourse as such is not made the boundary, but instead, the boundary is made a definite and fixed line as of the date of the conveyance by a survey with reference to the water or by high water marks as it then existed or by the banks of the water as it then existed.

**TITLE TO LAKES AND PONDS**

With the exception of Lake Erie, there are no navigable lakes and ponds bordering on or within the boundaries of the Commonwealth.
The patentee of land on the shore of a non-navigable lake or pond takes, like the owner of the bank of a non-navigable river, but unlike a riparian owner on navigable waters, to the center of the body of water. However, a riparian owner's right in the water and land thereunder depend on his deed, rather than on his riparian status. Caution should be used, for it may be that a riparian owner's rights end at the shore, while title to the bed is in another.

The importance of referring to a deed may be illustrated in the following case. A deed described property as bounded on one side by a certain non-navigable lake, gave no courses and distances, recited that the property contained sixty acres more or less and made no mention of water rights. What were the limits of the grantee's interests? The Pennsylvania Superior Court in interpreting the language of the deed said that they were not entitled to any land beyond the line of the lake nor to any rights therein nor use of the water.

**SOURCES FOR DETERMINING THE NAVIGABILITY OR NON-NAVIGABILITY OF PENNSYLVANIA WATERCOURSES**

As has been said before, there are seven sources of information as to whether a particular watercourse has been determined to be navigable or non-navigable in law in whole or part.

The first source to be checked is Acts of Congress. For example, the Act of July 27, 1916, declares Crum Creek in Delaware County from its confluence with the Delaware River and its new channel to be a navigable stream and the Federal Government is to have the right, title and interest in and to the bed of the new channel to ensure navigation.

The second source is Federal Court decisions. The following have been declared navigable in Pennsylvania: The Allegheny River, the Delaware River, the Monongahela River and the Ohio River.

The third source to be checked is the Coast Guard Regulations. The Coast Guard when necessary will make such determination under the authority and direction of the Commandant of the United States Coast Guard.
The last Federal source is the Department of the Army. The Secretary of the Army pursuant to Act of Congress has the authority to issue regulations for the navigation of waters of the United States generally. This authority has been delegated by the Secretary to the United States Army Corps of Engineers which maintains regional offices from which information can be obtained.

The first Commonwealth source is the enactments of the General Assembly. Some important statutory title decisions are as follows:

a) Act of September 20, 1783, states that title to the bed and channel of the Delaware River between Pennsylvania and New Jersey belong respectively to those states, the title of each to the bed extends from the respective shore to the middle of the river.

b) The Act of September 25, 1786, decides specifically which islands in the Delaware River belong to Pennsylvania.

c) The Act of June 5, 1937, P.L. 1664 as amended (71 P.S. Section 1840) which is a compact between Ohio and Pennsylvania concerning Pymatuning Lake which is situated partly in Ohio and partly in Pennsylvania provides that all islands within the Lake shall be considered as part of the State of Pennsylvania.

d) The Act of June 6, 1887, provides for the boundary between New York and Pennsylvania on the Delaware River as the center of the main channel.

Another important source of information is judicial decisions as to the navigability or non-navigability of specific watercourses. In the case of Commonwealth v. Fisher (1830), the Susquehanna River as declared navigable in law; as was the Schuylkill River in Philadelphia v. Collin.
Finally, the last source of information is the Pennsylvania Department of Forests and Waters. The agent of the Department is the "Water and Power Resources Board," created by Act of Assembly of June 12, 1938. Section 807 reads: "The Board is vested with authority in the name of the Commonwealth to determine the course and to define the location, width, and depth of any river or stream or part thereof wholly or in part within or forming a part of this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries."

Section 808 states that "whenever the Board shall define the location of a river or stream or part thereof, it shall prepare and have recorded a plan thereof in the office for the recording of deeds of the county where such location was defined, and such recording shall definitely fix the course, location and lines of such river for all such purposes in law, until altered by any subsequent plan recorded in like manner."

Therefore, it will be necessary to check the recorder's office and plans filed therein for accurate surveys and location of channel, center and other lines.

**RIPARIAN RIGHTS & RIPARIAN TITLE**

A watercourse is a stream of water usually flowing in a definite channel, having a bed and sides (or banks) and discharging itself into some other stream or body of water. Watercourses may include a bay, river, lake, pond, creek, run or stream.

**DEFINITIONS:**

**RIPARIAN RIGHTS:** Rights of property owners whose real estate is bounded by, abuts, borders or is positioned on or along a watercourse. Riparian rights concern waters which are part of the ordinary flow or underflow of a watercourse. Waters rising above this line are considered flood waters and no riparian rights are involved with them.
RIPARIAN TITLE: Lands abutting a natural watercourse.

RIPARIAN OWNER: Any landowner through whose land water flows on the surface in a natural watercourse. Every riparian owner is entitled to use so much of a watercourse running through his/her land as may be necessary for domestic needs or similar purposes.

REASONABLE USE: Determining factor for riparian owners in connection with the enjoyment of the land. The exercise of such right must not violate the rights of other riparian owners.

NAVIGABLE WATER: That which or can be used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in customary modes.

NON-NAVIGABLE WATER: That which is not capable of use as a highway for commerce under the navigable definition.

HIGH-WATER MARK: The first line of water on the shore determined by marks made on the shore at a normal high tide. In New Jersey, the "high-water" mark is determined by the medium high tide between the spring and neap tides.

LOW-WATER MARK: The height of the water at ordinary stages of low water unaffected by draught.

BULKHEAD LINE: The line to which the riparian owner may build or fill without additional permission. On the waterfront, it is the line of the wall at the edge of the water from which the piers extend. The bulkhead line...
may be moved at any time without compensation to the owner for the fill or improvements erected between the bulkhead and the high water line.

**PIERHEAD LINE:**

Sometimes call Harbor Line, it is the line created by the Federal Government to which an owner may build a pier after obtaining a permit to do so. The line is generally beyond the bulkhead line.

**ACCRETION:**

The doctrine that recognizes that increases or additions to one parcel of foreshore land, gradually moving from another parcel by natural action, become a portion of the foreshore land and add to the ownership of that land (Foreshore land being riparian, shoreline, waterfront land).

Accretion is the process by which land is increased by gradual deposit of soil caused by the natural flow of a body of water.

**AVULSION:**

A sudden or in perceptual loss of one property or addition to another caused by action of body of water, including a sudden change in the bed or course of a stream.

Avulsion can be applied to floodwaters which suddenly cut away the bank of a stream.

Additions to foreshore land caused by avulsion belong to the foreshore owner to which the additions have attached, SUBJECT to rights of upstream foreshore owners to identify and reclaim deposits lost.
RELICATION: Process of creation of exposed land caused by the withdrawal of water from land previously covered by the water (permanent uncovering of land or the laying bare of a body of water).

PIERHEAD LINE: Sometimes call Harbor Line, it is the line created by the Federal Government to which an owner may build a pier after obtaining a permit to do so. The line is generally beyond the bulkhead line.

BASIC RULES RELATING TO TITLE RIGHTS AND BOUNDARIES:

PENNSYLVANIA:

The property owner has title to the low water line subject to the rights of the public and the powers of the Federal & State Governments to improve the waterway, between the high and low water marks.

In non-navigable waters, title runs to the main channel subject to the same rights of the public and certain other rights of the government.

Stream beds are State property as far as the streams are navigable. Title to beds of waterways not held to be navigable is available for private ownership.

GENERALLY:

When State or riparian owner owns the banks and beds of a watercourse, that ownership is subject to the rights of others for navigation, when appropriate, and for fishing.

No one may sell or lease beds of watercourses for purposes which might interfere with the rights of others.

When title to land uses a watercourse or body of water as a boundary, title extends to the low water mark for navigable waters and to the thread for non-navigable waters.
Land under common ownership can be treated as riparian only to the extent that it is within the area of natural drainage to the stream.

A riparian owner may make use of the water for such artificial wants as irrigation, water power, mining, etc., as long as it does not interfere with interest of other riparian owners.

Riparian rights do not include the right to go on the water for boating, swimming or skating. The owner of land adjoining water has the right to go on the water only to the extent that his/her boundaries include the bed of the body of water. One navigable water, the public has an easement to traverse irrespective of the ownership of the bed.

NOTES:

The Commonwealth of Pennsylvania owns land beneath the natural low water mark of navigable waters, in Trust for the public and subject to control by the Federal Government for commerce and navigation. SUCH TITLE IS NOT INSURABLE.

Islands in navigable waters belong to the commonwealth unless previously granted.

A permit MUST be obtained from Department of Commerce in Philadelphia and from the Navigation Commission for the rest of the State before any work is done that might affect navigability between the bulkhead and high water lines. The State can, with approval of the Federal Government, require or permit work done in navigable waterways without compensation to riparian owner(s) provided the work does not restrict public use of the waterway.

A permit MUST be obtained from the Army Corps of Engineers for any work done between high water lines of established bulkhead lines of a navigable waterway. (I.E. for shipyards along Delaware River in Philadelphia, Camden and Trenton). The harbor of pierhead line as determined by the Army Corp of Engineers sets the maximum encroachment on the waterway for such project.
RIPARIAN RIGHTS AND RIPARIAN TITLE

Riparian rights are those of property owners whose real estate is bounded by, abuts, borders or is positioned on or along a watercourse.

Riparian rights concern waters which are part of the ordinary flow and underflow of a watercourse. Waters rising above this line are considered flood waters and no riparian rights are involved with them.

A watercourse is a stream of water usually flowing in definite channel having a bed and sides or banks and discharging itself into some other stream or body of water. Mere drainage of water or occasional bursts due to storms is considered surface water and is irrelevant to one's riparian rights.

A watercourse may include a bay, river, lake, pond, creek, stream or run.

Every riparian owner is entitled to use so much of a stream running through his land as may be necessary for domestic needs or other similar purposes. Reasonableness of use is the measuring rod.

In Pennsylvania, the extent of title depends upon whether the watercourse is navigable or non-navigable.

Title to lands on navigable watercourses extend to the Low Water line as it exists in its natural and unfilled state. But absolute title extends only to the High Water line; between the high and low water lines title to the soil is subject to public rights of navigation and fishing, and subject to improvement of the stream as a public highway. Title between the low water lines remains in the Commonwealth of Pennsylvania in trust for all citizens, subject to the paramount right of control by the United States for commercial and navigational purposes. This control is often referred to as the Federal Navigational Servitude.

Unlike some states, the test of navigability in Pa. is whether the water is navigable in fact. [Many states, such as New Jersey, use a tidal ebb-and-flow rule]. Bodies of water are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and
travel are or may be conducted in customary modes of trade and travel on water. But the concept of navigable in fact is not always easily discerned. It is not unusual for a court to declare a body of water navigable if a toothpick can float on it. A body of water can be declared navigable when declared so by any of the following Federal or State sources:

- Federal Court Decisions.
- United States Coast Guard.
- United States Army Corps of Engineers.
- State Court Decisions.

-Pennsylvania Department of Forests and Waters.

When land borders a non-navigable watercourse, title runs to the center of the body of water. Consequently, if a person owns the land on both sides of the non-navigable body of water, he then owns the entire bed. It is possible for one person to own the bed, while another owns the land on the bank. It is important to check the deeds of conveyance to determine the ownership rights.

**TIDAL WATER - RIPARIAN RIGHTS & NAVIGATIONAL SERVITUDE**

Riparian rights are defined as the rights of the owners of land on the banks of water courses, relative to the water, its use, ownership of the soil under the watercourse, and accretion and alluvium thereto. The right of the riparian owner to the flow of water on, over or under his property, and the obligation of the owner not to obstruct the flow date back to the beginning of land ownership itself, and, furthermore, as relates to State or Federal Law, depend primarily on whether or not the watercourse is navigable and whether or not compensation is due the riparian owner.

In 1862, the Pennsylvania Supreme Court declared that "navigable waters are those which are capable of being navigated". In 1935, the Court further stated: "Those waters must be regarded as public, navigable
waters which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce over which trade or travel are or may be conducted in the customary modes of trade or travel on water." Any waterway which can be made available for navigation by reasonable improvement is considered navigable water.

The basic rule in Pennsylvania is that the property owner has title to the low water line subject to the rights of the public and the powers of the Government (State or Federal) to improve the waterway, between the high and low water marks. In non-navigable waters, such as streams and some creeks, title runs to the main channel of the waterway, subject to the same rights of the public and certain other rights of the Government. The "high water mark" is the first line of water on the shore determined by marks made on the shore at a normal high tide. The "low water mark" is the height of the water at ordinary stages of low water unaffected by draught.

In connection with natural water marks created by water courses, both State and Federal Governments have created artificial water lines as aids in regulating commerce on the waters. The "bulkhead line" is the line to which the riparian owner may build or fill without additional permission. On waterfront areas, the bulkhead line is the line of the wall at the edge of the water from which the piers extend. This implies permission for the owner to fill in the area behind the bulkhead. However, the line may be moved at any time without compensation to the owner for the fill or improvements erected thereon between the bulkhead and the high water line. The "Pierhead line" (or Harbor line), created by the Federal Government, is the line to which an owner may build a pier after obtaining a permit to do so. Generally, this line is beyond the "bulkhead line".

Under common law in England, title to the beds of waterways where the tide ebbed and flowed was in the Sovereign. As a result, the thirteen original colonies acquired title to the beds of waterways in the same way. The land permanently under water between the low water marks on each bank belonged to the States. As the Country grew, title to the beds of streams and rivers passed from the Federal Government to the States at time of their admission to the Union.
Again, in England, title to stream beds above tidewater belonged to the riparian owners. Conversely, many State Courts, including Pennsylvania, have held that stream beds are State property as far as the streams are navigable. It is a general rule that title to the bed of waterways not held to be navigable is available for private ownership. Title of the riparian owner on navigable waters extends to the low water mark in Pennsylvania.

New Jersey holds a somewhat different view. The "high water line" in New Jersey is determined by the medium high tide between the spring and neap tides. Also, in New Jersey, the riparian owner owns the beds of all rivers and streams above tidewater.

Whether the State or a riparian owner owns the banks and beds of a watercourse, that ownership is subject to rights of others for navigation, when and where appropriate, and for fishing. No one can sell or lease those beds for purposes which would interfere with the rights of others. Above the high water mark, there is no limit on title.

When a property owner's title uses a watercourse or body of water as a boundary, title to that property extends to the low water mark for navigable waters and to the thread of nonnavigable waters.

A permit must be obtained from the Department of Commerce in Philadelphia, and the Navigation Commission for the rest of Pennsylvania, before any work is done that might affect a navigable waterway between the bulkhead lines or the normal high water lines. The State can, with approval of the Federal Government, require or permit work done in navigable waterways without compensation to the riparian owner provided it does not restrict public use of the waterway.

The Federal Government's power has been extended to cover not only navigable waterways but also those which may be made so by reasonable means. In 1941, the United States Supreme Court held that "The dominant power of the Federal Government extends to the entire bed of a stream, including lands below ordinary high water mark .... The damage sustained results not from taking property in the stream bed, but from the lawful exercise of power to which the property has always been subject." In 1875, a bridge was constructed over the Allegheny River (without objection of the Federal Government). In 1903, the Federal
Government required the bridge building company to reconstruct the bridge because it was so low as to obstruct traffic on the river and hamper the development of Pittsburgh. It was done without compensation to the company. A permit must be obtained from the Army Corps of Engineers for work done between high water lines of a navigable waterway or between established bulkhead lines. This would be the case for shipyards along the Delaware River in the Philadelphia, Trenton, Camden area. The harbor or pierhead line as determined by the Corps of Engineers sets the maximum encroachment on the waterway for the project. The Government can relocate the harbor or pierhead lines at any time.

In addition to the State and Federal Government sanctions in this area, the Delaware River Basin Commission must approve all projects affecting waters in any rivers, streams, creeks, or the like which form a part of the Delaware River watershed.

Relative to the Delaware River and its watershed, are the islands which are found in the beds of the rivers. In the case of these islands, the land above the high water mark cannot be taken or destroyed without compensation, much the same as river bank properties. However, the riparian owner's rights below the high water mark are subject to the same public rights and governmental powers.

Natural watercourses have a tendency to change course at times. Property lines based on nonnavigational waterways follow the main channel of the stream, which may change gradually with the stream by erosion and accretion. Erosions wash away property of owner on one side and accretions add to the property of the owner on the other side. However, if the change is sudden and irreversible as to create a new channel, the property lines will remain the same as before the change. The same rules apply to navigable waterways with the title line running to the low water line. However, the riparian owner does not take title to artificial fill.

The determination of the aforesaid high and low water lines as to the title to the riparian owner's property is historical at best. The lines which count are the natural lines formed by the waterway without artificial improvements. Filling, excavation or erection of bulkheads can change the course of a waterway, but it does not change the riparian owner's title lines as determined by the high and low water lines.

The element of navigability also enters the picture in regard to lakes. On navigable lakes, private ownership
is subject to the use of the public. On lakes determined to be nonnavigable, the owners can exclude all others. Title lines for property on the nonnavigable lakes depend solely on the Deeds. The lakebed is subject to private ownership and the owner of the lake or a portion thereof may prevent others from using the lake or his portion of same.

A summary of the foregoing will show the following: A riparian owner has no property rights beyond the low water mark. Title to land below the low water mark is in the Commonwealth. Title to land riparian owner between high and low water marks is subject to control of State. Whatever easement rights, private or public, exist or are acquired, in and over navigable waters and lands under them, are subject to State control so far as navigable waters are over privately owned lands.

WATERS AND RIGHTS AND DUTIES OF ADJOINING LANDOWNERS IN CONNECTION THEREWITH

NATURAL WATERCOURSES FLOWING ALONG OR THROUGH ADJOINING LAND:

Any landowner through whose land water flows on the surface in a natural watercourse is said to be a riparian owner and, as such has certain riparian rights in the watercourse.

1. Limitations - Acts of God, such as floods or earthquakes, do not apply to the above general rule thereby giving riparian owners no recourse.

2. Reasonable Use - Each riparian owner has the right of a reasonable use of the water in connection with the enjoyment of the land. The exercise of such right is not violative of the right of other riparian owners.


4. Extent of Riparian Rights - Land under common ownership can be treated as riparian only to the extent that it is within the area of natural drainage to the steam.
5. Acquisition of Adjacent land - Acquisition of land adjacent to riparian land does not enlarge the area of the riparian land even if the newly acquired land is within the natural drainage area.

6. Artificial wants on riparian land - A riparian owner may make use of the water for such artificial wants as irrigation, water power, mining, etc., so long as it does not infringe on interests of other riparian owners.

7. Pollution - A riparian owner is entitled to the flow of water undiminished in quality as well as quantity. Such right is subject to right of each riparian owner to use stream to a reasonable extent to carry away waste materials. If degree of pollution destroys value of stream, it is unreasonable and subject to action.

8. Upper & Lower Riparian Owners - Lower riparian owner's right to receive water from above is subject to corresponding right of upper riparian owner to have water flow in natural course.

9. Right to go upon water - Riparian rights do not include the right to go upon water for purposes of boating, swimming or skating. The owner of land adjoining water has the right to go on the water only to the extent that his boundaries include the bed of the body of water. On navigable water, the public has an easement to traverse or navigate thereon, irrespective of the ownership of the bed or the extent of the boundaries.

TITLE EXCEPTION:

Rights of adjoining owners in and to the uninterrupted flow or ____ (stream) (creek) ____ together with flooding and drainage rights, if any, appurtenant thereto.

SUBTERRANEAN WATERS & STREAMS:

1. Percolating waters - The landowner beneath the surface of whose land waters percolate so as to feed a spring of another's land, has the right to make whatever reasonable uses he desires of his property. If another, acting with malice, interferes with such property right, he is responsible for damages.
2. Excavations - One landowner has as much right to subterranean waters for a well on his property as does another, subject only to the limitation that he does so without malice. A landowner is not liable for digging on his own property even if it interferes with percolations which fed a neighboring spring or well.

3. Use of water - Rights of landowners to the use of subterranean waters are the same as rights of riparian owners rights bordering on streams. A landowner may take whatever quantity is necessary as long as it is in connection with the enjoyment of the land.

4. Subterranean Streams - The landowner has no right to obstruct or divert subterranean streams which he is aware of. It is held in the same manner as a stream flowing above the surface.

5. Qualifications for mining companies - The interest of the public is obtaining minerals is superior to the rights of adjoining landowners. Hence, a mining company may divert a subterranean stream for the purpose of getting to the minerals.

DRAINAGE OF SURFACE WATERS:

1. Rules applicable for rural areas - The owner of the dominant tenement has an easement in the servient tenement for the discharge of all waters which, by nature, rise in, flow or fall upon the dominant. The owner of the servient tenement may not change the grade or surface of his land so as to cause water to collect on that of the dominant tenement. Conversely, the dominant tenement has the right to discharge surface water on his land onto the land of the servient tenement, subject to the limitation that the dominant tenement cannot concentrate the water, increase its flow or change its channel by unnatural means.

2. Agricultural Use - An owner of agricultural property has the right to increase the flow of surface water by building ditches, etc., as an incident to cultivation or to discharge waters, as long as the increased flow follows natural channels.

3. Rules applicable for urban areas - All urban owners have equal rights neither lessened nor increased by improvement, the primary right being protection of property. Urban lot owners may, if need be, shut out
surface water and he is not liable for increased flow on adjoining lot. However, the privilege to change the
grade of an urban lot and affect the flow of surface water is limited as to intent to injure or negligence and
obstruction of natural channels.

**NAVIGABLE WATERS (GENERALLY):**

1. Title to abutting lands extends to low water mark as same is natural and unfilled.

2. Commonwealth of Pennsylvania owns land beneath natural low water mark (in Trust for the public),
   subject to control by Federal Government for commerce and navigation. Such title is NOT
   Insurable.

3. Riparian owner’s title, between high and low water mark, is subject to Federal, State and public
   rights as to navigation and commerce, including rights of other riparian owners.

4. Islands in navigable watercourse belong to Commonwealth unless previously granted.

5. **Navigable Watercourses in Eastern Pennsylvania:**

   - Schuylkill River (Berks, Montgomery & Philadelphia Counties)
   - Delaware River (Bucks, Delaware & Philadelphia Counties)
   - Susquehanna River (Dauphin County)
   - Neshaminy Creek (for 4 miles from Delaware River) (Bucks County)
   - Pennypack Creek (for 2 miles from Delaware River) (Philadelphia)
   - Frankford Creek (in part) (Philadelphia County)
   - Conestoga Creek (in part from Susquehanna River) (Lancaster County)
   - Little Swatara Creek (in part) (Lebanon County)
   - Chester Creek (in part) (Delaware County)
   - Ridley Creek (in part) (Delaware County)
   - Darby Creek (for 4.8 miles from Delaware River) (Delaware County)
Clarks Creek (in part) (Dauphin County)
Mahantango Creek (Dauphin County)
Pine Creek (Dauphin County)
Powell Creek (in part) (Dauphin County)
Swatara Creek (in part) (Dauphin County)
Wiconisco Creek (Dauphin County)
Crum Creek (Delaware County) (NOTE: Bed from Delaware River to new Channel is titled in United States)

6. Other Navigable Waterways in Pennsylvania

<table>
<thead>
<tr>
<th>ALLEGHENY RIVER AND TRIBUTARIES</th>
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<tr>
<td>Allegheny River</td>
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</tr>
<tr>
<td>Kiskiminetas River</td>
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<tr>
<td>Conemaugh River</td>
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<tr>
<td>Crooked Creek</td>
<td>51.7 miles upstream from Kiskiminetas River</td>
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<td>Mahoning Creek</td>
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<td>Redbank Creek</td>
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<td>Clarion Rover</td>
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<tr>
<td>Tionesta Creek</td>
<td>90.0 miles upstream from Allegheny</td>
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<td>0.3 miles upstream from Allegheny</td>
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<tr>
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<td>Youghiogheny River</td>
<td>31.2 miles upstream from Monongahela</td>
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<tr>
<td>Tenmile Creek</td>
<td>2.7 miles upstream from Monongahela</td>
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<td>Cheat River</td>
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</tr>
<tr>
<td>Shenango River</td>
<td>1.8 miles upstream from Beaver R.</td>
</tr>
<tr>
<td>Raccoon Creek</td>
<td>1.8 miles upstream from Ohio River</td>
</tr>
<tr>
<td>Little Beaver Creek</td>
<td>15.7 miles upstream from Ohio</td>
</tr>
<tr>
<td>River</td>
<td></td>
</tr>
<tr>
<td>North Fork of Little Beaver Creek</td>
<td>14.3 miles upstream from Little Beaver Creek</td>
</tr>
<tr>
<td>SUSQUEHANNA RIVER AND TRIBUTARIES</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Susquehanna River</td>
<td>268.4 miles (to Athens, PA)</td>
</tr>
<tr>
<td>Susquehanna River (West Branch)</td>
<td>69.6 miles upstream from Susquehanna to Lock Haven, PA</td>
</tr>
<tr>
<td>Codorus Creek</td>
<td>11.4 miles upstream from Susquehanna</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>DELAWARE RIVER AND TRIBUTARIES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware River</td>
<td>333.0 miles (entire length in PA)</td>
</tr>
<tr>
<td>Chester River</td>
<td>2.0 miles upstream from Delaware</td>
</tr>
<tr>
<td>Crum Creek</td>
<td>1.0 miles upstream from Delaware</td>
</tr>
<tr>
<td>Neshaminy Creek</td>
<td>4.0 miles upstream from Delaware R.</td>
</tr>
<tr>
<td>Pennypacker Creek</td>
<td>2.0 miles upstream from Delaware R.</td>
</tr>
<tr>
<td>Ridley Creek</td>
<td>1.0 miles upstream from Delaware</td>
</tr>
<tr>
<td>R. Lehigh River</td>
<td>72.0 miles upstream from Delaware R. (to White Haven, PA)</td>
</tr>
<tr>
<td>PA)Schuylkill</td>
<td>110.0 miles upstream from Delaware R. (to Port Carbon, PA)</td>
</tr>
</tbody>
</table>

[continued on next page]
NON-NAVIGABLE WATERS (GENERALLY):

1. Title to land bordering on non-navigable waters extends to middle or center line.

2. Title to land beneath non-navigable streams, lakes and ponds (including owners of land on both sides of a watercourse) is usually in owner of said lands within stated boundaries. Rights in the water and the land thereunder depend on language of Deed (words "along" or "to" referring to a watercourse could express title to watercourse as being in another).

3. Riparian owner abutting a non-navigable watercourse always takes subject to rights of other riparian owners.

[The Material Noted below is not germane to the NBI Boundary Seminar Materials]

STANDARD OPERATING PROCEDURES WATER RIGHTS

NAVIGABLE WATERS

1. When tidal water crosses or abuts Insured premises and title below the mean high water mark is not established as to private ownership, it should be excepted from the Insurance, as follows:

   Title to that portion of premises herein lying below the mean high water mark of (watercourse) .

2. When private ownership to tidal water can definitely be established (upon checking back to original grant or patent) to the low water mark, rights of Government and public are excepted, as follows:

   Rights of the United States of America, State of Pennsylvania and the public generally
between the high and low water marks of ___(watercourse)____.

Subject to the laws and authority of the Federal and State Governments, their political subdivisions and agencies, to regulate commerce and navigation over that portion of premises herein beyond the high water mark of ___(watercourse)____ and to exert Governmental title and ownership in the area lying beyond the original low water mark.

3. If title to Insured premises is below the low water mark, such land cannot be insured, and must be excepted, as follows:

   Title to any portion of the premises herein lying below the low water mark of ___(watercourse)____.

4. Lesser navigable waters create an easement on the land and must be excepted, as follows:

   Easement of ___(Watercourse)____ (on) (along) (through) premises; subject to the rights of the public between the high and low water marks.

5. When there is an artificially filling-in of a body of water on the Insured premises, it is subject to Governmental control, as follows:

   Title to that portion of premises herein lying below the mean high water mark of ___(watercourse)____, unaffected by fills, jetties and bulkheads.

6. When the artificially filled-in land can be insured by issuance of a permit from the Department of the Army, the following is excepted:

   Any and all rights of the United States of America and State of Pennsylvania in and to navigable waters or filled-in land formerly within navigable waters, contained in any permits authorizing the filling-in of such land.
CREEKS AND STREAMS

7. When stream, branch or other watercourse extend through Insured premises, rights of other entitled to same are excepted as follows:

Stream of water flows through (or along) premises herein; rights of others abutting said stream.

LAKES AND PONDS

8. If there is a pond or lake on Insured premises, not entirely surrounded by said premises, rights of other abutting owners are to be excepted as follows:

Use of the waters of the (pond) (lake) and the bed thereof for fishing, boating or other riparian purposes.

CANALS

8. When title to Insured premises falls within the metes and bounds of a canal, that portion of premises in the bed thereof is State owned, and must be excepted from the Insurance, as follows:

Example

1. Easement of Pennsylvania Canal along premises herein insured.

NB Title to that portion of premises herein in the canal bed, towing path and berm bank of the Delaware Division of the Pennsylvania Canal is not insured hereunder and is excepted from coverage, same being vested in the Commonwealth of Pennsylvania by Deed from Delaware Division Canal Company of Pennsylvania dated 10/31/40 and recorded 1/21/1941 in Deed Book 692 page 496.
2. Rights of the Commonwealth of Pennsylvania and the political subdivisions thereof to enter upon the insured premises for the purpose of maintenance, repair, and reconstruction of said canal.

3. The high water mark of said canal is not insured hereunder.

NB. Cross reference with the NJ exceptions across the river

DRAINAGE DITCHES

10. When a drainage ditch extends along or through the insured premises and it is clear that a normal flow of water through said ditch is necessary for the enjoyment of bounding owners, the following exception should be made:

Rights of others thereto in and to the continued uninterrupted flow of water through the drainage ditch(es) of premises herein.

RIPARIAN RIGHTS - GENERALLY

11. Riparian rights are not to be insured unless it is definitely determined that such rights are appurtenant to the insured premises. If there is a watercourse on the insured premises and riparian rights are not appurtenant thereto, except the following:

Continued source and supply of water is not insured.

12. When dealing with a title in which there is a suspicion that water exists, but there is no evidence (other than a physical inspection) (usually a rather large tract), certify the following:

Rights, public and private, together with flooding and drainage rights, if any, in and to all streams, rivers or watercourses crossing, bounding or otherwise affecting premises insured hereunder.
Resolution of Boundary Disputes

Lawrence S. Rosenwald
RESOLUTION OF BOUNDARY DISPUTES

Definitions

1. "Boundary" is a line of division, either natural or artificial, separating two contiguous parcels of land.

2. "Monument" is a permanent, stable and definite landmark used to indicate a boundary. There are two types of monuments, natural and artificial.
   a. Natural monuments are objects found naturally on the land, e.g., mountains, hills, bodies of water, outcrop of coal; normally, trees do not adequately define a boundary line.\textsuperscript{17}
   b. Artificial monuments are landmarks or signs placed on the land, e.g., party walls, old fences, markers on the ground, particular buildings.

3. "Call" is a line or arc, referenced by course, angle and distance, in a property description.

4. "Metes and Bounds" is a method of describing land by application of compass directions and distance to its boundary lines.

5. "Consentable Boundary Line" is a boundary line created by agreement of adjoining landowners.

\textsuperscript{17}
A. **Rules of Construction**

1. In general, when there is a conflict as to a boundary, the intentions of the parties control. *Jedlicka v. Clemmer*. 677 A.2d 1232 (Pa. Super. Ct. 1996)

2. Monuments on the ground are of the highest value in questions of boundary. 2/

3. A mete and bound description takes precedence over a general descriptive designation.

4. Where a monument is a palpable mistake and reliance thereon would lead to absurd results, it will be disregarded. 3/

5. When a monumental boundary line 'given in a deed has physical extent as a road, street or other monument having width, the court shall interpret the language of the description, in the absence of any apparent contrary intent, as to carry the fee of the land to the center line of such monument. 4/

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And, it must be noted, a conveyance of land to the center of a road is subject to public use as a highway. Also, should the street or public way be abandoned or vacated, that portion of the street or public way reverts to the owner of the land with the full right of possession and use. 

B. Boundary Agreements Between Adjoining Landowners

1. Adjoining landowners may resolve a specific disputed boundary by mutual consent to an agreed-upon boundary line.

2. A consentable boundary line is binding upon the parties if it meets the following requirements:27 (1) there must be a dispute; (2) a line settling the dispute must be established; (3) there must be consent of both parties to that line; and (4) the parties must give up their respective claims which are inconsistent with the consentable boundary line. 

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7/Sorg v. Cunningham. 687 A.2d, 846, 948 (Superior 1997).
3. An agreement between the owners of adjoining lots of land establishing the boundaries, when executed, will be conclusive against them.\(^2\)

4. Once a boundary line has been fixed between adjoining landowners, a purchaser from one of them will be bound by such line.\(^{127}\)

5. A consentable boundary line may be created by recognition and acquiescence of adjoining landowners. When adjoining landowners acquiesce for more than twenty-one (21) years in a division line different from that in their deeds, both will be bound by it as a consentable line.\(^{117}\)

6. In certain instances, boundary lines may be established by estoppel, i.e., where the silence or representations of one landowner regarding the boundary line of adjoining property induces the other landowner to change his position based upon such silence or representations. In such case, the first landowner, regardless of the true boundary line, may be estopped from exerting the true boundary line. However, silence of a landowner while the adjoining owner makes valuable

\(^{9}\text{Kerr v. Wright, 37 Pa. 196 (1860).}\)

\(^{10}\text{LaBelle Coke Company v. Smith, 70 A. 894, 221 Pa. 642 (1908).}\)

\(^{11}\text{Miles v. Pennsylvania Coal Company, 91 A. 211, 245 Pa. 94 (1914).}\)
improvements will not operate as an estoppel when the landowner was ignorant of the true boundary, if he in no way induces the improvements. *5

C. **Affidavits**

Affidavits, deeds of correction and similar instruments filed of record have been used to amicably resolve boundary disputes which arise due to mistakes, confusion or ambiguity.

D. **Quiet Title Action**

The Pennsylvania Rules of Civil Procedure provide for an action to quiet title at Rule 1061. The action may be brought to compel an adverse party to commence an action of ejectment; 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 the land; 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 the land; or to obtain possession of land sold at a judicial or tax sale. Upon granting relief to the

plaintiff, the court shall order that the defendant be forever barred from asserting any right, lien, title or interest in the land inconsistent with the interest or claim of the plaintiff as set forth in his complaint unless an appropriate appeal is filed.

E. **Trial Preparation and Considerations**

1. Investigating the claim.

2. Selecting the cause of action (action to quiet title, declaratory judgment, injunction, ejectment, and/or trespass).

3. Selecting the forum.

4. Identifying the parties.

5. Drafting the complaint and pleading in the alternative.

6. Discovery.

7. Identifying experts.

8. Selecting exhibits.

9. Presenting the claim at trial.

10. Appeals.

F. **Evidentiary Considerations**

1. Burden of proof.

2. Best evidence rule.

3. Testimony.
a. Lay;
b. Expert;
c. Video Tape.

4. Exhibits,
a. Documents;
b. Photos;
c. Plans and surveys.

5. Requesting a "View."

G. MISCELLANEOUS

A. Party Walls

1. Definition: A party wall stands on the line between two adjoining buildings owned for different purposes and for the use of both owners. A wall which has its foundation laid partly on the ground of an adjoining owner is a party wall. A right to use of a party wall is an easement by which an owner of land may build a division wall partly over his line on the land of another.

2. Creation: Party walls can be created by contract between the adjoining owners, by statute or by prescription. In common law there are no party wall rights.

3. Factors to Determine Whether a Wall Between Two Properties is a Party Wall: The intent of the builder, the
understanding of the adjoining owners at the time the wall was built and the use of the wall must be considered.

4. **Statutory Law:** There are statutory provisions in certain municipalities (including Philadelphia) which provide for the building of a party wall and govern the necessary procedures to be followed for authorization to build a party wall.

5. **Location of Party Wall:** Even when the wall is built entirely on one property or does not rest equally on the adjoining lots, if it was intended that it should be used as a party wall and is used as a party wall it will be considered a party wall.

6. **Right of Support:** Land covered by a party wall remains the individual property of the owners of each house subject to reciprocal easements by which each owner is entitled to support for his building by means of the half of the wall belonging to his neighbor.

B. **Case Studies**
RULES OF CONSTRUCTION FOR AMBIGUOUS DESCRIPTIONS AND BOUNDARIES

William C. Hart
Library References:
Palomar, Patton and Palomar on Land Titles, Chapter 4, Sec. 126 through 128 inclusive, and Sec 151 through 159 inclusive citing the encyclopedias and West's Key No. Digests;
Anno., 7 A.L.R. 4th 53 (1981);
Crampton, A Practical Guide to Disputes Between Adjoining Landowners, Chapter 8, Boundary Disputes.
Laddner on Conveyancing in Pennsylvania, Chapter 9, Sec. 9.04(c);
PLF, Boundaries 1, 3-5, 7-9, 13, 15; Easement 12

TITLE RULES OR GUIDELINES APPLICABLE TO BOUNDARY LAW ISSUES INCLUDING RESOLUTION OF BOUNDARY DISPUTES

A. Canons of Construction

Descriptions are commonly phrased in terms of monument, maps and lot numbers, stated occupancies, metes and bounds or quantity of land. During the Colonial period in the original 13 colonies two land systems developed [See C.J.S. Public Lands sec. 200-201; West's Key No. Digests, Public Lands 188-196.5]. They may be designated as he New England System and the Southern System. Following the revolutionary war, land grants or warrants identified by the various states' surveyor general were no longer sufficient to identify increasing smaller parcels of land. Consequently the metes and bounds description became the most common form of description [See C.J.S. Boundaries, sec 9, 49-51; Deeds 30; West's Key No. Digests, Boundaries 3(3,6)), 6; Deeds 38(3); 12 A. Jur. 2d, Boundaries 9]. Where the scrivener included two or more of these formats in the same description on of two matters inevitably occurred. Either the property was more particularly and adequately identified or inconsistencies and conflicting descriptions arose. Therefore, there was a need for the establishment of rules of judicial or statutory construction, i.e., a hierarchy of control when a description used two or more apparently conflicting description, so that the true intent of the parties might be determined. Professor Cribbet, in his text Principles of the Law of Property, at page 169 of the Second Ed., identifies 10 canons of construction.

Since the foregoing texts refer to cases all over the lot, we will confine our review to Pennsylvania law alone. However, I should here also refer the reader to other texts, namely Powell on Real Property, 887[3]. See also Patton and Palomar on Land Titles.


Rules of construction with regard to boundaries are not imperative but are aid in construction that must yield to a contrary showing. Pencil v. Buchart, 380 Pa. Super 205, 551 A.2d 302 (1988)

B. Rules of Construction for Ambiguous Description-Monuments

NB As previously mentioned above, statutory rules of construction may be found in Professor Cribbet’s text Principles of the Law of Property, at page 169 of the Second Ed., which identifies 10 canon of construction. When descriptions contain discrepancies, courts seek to determine the intent of the parties. If the court is unable to determine the intent of the parties by other means, an ambiguous description is settled by applying rules of construction. The various ways in which property boundaries are described have been categorized in a hierarchy of priorities. These construction aids are not absolute and always give way to the primary objective of determining the parties intent, if that is clarified by considering the deed as a whole. In applying such rules courts have generally agree upon a classification of and gradation of calls in a grant, survey, or entry of land, by which their relative importance and weight may be determined [See further, 11 C.J.S., Boundaries, 48]. Take note, however, that in applying these rules to any particular set of facts the title attorney must always remember that the
purpose of these rules is to determine the intent of the parties. They should not be applied to defeat the apparent intent of the parties [citing Patton 3rd Ed supra. 151 n. 4]. A much more detailed analysis of these rules of construction as they relate to Control of (i) Fixed and Natural Monument; (ii) Artificial Monument and Marks; (iii) Plats and Field Notes; (iv) Calls for Adjoiners; (v) Courses and Distances may be found in Patton and Palomar on Land Titles Third Ed., Land Descriptions & Boundaries, sec. 152-158. Below are references to some Pennsylvania rules of construction.

Generally speaking, where calls for location are inconsistent, other factors are considered in the following order:

1. natural objects or landmarks;
2. artificial monuments;
3. adjacent boundaries;
4. courses and distances

Let’s consider each of these in various contexts.

As to 1: **Monuments:**

Monuments are visible markers or indications left on natural or other object indicating the line of a survey. Grier v. Pa. Coal Co., 128 Pa. 79, 18 A. 480 (1889)

Monuments are tangible landmarks established to indicate a boundary. When choosing such landmarks, factors to take into account should be visibility, permanence, stability and definiteness of location.

Rules of construction specify which elements of an ambiguous description are to be given more or less weight in comparison with
one another. In the order of preference, the courts consider the following description factors. First, references to fixed natural monuments are most persuasive. *Yoho v. Stack*, 540 A.2d 307 (1988). It is commonly held that “monuments” control not only map references, but also descriptions couched in terms of metes and bounds. *Keta Gas & Oil Co. v. Jents*, 380 Pa. 217, 110 A.2d 369 (1955).

Natural monuments are naturally occurring objects which are permanent in character. Examples include large stones, lakes, streams, trees, and the boundary line of an adjoining property or other physical features that are present on the land in its natural state. The permanency and readily observable nature of these natural property features are the justification for their prominent position.


However, call to a stake or post in the ground long since gone is not such a “monument” that a reference thereto is controlling over calls for courses and distances and adjoiners in a deed [*Allison v. Oligher*, 141 Pa. Super 201, 14 A.2d 569 (1940)] *so long as they close* (emphasis mine).

NB Exception to title rule. “Obliterated Monument”. If a monument is no longer standing, but its position can be determined by witness, evidence, surveyors’ field notes, improvements or reputation, the monument should control. If the position cannot be identified, it cannot control.
As to 2: The second level of preference in this constructional hierarchy gives favor to artificial monuments such as landmarks, signs, survey markers, buildings, party walls, roads and fence lines or rock walls predating the deed or conveyance.

NB However, if mistake with respect to call is apparent, inferior means of location may control a higher one. See Baker v. Roslyn Swim Club, 206 Pa. Super 192, 213 A.2d 145 (1965) for cases subordinating monuments to course and distances.

Natural and artificial monuments:


4. Monuments must be certain as to existence and location in order to control. If doubt, report to courses and distances. Post v. Wilkes Barre Connecting Railroad Company, 286 Pa. 273, 133 A 377 (1926). If no monumentation is called for priority should be given to the calls describing the property in metes and bounds.
5. Parole evidence is admissible to show existence of monuments. New York State Natural Gas Corp., Supra.


7. Rules must give way when it is unlikely that parties could have intended the result of its application. Howarth v. Miller, 382 Pa. 419, 115 A.2d 222 (1955).


9. That artificial monuments control courses and distances in case of conflict is not imperative and exclusive rule but is rule of construction to ascertain or aid in determining intention of the parties and is not followed where strict adherence to call for monument would lead to construction plainly inconsistent with such intention. Id.


11. Courses and distances prevail over monuments where absurd consequences might ensue, by giving controlling influence to call for the latter or where consideration of all facts and
circumstances shows a call for distance to be more reliable or certain or the call for monument has been inserted by mistake or inadvertence.

12. Courses and distances in deed rather than stone, were to be followed where additional errors in deed would be created if ambiguity or mistake were resolved in favor of stone, nut all courses and distances in all deeds involved and all lot areas would be accurate if the ambiguity or mistake were resolved in favor of the courses and distances.

13. Where use of stake mentioned as monument in deed corresponded to all other courses and distances while use of stone did not the stone monument was properly rejected as surplusage. Id

NB. Examples

(1) Natural-streams, lakes, rocks or trees.

(2) Artificial-stakes, iron pins or such other markers

14. Where a line is described both by a call for an adjoiner and by course and distance, the call for adjoiner will usually prevail in the event of a conflict.

15. The Clear Meaning Doctrine is sometimes said to exclude all extrinsic facts or evidence where the language of the deed is “unambiguous”, i.e., only when the language of a deed is unambiguous are the judicially and statutorily established rules on construction ignored. See Kimmel v. Ivonavec, 369 Pa 292, 85 A.2d 146 (1952).
C. Maps, plats, or field notes


D. Quantity of Land as a controlling factor


2. Especially so if acreage is stated to be "more or less". Dawson v. Coulter, 262 Pa. 566, 160 A 187 (1919).

3. However, if actual location of boundary is in doubt, acreage is significant in determining intention of parties. Dawson, Supra.

4. Ordinarily, statements as to quantity appear only in connection with description by other terms. However, the quantity element may control if the other terms will leave the boundary description doubtful [Duncan v. Madara, 106 Pa. 562 (1884)] or where there is a clear intention expressed, or an express or implied covenant to convey a definite quantity [McGowan v. Bailey, 155 Pa. 256, 25 A. 648 (1893)].

5. It has been said that "all other elements of descriptions must lose their superior value through ambiguities and uncertainties before resort can be had to quantity". Miller v. Cramer, 190 Pa. 315, 42 A. 690 (1899)
6. Quantity of land as a controlling factor almost always yield to particular descriptions by calls for natural or permanent objects, monuments of surveyed lines, other artificial monuments and marks, plats or field notes, adjoiners, courses and distances or descriptions by named recital. McGowan, supra.; Wood v. Jones, 7 Pa.478 (1848).

E. Streets, Alleys and Highways described as boundaries:

Library Reference:
Palornar, Patton and Palornar on Land Titles, Chapter 4, Sec. 146
Ladner on Conveyancing in Pennsylvania, Chapter 9, Sec. 9.04(e)
C.J.S Boundaries Sec 33, 35 et seq, Highways Sec. 4, 7-8, 10, 15,
West’s Key No. Digests, Boundaries 19. 19.1 et seq.; Highways 6(1);
PLE, Boundaries [Streets] 6 & 10, n.19

Generally: When a tract of land is bound by a monument which has width, such as a highway or stream, the boundary line extends to the center, provided the grantor owns that far, unless the deed manifests an intention to the contrary. See Anno: 42 ALR 228 (1925).

   a. If Street ever vacated, the surface to the middle will revert to abutting lot, Rahn, Supra.
   b. May use surface, if it does not interfere with the use of the surface. Stuart v. Gimbel Bros., 285 Pa. 102 (1926)

2. If an open public street is called for as a boundary, the grantee takes title in fee to the middle of the street if the grantor has title to it. Beechwood v. Reed, 438 Pa. 178, 265 A.2d 624 (1970).


7. Street plotted on municipal plan but not opened.
   a. Does not take title to any part of street, *Fidelity Philadelphia Trust Co. v. Foster*, 346 Pa. 59, 29 A.2d 496 (1943)
   b. If street later opened, title extends to middle of street. *Hancock v. City of Philadelphia*, 175 Pa. 124 (1896)


10. If street is not a highway nor dedicated to public use, title does not extend to the center. Hoover v. Frickanisce, 169 Pa. Super. 443, 82 A.2d 570 (1951).


12. If plan is recorded, but lots not sold according to plan, and roads are referred to as private roads, title does not extend to the middle of the road. Sedwick v. Blaney, 177 Pa. Super. 423, 110 A.2d 902 (1955).

13. If conveyance runs to and including an alley, title to the bed of the whole alley goes to the adjoining land as same abut the lot. A construction should be given to an instrument as a whole which, if possible, will give effect to all the words, and where the words of a grant have doubtful meaning, they should be taken most strongly against the Grantor. Wilson v. Peerless Co., 240 Pa. 473, 87 A 705 (1913).
NB For further in depth discussion of this topic see The Law of Titles in Pennsylvania, Chapter 45 entitled Streets, Alleys and Highways Described as Boundaries attached to the end of this chapter

F. Waters and Water Courses in Pennsylvania

NB For further in depth discussion of this topic see The Law of Titles in Pennsylvania, Chapter 42, Riparian Title In Pennsylvania included in Chapter V of the seminar material

1. Non-navigable stream or non-navigable lake with middle thread

   (a) title goes to middle. City of Johnstown v. Fearl, 317 Pa. 154 (1939); Conneaut Lake Ice Co. v. Quigley, 225 Pa. 605, 74 A 648 (1909).

2. Navigable body of water.

   (a) Water and bed belong to Commonwealth and title to abutting land extends only to waters edge. Leaf v. Pennsylvania Co., 268 Pa. 579, 112 A 243 (1920).

   (b) Same applies to non-navigable lake without middle thread. See Leaf, Supra.

3. Tidal Waters.
(a) Title extends on to low water line. Leaf, Supra; Cole v. Pittsburgh and L.E. Railroad, 106 Pa. 436, 162 A 712 (1932).

G. Old roads if intermediate width

1. Almost any evidence, especially unimpeached possession, may be enough to indicate exactly the line of property along the road. Maps, surveys, monuments, pedigree and even reputation evidence area admissible to establish boundaries. Hostetter v. Commonwealth, 367 Pa. 603, 80 A.2d 719 (1951)

H. Railroads

1. Interest of a railroad in a right-of-way is equivalent to a public highway, in that subsequent Grantees own to the centerline. Therefore, original right of way grant is not a base fee that, if abandoned, would revert to original owner. Flick v. Universal-Cyclops Steel Corp., 397 Pa. 648, 156 A.2d 832 (1959).

I. Evidence


2. Where there exists conflict between courses and distances or quantity of land, on one hand, and natural or artificial monuments on the other, monuments will ordinarily prevail, but before physical monument is accepted as boundary line, there must be evidence, other than its mere existence, that the

3. In boundary dispute, survey based on reconstruction of original subdivision plan from which parties’ properties were sold, and on other deed descriptions, was properly adopted over survey based on a tree-fenced line, not referred to in any of the deeds. Id.

4. The primary function of the Trial Court resolving a boundary dispute is to ascertain the intent of the Grantor at the time of the original subdivision. Pencil v. Buchart, 551 A.2d 302 (Pa. Super. 1988).

5. Evidence of the acreage of land, especially where the number of acres is followed by the words "more or less" has little weight as against specific boundaries and is in its nature an uncertain method of description and often a mere estimate. Where, however, a doubt exists as to the actual location of the boundary and the writing contains no words to definitely fix the line by either metes and bounds or monuments on the ground, evidence of the acreage becomes a material factor in the determination of the intention of parties. Dawson v. Coulter, 262 Pa. 566, 106 A 187 (1919). Pencil v. Buchart, Supra.

6. Trial Court’s decision to look at acreage of original deeds to predecessors of owners and neighbors in determining that neighbor’s tract contained thirty-one (31) acres and owners tract contained thirty-two (32) acres, rather than looking at monuments referred to in survey conducted before neighbors acquired property, was supported by evidence, which indicated
that none of the deeds referred to monuments, that monuments were not established or consented to by parties or predecessors, that following monuments would have resulted in neighbors’ tract of land being 40.29 acres in that no survey of property was undertaken until nearly one hundred (100) years after conveyance. *Pencil v. Buchart*, Supra.

J. Determination of Boundaries by Express or Implied Agreement or by Statutory Proceedings

NB The reader is encouraged to cross reference this section with the materials presented in Section III of the seminar agenda entitled “Unwritten Transfers of Title”. For further library references see C.J.S. Boundaries, 67, 69-73; West’s Key No. Digest, Boundaries 46.

NB See *Express and Unwritten Transfers of Title as They Apply to Boundary Law Issues*, included in Chapter III these seminar materials.
STREETS, ALLEYS AND HIGHWAYS DESCRIBED AS BOUNDARIES.

The law of Pennsylvania clearly states that, in the absence of clear intent to the contrary, a conveyance of land described as bounded by a street or road gives the grantee title to the soil to the middle of the highway if the grantor had such title. See:

Jones v. Sedwick, 383 PA 120 (1955)
Cox v. Freedley, 33 PA 124 (1859)

The significance of this is that, if the street is ever thereafter vacated, the surface to the middle will revert to the buyer or his successors as owners of the abutting land. Neither you nor I have any reservations as to the foregoing so far.


a. If the street is ever vacated, the surface to the middle will revert to abutting lot. Rahn, Supra.

b. May use subsurface, if it does not interfere with the use of the surface. Stuart v. Gimbel Bros., 285 Pa. 102 (1926).

Street plotted on municipal plan but not opened.


If street is not a highway nor dedicated to public use, title does not extend to the center. Hoover v. Frickanisca, 169 Pa. Super. 443, 82 A.2d 570 (1951).

If plan is recorded and lots sold according to plan, title goes to middle of road. Rahn v. Hess, Supra.

If plan is recorded, but lots not sold according to plan, and roads are referred to as private roads, title does not extend to the middle of the road. Sedwick v. Blaney, 177 Pa. Super. 423, 110 A.2d 902 (1955).

If conveyance runs to and including an alley, title to the bed of the whole alley goes to the adjoining land as same abuts the lot. A construction should be given to an instrument as a whole which, if possible, will give effect to all the words, and where the words of a grant have doubtful meaning, they should be taken most strongly against the Grantor. Wilson v. Peerless Co., 240 Pa. 473, 87 A 705 (1913).

PAPER STREET APPEARANCE ON FILED PLAN

The general rule of law is that when the owner subdivides his land into lots according to a plan and sells lots by reference to the plan, there is an implied grant or covenant to the purchasers that the streets shall be forever open to the public and are dedicated to public use. The dedication includes the paving, sewers and other improvements shown on the plan. You will note that this dedication is not limited to the purchasers but extends to the public.

It is not necessary that the plan be recorded on the public records. Woodward v. Pittsburgh, 194 PA 193. Reference to the plan in the deeds of conveyance is sufficient and the plan need not be signed or sealed. O'Donnell v. Pittsburgh, 234 PA 401. The dedication takes effect from the date of the first conveyance from the tract. Fereday vs. Menadick, 172 PA 535. The dedication is irrevocable, Garvey v. Harbison-Walker, 213 PA 177. This rule is applicable even if the City Surveyor makes the plan for the owner by adopting the City Plan. Dobson v. Hohenadel, 148 PA 367.
The plotting of a street on a plan which is recorded is an offer of dedication of the street as a public highway. The owner's actual intent is immaterial. The owner cannot thereafter contradict the plain legal affect of the instrument. This is true even though no lots abutting on the street were sold. Thereafter, upon the sale of the subject premises to a subsequent purchaser, the right passing to the purchaser of the land is not the mere right that he may use the street but that all persons may use it. [Snyder vs. Commonwealth, 353 PA 504, (1946); Quicksall, et al. vs. the City of Philadelphia, 177 PA 301 at 304, 35 A. 609; Ron vs. Hess 378 PA 265 at 286]. Ladner, in his text on Conveyancing in Pennsylvania states the matter in another way: "Where an owner records a plan . . . he is presumed to have intended dedication of the roads shown on the plan to public use and a (subsequent) purchaser takes title subject to the use of the road by the public."

The issue is whether the rights obtained by the public and the purchasers of the individual lots can be lost, and if so, how? The Act of May 9, 1889, P.L. 173 (36 P.S. 1961) provides: Any street, lane or alley, laid out by any person or persons in any village or town plot or plan of lots, on lands owned by such person or persons in case the same has not been opened to, or used by, the public for twenty-one years next after laying out of the same, shall be and have no force and effect and shall not be opened, without the consent of the owner or owners of the land on which the same has been or shall be, laid out." You will note that this Act applies to a village or town plot or plan of lots.

In Barnes v. R. R. Co., 27 PA Super. 84, the owner conveyed three adjoining lots on the West side of Second Street with a total frontage of eighty feet. They were described in the conveyances later made to the plaintiff in that case as one-hundred and twenty-one feet nine inches to Philip Street Thirty feet Wide, and bounded by Philip Street. Philip Street belonged to the owner who originally conveyed the three adjoining lots but it was not opened and had not been opened or plotted as a street on the City Plan. The plaintiff's contention was that the Act above mentioned applied and the land lost its character as a street and he became owner of the middle of the same because of the vacation by force of the Act above mentioned. The court held that none of the lots or the adjoining land described as Philip Street had been laid out in a town plot or plan within the terms or the Act.
The statute, said the Court, was designed for the benefit of the land owner in such cases to relieve his land from the servitude arising from the dedication to public use that had remained unaccepted for twenty-one years, and was not to enable the owners of abutting lots to seize the interest of the owner of an unopened street. The court further said that if the Statute was construed as automatically operating to vacate streets under such circumstances it would be taking property without due process of law and the Statute gave no indication of such effect in its title. The Statute was before the Supreme Court in the case of Rahn v. Hess, 378 Pa 264, 106 A2 461. In that case the owner of a large tract in Montgomery County in 1926 divided it into a plan of lots known as "Far View Farms" and sold some of the lots according to the plan by lot and block number. The decision does not indicate whether the plan was recorded. Streets were laid out through the tract and the lots sold were described as extending to the sides of the streets and not to the centers. The plaintiffs acquired title to some of the lots on one of the streets and the defendants acquired title to the other lots on both sides of the same street where it intersected with another street. The streets were never physically opened or used by the public for twenty-one years. In 1952 the defendants put barriers across both streets to block the plaintiffs from entrance and exit to their lots and they refused to move the barriers on plaintiff's demands. Plaintiffs brought an action for an injunction to restrain the maintenance of the barriers and from interference from their use of the streets and the use of the public generally to the streets. The lower court enjoined the maintenance of that the rights of the public had been lost. Both parties appealed. The Supreme Court affirmed. There were three questions involved:

1. Did the public generally lose its right to the use of the streets?

2. Did the plaintiffs lose their rights to the use of the streets?

3. Did the plaintiffs have any title to the bed of the street on which their lots abutted.

The Supreme Court referred to the general rule that the conveyance, according to the plan, was a public dedication of the streets and said that prior to the Act of 1889 there was no time limit upon which the public authorities could accept dedication but that Act fixed a time limit and if the offer to dedicate is not accepted within twenty-one years after it is made, the public rights to the street are lost. The Act is actually a Statute of Limitation which applies to all who seek to assert public character to the streets whether they are municipal authorities or lot owner's, and the purpose of the Act was to receive the land from the easements. It decided that the public had lost all right to the streets.
In discussing the plaintiffs' contention that the sub-divider by putting the streets on the plan merely made an offer to dedicate, and at the end of twenty-one years he still has the option to make another offer to dedicate or to retain a fee for himself, the court said the wording of the Act was clear that the streets could not be opened after twenty-one years without the consent of the owner of the land on which the street was laid out.

The question was then . . . Who was the owner, the original subdivider or the purchaser of the lots? The court held that the Act intended the lot purchasers and said that under the rule of *Paul v. Carver*, 26 PA 223, the abutting lot owners acquired title to the middle of the street. In that old case, you will remember, the Supreme Court held that the owner who laid out the streets or alleys and sold property abutting on the same received full consideration for them in the increased value of the lot, and if the streets were vacated it would be of no use to the original owner except to annoy the abutting lot owners and an intention would be found that title passed to the center of the street subject to the right of the public passage. The court compared the street when called for as a boundary as a single line, calling it the "thread of the road" similar to the thread of a creek or stream and said it was a monument or abuttal. The Supreme Court in the Rahn case held that, since there as no reservation or restriction respecting the streets by the original subdividers, the lot purchasers took to the middle of the street and there was nothing in the Act of 1889 of any intention to change the law in that respect. At that point we may note that the sub-divider may, be reservation on the plan, retain title to the street bed. *Dobson v. Hohenadel*, 148 PA 367. In discussing the question whether the Act of 1889 terminated the private easements of the lot owners as well as the public right, the Supreme Court said that the precise question had never been passed on previously. It rights and that the latter were private contractual rights resulting as a legal consequence from the implied covenants in the deed and were not affected by the failure of the Municipality to accept the dedication and not dependent upon such action.

The decision is in accordance with the common sense and the law of real property. The Act of 1889 did not purport to affect private easements at all. The lot purchasers obtained those easements when they bought according to the plan, and mere non-use would not extinguish them. *Nichels v. Hand Band*, 52 PA Super. 145; *Dulaney v. Bishoff*, 165 PA Super.

If it also appears from the notes of the subdivision plan recorded that the intent was clearly to lay out the streets, cul-de-sacs and rights of ways as "public right of ways", then dedication was intended as well. The case of *Cox's Inc. v. Snodgrass*, 372 Pa. 148, 152, 92 A.2d 540, 541 (1952) provides that:
"It is well settle that the grantee of a lot, which is sold according to a plan of lots on which streets or alleys not previously opened or projected as a public street or plotted out by the grantor acquires and easement over those streets and alleys as a private right of property arising out of the grant, of which we cannot be deprived without compensation."

Therefore, it is important to determine whether or not the streets or right of ways outlined on the subdivision plan has been dedicated. If so, the right of the owners of Parcel A and Parcel B to use the right of way would not necessarily be as a matter of private easement, but as a matter of being a member of the general public which would entitled to use the right of ways. See Cox's, Inc. v. Snogress, 372 Pa. 148, 152, 98 A.2d 540, 541 (1952). If the public has not accepted the officer to dedicate the streets/right of ways to public use shown on the subdivision plan within twenty-one (21) years after the dedication, then the public's right to accept the offer is foreclosed. See Rahn v. Hess, 378 Pa. 264, 268-69, 106 A.2d 461, 463-64 (1954). However, the individual's property right in the dedicated street in a private contractual right resulting as legal consequence from the implied covenant under which the grantee purchases, and, as such, is not affected by the failure of the municipality to act upon the dedication. Therefore, even though public rights in the street are lost, private easement are left unaffected unless surrendered. See Rahn v. Hess, supra, 106 A.2d at 464.

Covenants and restrictions which appear on recorded subdivision plans are binding upon the purchasers of lots under the subdivision plans even though the deeds for the various lots do not specifically set forth the various restrictions and covenants. See Ballard v. Hepp, ___ Pa. Super., 589 A.2d 266 (1991). Again, even if a road has never been dedicated to the public, for the public use or accepted for dedication, an easement is implied over a road where a recorded plan incorporated the road, even though the road was never dedicated. MacAndrews v. Spencer, 447 Pa. 268, 290 A.2d 258 (1972). See also, Sides v. Cleand, ___ Pa. Super., 648 A.2d 793, 795 (1994). The case of Potis v. Coon ___ Pa. Super., 496 A.2d 1188 (1985) contains one of the most exhaustive discussions regarding the acquisition of a private easement over unopened roads by lot owners in a subdivision. In that case, even though the subdivision plan was not recorded, the court held that the property owners acquired a private easement over the unopened roads because their deeds referred to the subdivision plan showing those roads. As such, a subsequent purchaser of a large part of this subdivision could not resubdivide the property so as to eliminate one of the roads that had been originally laid out. Pennsylvania statutory law found at 21 P.S. § 3.
"All deeds or instruments in writing for conveying or releasing land hereafter executed granting or conveying lands, unless and exception or reservation be made therein, shall be construed to include all of the estate, rights, title interest, property, claim and demand whatsoever of the grantor or grantors in law, equity or otherwise howsoever, of, in and to the same and every part thereof together with all and singular improvements, ways, waters watercourses, rights, liberties, privileges, herediments, and appurtenances whatsoever thereto belonging, or in anyway appertaining, and the reversions and remainders, rents, issue and profits thereof."

EASEMENT CREATED IN STREETS AND ROADS

Public and Private Rights of Passage are created over and across property lying within the bounds of streets and roads. Below are case citations which address various easement issues litigated in the Commonwealth Courts.

1. Streets and alleys laid out on a city plan, but not open and which right to open the city has not abandoned.
   a. Acquire easement by implication over entire bed of unopened street mentioned as a boundary in a deed, unless circumstances and description of grant clearly negate such implication. Fidelity Philadelphia Trust Company v. Foster, 346 Pa. 59, 29 A.2d 496 (1943).

2. Unopened private street mentioned in deed as boundary.
   b. A Grantee of a lot which is sold according to a plan of lots on which the streets or alleys are plotted but have not been previously opened or projected as public streets by Grantor acquires an easement over all the streets on the plan as a private right of property arising out of the grant, and the easement thus created is independent of the dedication of the plotted streets to the public use and survive abandonment of the public right regardless of whether the Grantee's property abuts such a street. Cohen v. Simpson Real Estate Corporation, 385 Pa. 352, 123 A.2d 715 (1956).
3. Prior opened or projected street by a municipality, or a dedication by a private owner and acceptance by a municipality.

   a. Where there has been a prior opening or projection by a municipality or a dedication by a private owner and acceptance by a municipality of streets and alleys appearing on a plan of lots, a subsequent purchase of a lot which is a part of the plan of lots obtains no private right to an easement over those streets. In such a situation there is negatived any implied covenant that the Grantee should have private rights in the streets in addition to rights of the public therein. Cohen v. Simpson Real Estate Corporation, Supra.

   b. Where sales of lots to original Grantees antedated the conveyance by the developer's successor to borough of all streets and alleys in plot for use as public highways, but when deeds were delivered to original parties after they had made payment, streets and alleys had become public highways and titles they had acquired, as far as private easements over highways were concerned, were correspondingly restricted and regardless of whatever rights and easements they may have derived from the original purchase of the lots, they acquired no individual rights apart from those of the general public in the streets and alleys mapped on the plot. Id.

   c. If plan is referred to in deed by Seller, he makes plan a part of deed, and it constitutes a dedication of the streets and the public ways as though the land were a part of the writing. Vinso v. Mingo, 162 Pa. Super. 285, 57 A.2d 583 (1948).

4. Deed refers to streets laid out or to be laid out, even if not a part of the municipal plan.

   a. Grant of private easement and reference in deed to a plan makes the plan part of the deed and is an offer of dedication of streets as public ways. Vinso v. Mingo, 162 Pa. Super. 285, 57 A.2d 583 (1948).

   b. If streets or alleys have not been previously opened or projected as public streets, but are merely plotted by the Grantor, Grantee acquires an easement over all of the streets of plan as a private right of property arising out of the grant. This easement is independent of the dedication of the plotted street to public use and survives abandonment of the public right. Vogel v. Hass, 456 Pa. 585, 322 A.2d 109 (1974).
c. If plan is referred to in deed by Seller, he makes plan a part of deed, and it constitutes a dedication of the streets and the public ways as though the plan were a part of the writing. *Vino v. Mingo*, Supra.

5. Villages or towns - If street is not opened to, or used by, the public for more than twenty-one (21) years, the right of the public is lost. *Act of May 9, 1889*, P.L. 173, 36 P.S. Section 1961.


6. Boroughs - If street is not opened to, or used by, the public for more than twenty-one (21) years, such street shall not thereafter be opened without the consent of at least fifty-one (51%) percent of the number of owners of the abutting real estate and without the consent of the owners of at least fifty-one (51%) percent of the property abutting such street, based on a front foot basis. 53 P.S. Section 46724.

a. If a street remains laid out, but not opened, for a period of ten years or longer, any owner or owners of fifty (50%) percent of the front feet of the land over which such street was laid out, may petition the council to remove such street from the plan of streets and to cancel the laying out thereof.

(1) Council must give fifteen (15) days personal notice to the owners of all real estate abutting upon the land over which such street or portion thereof was laid out and fifteen (15) days notice in a newspaper of general circulation in the borough before holding a public hearing on the matter. Council may, on motion, deny the petition, or, by ordinance, grant such petition and remove such street or portion thereof from the borough plan and cancel the laying out thereof. Any person cancel the laying out thereof. Any person aggrieved by the decision of the council, either granting or denying such petition, may appeal therefrom. 53 P.S. Section 46724.

7. A street may become a public street if there is adverse use by the public for more than twenty-one (21) years. *Donahugh v. Leister*, 205 Pa. 464 (1903).

8. Unopened streets and alleys on Seller’s recorded plan.
a. When the owner of the tract originally prepared a plan with unopened streets and lots abutting thereon, referring to the plan in the deeds, this implies a grant or covenant to purchasers of lots that streets shall be forever opened to the public and operates as a dedication of it to the public's use. Any owner of a lot shown on the plan may assert the public character of any street and the right of the public to use it. The rights of the lot owner are private contract rights and are not affected by the failure of the municipality to act upon the dedication. Highland Sewer and Water Authority v. Engelbach, 208 Pa. Super. 1, 220 A.2d 390 (1966).

b. Where owner of land subdivides it into lots and streets on a land and sells his lots accordingly, there is an implied grant or covenant to Purchaser that the street shall be forever opened to the use of the public and operates as a dedication of them to the public use. The right passing to the Purchaser is not the mere right that he may use the street, but that all persons may use it. Rahn v. Hess, 378 Pa. 264, 106 A.2d 461 (1954).

c. If plan referred to in deed by Seller, he makes plan a part of deed and it constitutes a dedication of streets and public ways as though the plan were a part of the writing. Vinso v. Mingo, 162 Pa. Super. 285, 57 A.2d 583 (1948).

d. An offer of dedication is not effective until accepted, and any implied acceptance must be very clear. TriCity Broadcasting Co. v. Howell, 429 Pa. 242, 240 A.2d 556 (1968).