

PT

**Question Number 3
on Exemplify**

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Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 24 and 25, 2018

PERFORMANCE TEST
July 24, 2018

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FILE

Memorandum

TO: Applicants
FROM: Mark Kerwick, Managing Partner
RE: Assignment to Draft Preliminary Objections
DATE: February 27, 2018

Ten (10) days ago, our client, George Gilbert, was properly served with a complaint concerning the ownership of a parcel of land near Lake Anne in Lake Anne Township, Luke County, Pennsylvania. The complaint was filed in the Court of Common Pleas of Luke County, Pennsylvania. The plaintiff, Paul Kerrigan, claims ownership of a tract of land measuring forty feet (40') by fifty feet (50'), even though record title to the property is in the name of George Gilbert.

The first part of your assignment is to draft two preliminary objections to the complaint asserting that the complaint is legally insufficient (demurrer). The first preliminary objection in the nature of a demurrer is based on Plaintiff's failure to meet the elements of adverse possession. The second preliminary objection in the nature of a demurrer is based on plaintiff's failure to meet the elements of consentable/aquiescence in a boundary. Although there are other preliminary objections that we could raise, your assignment is limited to the preceding preliminary objections as I will be drafting any additional objections. Do not raise tacking or privity as part of your preliminary objection based upon plaintiff's failure to meet the elements of consentable/aquiescence in a boundary. The second part of your assignment is to draft only the legal argument section of a brief in support of the two preliminary objections. I will draft the remaining sections of the brief. Your legal argument section should integrate relevant facts and set forth the law that will convince the court to grant the two preliminary objections. Place the legal argument portion of the assignment at the end of your preliminary objections and separate your legal argument with the heading "Legal Argument."

Included in the attached File is the plaintiff's complaint (attached to which are the deeds to the parties' properties, and a map of the parcels in question), a formatting memorandum on drafting preliminary objections, and a sample form of preliminary objection. Included in the attached Library is caselaw relevant to the two objections. You should only use facts contained in the File, and you should only use the attached cases for your preliminary objections and legal argument section. Do not rely upon your personal knowledge of these issues or on cases and statutes not included in the Library. Instead you should base your objections, analysis, and conclusions only upon the documents provided in the File and the Library.

Please set forth each preliminary objection and your legal argument under separate headings. In your legal argument section, provide the applicable standards for granting preliminary objections and a reasoned legal analysis supporting each preliminary objection. When citing to any authority, Bluebook citations are not necessary; however, you must include sufficient informal citations to the appropriate authority, such that I will know to which document you are referring.

PAUL KERRIGAN, Plaintiff

:
:
:
:
:

In the Court of Common Pleas of Luke County

v.

**Civil Action - Law
Action to Quiet Title
No. 2017 CIV 6241970**

GEORGE GILBERT, Defendant

COMPLAINT

AND NOW, comes the Plaintiff, Paul Kerrigan, and in support of his Complaint avers as follows:

1. Plaintiff, Paul Kerrigan, is an adult competent individual who resides at Lot 3, Lake Anne Township, Luke County, Pennsylvania.
2. Defendant, George Gilbert, is an adult competent individual who resides at 12 Church Street, Lake Anne Township, Luke County, Pennsylvania.
3. Plaintiff is the titled owner of Lot 3 in the Lake Anne Subdivision, said property being more particularly described in the Deed recorded with the Luke County, Pennsylvania, Recorder of Deeds Office at instrument number 06-03-19952, and which is attached hereto as "Exhibit A."
4. Lot 3 is a lakefront parcel measuring 40' x 100' that runs from the Lake on the front side of the property to the public roadway on the back side of the property, with the front and back sides measuring 40' each, and the sides of the property running from the lake to the road being 100' each.
5. Defendant is the titled owner of Lot 6 in the Lake Anne Subdivision, said property being more particularly described in the Deed recorded with the Luke County, Pennsylvania, Recorder of Deeds Office at instrument number 09-04-20041, and which is attached hereto as "Exhibit B."
6. Lot 6 is a large open field, consisting of approximately 50+ acres, with no fencing, trees or other distinguishing characteristics.
7. Plaintiff and his predecessor in title have been the titled owners to Lot 3 for in excess of fifty-three (53) years, with Plaintiff having purchased the parcel ten (10) years ago.
8. For no fewer than thirty (30) years, Plaintiff and his predecessor in title have used an area of land 40' wide and 50' deep, which is located directly across the public road from the back side of Lot 3 and which is encompassed as part of Lot 6. Plaintiff and his predecessor in title have been in actual, open, hostile,

continuous and exclusive possession of the 40' x 50' tract contained within Lot 6 for at least thirty (30) years. A map of the Lake Anne Subdivision is attached hereto as "Exhibit C," and Plaintiff's counsel has drawn a dotted line thereon depicting the 40'x50' tract in question.

COUNT I – ADVERSE POSSESSION

9. Plaintiff incorporates each and every paragraph by reference as if more fully set forth herein.

10. Plaintiff and his predecessor in title have adversely possessed the 40' x 50' tract of land referenced above for a period of time in excess of twenty-one (21) years.

11. Plaintiff and his predecessor in title have occupied and utilized said tract as their own, for their own exclusive use, including parking of vehicles and conducting recreational activities. Plaintiff and his predecessors have continuously exerted actual, open, hostile and exclusive possession of said tract for more than twenty-one (21) years.

Wherefore, Plaintiff respectfully requests that the Court enter judgment in his favor and against Defendant, declaring and adjudging that Plaintiff owns absolutely and is entitled to quiet and peaceful possession of the 40' x 50' tract encompassed by the Deed to Lot 6, and which is located directly across the public dirt roadway from Lot 3, and that the Recorder of Deeds be Ordered to execute a deed that can be properly recorded to reflect that Plaintiff is the sole owner of the 40' x 50' tract of land.

COUNT II – CONSENTABLE/ACQUIESCENCE IN A BOUNDARY

12. Plaintiff incorporates each and every paragraph by reference as if more fully set forth herein.

13. Plaintiff and his predecessor in title have possessed the 40' x 50' tract referenced above for more than thirty (30) years up through and including the present. Defendant has acquiesced to Plaintiff's ownership of the tract.

Wherefore, Plaintiff respectfully requests that the Court enter judgment in his favor and against Defendant, declaring and adjudging that Plaintiff owns absolutely and is entitled to quiet and peaceful possession of the 40' x 50' tract encompassed by the Deed to Lot 6, and which is located directly across the

public dirt roadway from Lot 3, and that the Recorder of Deeds be Ordered to execute a deed that can be properly recorded to reflect that Plaintiff is the sole owner of the 40' x 50' tract of land.

Respectfully Submitted,

/s/ *Atticus Mason*

Atticus Mason, Esquire
1 Courthouse Square
Maintown, PA 99909
Counsel to Plaintiff

EXHIBIT A

Instrument No. 06-03-19952

THIS DEED

MADE THIS 1st day of February 2008,

Between Ethan Bishop, of the Town of Maintown, County of Luke, Commonwealth of Pennsylvania (hereinafter "Grantor"), and

Paul Kerrigan, of the Town of Maintown, County of Luke, Commonwealth of Pennsylvania (hereinafter "Grantee"),

WITNESSETH, that in consideration of One Hundred Fifty Thousand Dollars (\$150,000), in hand paid, the receipt whereof is hereby acknowledged; Grantor does hereby grant to Grantee, his Heirs and Assigns,

ALL that certain lot, piece or parcel of land situate, lying and being in the Township of Lake Anne, County of Luke, and Commonwealth of Pennsylvania, bounded and described as follows, to wit:

All that certain piece or lot of land called and known as Lake Anne Subdivision Lot 3, in the Township of Lake Anne, bounded and described as follows:

BEGINNING at a pin at which the high water mark of Lake Anne, Lot 3 and Lot 4 come together; thence 100' North to a pin where the public dirt road, Lot 3 and Lot 4 come together; thence 40' West to a pin where the public dirt road, Lot 3 and Lot 2 come together; thence 100' South to a pin where the high water mark of Lake Ann, Lot 2 and Lot 3 come together; thence 40' East to the pin where the high water mark of Lake Anne, Lot 3 and Lot 4 come together. Containing approximately four thousand (4,000) square feet.

BEING the same premise conveyed by Benjamin Maier to Ethan Bishop by Deed dated January 3, 1965, and recorded in Luke County Deed Book 551, Page 400.

AND the said Grantor shall Warrant Generally the property hereby conveyed.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal the day and year first written above.

WITNESS: /s/ *Maria VonBergen*

GRANTOR: /s/ *Ethan Bishop*

EXHIBIT B

Instrument No. 09-04-20041

THIS DEED

MADE THIS 1st day of February 2008,

Between Lilly Townsley, of the Town of Maintown, County of Luke, Commonwealth of Pennsylvania (hereinafter "Grantor"), and

George Gilbert, of the Town of Maintown, County of Luke, Commonwealth of Pennsylvania (hereinafter "Grantee"),

WITNESSETH, that in consideration of Two Hundred Thousand Dollars (\$200,000), in hand paid, the receipt whereof is hereby acknowledged; Grantor does hereby grant to Grantee, his Heirs and Assigns,

ALL that certain lot, piece or parcel of land situate, lying and being in the Township of Lake Anne, County of Luke, and Commonwealth of Pennsylvania, bounded and described as follows, to wit:

All that certain piece or lot of land called and known as Lake Anne Subdivision Lot 6, in the Township of Lake Anne, bounded and described as follows:

BEGINNING at a pin at which the public dirt roadway, Lot 6 and Lot 9 come together; thence 1500' North to a pin where the Lot 6, Lot 8, and Lot 9 come together; thence 1500' West to a pin where Lot 6, Lot 8, and Lot 7 come together; thence 1500' South to a pin where the public dirt road, Lot 6 and Lot 7 come together; thence 1500' East to a pin where the public dirt roadway, Lot 6 and Lot 9 come together. Containing approximately two million two hundred fifty thousand (2,250,000) square feet.

BEING the same premise conveyed by Dorothy Fendick to Lilly Townsley by Deed dated August 4, 1961, and recorded in Luke County Deed Book 301, Page 895.

AND the said Grantor shall Warrant Generally the property hereby conveyed.

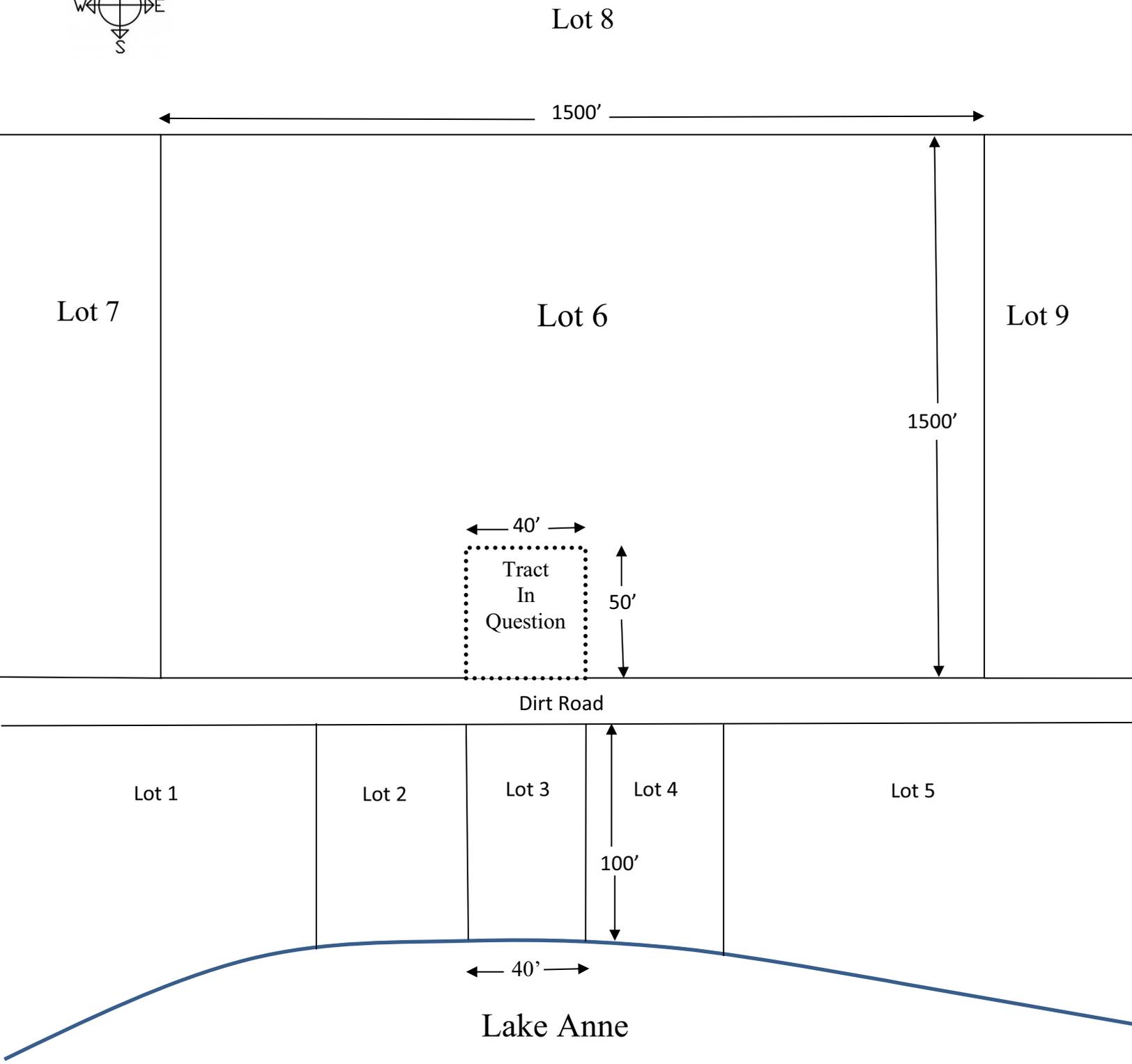
IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal the day and year first written above.

WITNESS: /s/ *Gretchen Arcaro*

GRANTOR: /s/ *Lilly Townsley*

EXHIBIT C

Map of Lake Anne Subdivision (not to scale)



Big Law Firm

TO: All Associates and Law Clerks
FROM: Mark Kerwick, Managing Partner
RE: Formatting Memorandum for Drafting Preliminary Objections
DATE: July 1, 2018

Use the following guidelines for drafting preliminary objections:

1. A preliminary objection is a pleading that sets forth a challenge to the sufficiency of a pleading, often a complaint, based on the contents of that pleading. Preliminary objections to a complaint are filed before a defendant answers the complaint, and are filed in an attempt to have the complaint, or a portion thereof, dismissed before proceeding with further litigation.
2. Two or more preliminary objections may be raised in one pleading.
3. The preliminary objections shall be divided into paragraphs numbered consecutively.
4. Each paragraph in the preliminary objections shall contain as far as practicable only one material allegation.
5. A material allegation is an assertion of fact that is essential to the objection.
6. The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.
7. Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action.
8. A party may incorporate by reference any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county.
9. More than one preliminary objection may be raised in the same pleading; preliminary objections are limited to following the grounds, as enumerated in Pennsylvania Rule of Civil Procedure No. 1028:
 - (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
 - (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
 - (3) insufficient specificity in a pleading;
 - (4) legal insufficiency of a pleading (demurrer);
10. Each preliminary objection must be stated in a separate section of the pleading, and must have its own heading (see sample preliminary objection attached hereto).
11. A paralegal will place a caption containing all relevant information at the top of your preliminary objections. The paralegal will also place an appropriate notice to plead, verification, proposed order, and signature block at the end of the preliminary objections. Thus, do not include any of these items in the preliminary objections.
12. A sample preliminary objection to a complaint (also with no caption, notice to plead, verification, or signature block) is attached hereto for your reference.

Sample Preliminary Objection

1. Plaintiff filed its complaint in the Court of Common Pleas of Luke County, Pennsylvania, alleging that Plaintiff performed professional engineering services on Defendant's behalf, and that Defendant failed to pay Plaintiff for those services. *See* Plaintiff's Complaint attached hereto as "Exhibit A."

2. Plaintiff's complaint admits that the project for which the services were allegedly performed was a single family residence. *See* Exhibit A at paragraph 12.

3. Plaintiff's complaint avers that this is the first and only project Defendant is working, and has worked, on. *See* Exhibit A at paragraph 13.

Preliminary Objection One
Based Upon
Legal Insufficiency of Defendant's Pleading
Under the Contractor and Subcontractor's Payment Act

4. Defendant incorporates all averments of these preliminary objections herein by reference as if more fully set forth at length.

5. Count IV of Plaintiff's complaint seeks to recover against Defendant under the Contractor and Subcontractor Payment Act, 73 P.S. § 501, et seq.

6. The Contractor and Subcontractor Payment Act is inapplicable to the instant matter.

7. The Contractor and Subcontractor Payment Act states "[t]his Act shall not apply to improvements to real property which consists of six or fewer residential units which are under construction simultaneously." 73 P.S. § 503(a).

8. Defendant owns only one property, which is not residential.

9. Defendant did not have six or more residential units under construction simultaneously.

10. Therefore, the Contractor and Subcontractor Payment Act is inapplicable to the instant matter, rendering Plaintiff's complaint legally insufficient.

WHEREFORE, Defendant respectfully requests that the complaint be dismissed for legal insufficiency of a pleading for failure to state a claim for which relief can be granted pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

Legal Argument

[Draft legal argument here.]

LIBRARY

Howard W.F. WOLFE, Jr., Appellant,

v.

Joseph B. PORTER, Appellee.

* * *

The dispute in this action of ejectment is between neighbors and pertains to the ownership of a seventeen (17) foot wide strip of land along a common property line. Joseph B. Porter, the defendant, holds record title to the disputed land. Howard W.F. Wolfe, Jr., the plaintiff, claims title by adverse possession. In order to establish his claim, however, it is necessary that Wolfe tack his possession to a period in which his parents allegedly possessed the land in dispute. The trial court held that tacking, under the facts alleged in plaintiff's complaint, was not available to establish title by adverse possession and sustained defendant's preliminary objections in the nature of a demurrer to plaintiff's amended complaint. After careful review, we affirm. [footnote omitted]

The standard of [trial and] appellate review was stated in *Ward v. Serfas*, [citation omitted] as follows:

When preliminary objections in the nature of a demurrer are filed, we must accept as true all the well-pleaded material facts set forth in the complaint and all reasonable inferences deducible from those facts. Accepting these facts and inferences, we then determine whether the pleader has failed to state a claim for which relief may be granted, and we will affirm the grant of a demurrer only if there is certainty that no recovery is possible. All doubts are resolved in favor of the pleader. Furthermore, by filing preliminary objections in the nature of a demurrer, appellees have admitted the factual allegations of the complaint for purposes of the demurrer.

[citations omitted].

* * *

A review of the facts alleged in the complaint . . . makes it apparent that plaintiff cannot establish title to the disputed land by adverse possession.

"[O]ne who claims title by adverse possession must prove that he had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years." [citation omitted]. In the instant case, the plaintiff-appellant has been in possession of the disputed tract of land since 1979. This is an insufficient period to establish title by adverse possession.

Appellant argues, however, that when the period of his possession is tacked on to the period during which his predecessor in title held possession, a continuous and adverse possession for more than 21 years is established.

The applicable law was stated in *Wittig v. Carlacci*, [citation omitted] as follows:

* * *

The possession of successive occupants may be tacked, but only where there is privity between them. For our purposes, "privity" refers to a succession of relationship to the same thing,

whether created by deed or other acts or by operation of law.

But a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed * *

* The deed, in itself, creates no privity as to land outside its calls. Nor is privity created by the bare taking of possession of land previously occupied by the grantor.

Our court has held that acceptance of a deed describing boundary lines confined the premises to the area within the boundaries, and that such a deed did not convey inchoate [meaning: “an interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested.” Black’s Law Dictionary, Sixth Ed. (1990)] rights acquired by incompleted adverse possession. [citation omitted] Each predecessor must have claimed title to the property in dispute, and in transferring to his successors must have purported to include it.

[citations and footnote omitted]

Thus, a grantee cannot tack his grantor's possession of land when the grantor does not convey such land to him. The only recognized exception occurs where an intent to convey more land than that described may be inferred from the circumstances or the deed itself.

[citations omitted]

Plaintiff-appellant's title to his land was acquired by deed from his mother, Catherine M. Conrad, formerly Catherine M. Wolfe, on July 31, 1979. Prior thereto, the land had been owned by plaintiff's parents, Howard W.F. Wolfe and Catherine M. Wolfe, husband and wife, who had acquired title by deed in 1952. Howard W.F. Wolfe died April 27, 1978; whereupon, Catherine M. Wolfe became the sole owner thereof. Plaintiff's parents, it is alleged, were in continuous possession of their own land and also of the disputed tract between 1952 and 1979. There is no suggestion, however, that title by adverse possession was perfected by adjudication or, indeed, that a claim of title by adverse possession was ever made against the owners of the adjoining tract.

When Catherine M. Wolfe (Conrad) conveyed to her son, she conveyed only the land for which she had record title. The deed contained a metes and bounds description of the land; and this description did not include any part of the land now in dispute. Where title by adverse possession is inchoate, a deed by a grantor which fails to convey such inchoate right is ineffective to create privity which allows tacking. The grantor's failure to include the disputed tract in the 1979 conveyance to her son prevented the son from tacking his possession of the disputed tract on to that of his parents to establish his own title by adverse possession. [citation omitted]

Appellant argues that an intent to include the disputed tract can be inferred from the language of the deed. We disagree. A careful examination of the deed discloses no reference to the disputed tract or to any inchoate right thereto. "The deed, in itself, creates no privity as to land outside its calls." [citation omitted] In the absence of a conveyance of the grantor's inchoate rights, we assume that appellant's predecessors either occupied the disputed land permissively or that they abandoned every intention of holding adversely before the conveyance. [citations omitted] (where grantor had claim of adverse possession to certain tract of land, and subsequent deed to grantee specifically excluded that tract, grantee was precluded from asserting continuing claim of adverse possession,

since he cannot be said to be in privity with grantor); [citation omitted] (although party claiming title by adverse possession may tack possession of predecessors, party must show sufficient privity between them and that each of them has transferred to his successor in some lawful manner the adverse possession or inchoate interest held).

* * *

As we have observed, appellant's own possession falls short of the required twenty-one (21) year period and the amended complaint discloses that there is no privity between appellant and his predecessors in title which would enable him to tack his period of possession to the possession of his predecessors. Therefore, appellant has failed to state a claim for which relief may be granted, and the trial court properly granted appellee's preliminary objection in the nature of a demurrer.

Affirmed.

Frank A. ZEGLIN, Jr., and Tammy Lee Zeglin, Appellants,

v.

Sean E. GAHAGEN and Kimberlee H. Gahagen, Appellees.

* * *

In this appeal involving a boundary dispute, the question presented is whether privity of estate between succeeding landowners is required to support tacking periods of ownership to form the requisite twenty-one-year period under acquiescence theory.

Appellants, Frank and Tammy Zeglin, and Appellees, Sean and Kimberlee Gahagen, own adjoining properties in Windber, Paint Township, Somerset County. The Zeglins purchased in 1977 from Cora Murphy, who, together with her late husband, had owned the property since 1937. The Gahagens bought from Margaret Swincinski in 1989, who had acquired the parcel in 1979 from the previous owners since 1972.

In 1995, the Gahagens employed a professional to survey their property and learned that their deed described a boundary on the Zeglins' side of a line marked by a row of bushes, utility pole, and fence that had been added by the Zeglins. The surveyor therefore concluded that the Gahagens' property extended over such visible line, and this was confirmed in a subsequent survey commissioned by the Zeglins. The Gahagens notified the Zeglins that a portion of their driveway encroached on their land, removed the bushes, and constructed a retaining wall adjacent to the surveyed boundary. The Zeglins responded by filing a complaint against the Gahagens sounding in ejectment and trespass and claiming ownership up to the line previously demarcated by the bushes, utility pole, and fence. In furtherance of this position, the Zeglins relied, *inter alia*, on the doctrine of acquiescence in a boundary, alleging that their occupancy and possession, together with that of their predecessors in title, for a period of more than twenty-one years established the visible line as the legal boundary. The Gahagens filed an answer and counterclaim.

In March of 2000, following a non-jury trial, the common pleas court issued a *decree nisi* in favor of the Zeglins, which it later made final. In accompanying opinions, the court summarized the acquiescence doctrine as follows:

an occupation up to a fence on each side by a party or two parties for more than 21 years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, whether the fence is precisely on the right line or not; and this is so although the parties may not have consented specifically to the fence in question.

[citations omitted]. The court identified as the basis for the principle public policy favoring peace and the repose of titles. It reasoned that, for a period of more than twenty-one years, the Zeglins, the Gahagens, and their predecessors in interest had recognized and acquiesced in a boundary line demarcated by the hedgerow (and also highlighted by the fence maintained by the Zeglins through a portion of that time period). Although the Zeglins had occupied the property for only eighteen years prior to the Gahagens' actions, the court permitted them to tack the period of ownership by the Murphys, despite the fact that Cora Murphy had not specifically and formally

conveyed her purported interest in the disputed tract to the Zeglins in the written deed. As pertains to tacking under the doctrine of adverse possession, the court recognized the requirement in Pennsylvania of privity of estate, namely, a higher degree of relation than that of mere grantor and grantee of a main parcel, generally comprised of specific and formal conveyance of the predecessor's interest in the disputed tract where the transfer is between unrelated parties. [citations omitted] The common pleas court found, however, that Pennsylvania courts had distinguished acquiescence in a boundary by applying the less rigorous requirement of privity of possession to claims predicated on such theory. [citation omitted] ("Pennsylvania courts have adopted the view that succeeding owners of property are bound by the fences that were accepted and recognized by former owners even without any other privity or formal transfer of the area possessed adversely." [citation omitted]).

On the Gahagens' appeal, the Superior Court reversed The court determined, however, that, just as in the case of adverse possession, privity of estate is an essential prerequisite to employment of tacking to perfect a claim under acquiescence theory. [citations omitted] Accordingly, the Superior Court held that the common pleas court erred by permitting the Zeglins to tack the period of the Murphys' ownership based on privity of possession alone. [citation omitted]

Presently, the Zeglins argue that privity of estate as a prerequisite to tacking is inappropriate to, and contrary to the doctrine of, acquiescence in a boundary, since an underlying premise of such theory is that the evidence of longstanding acquiescence in a physical boundary by adjoining property owners will control over contrary deed calls. The Zeglins distinguish *Plott v. Cole*, cited by the Superior Court, as allowing for creation of privity by "other acts," and not solely by references culled from a deed. The Gahagens concede that the privity of estate requirement has not expressly been attached by Pennsylvania courts in acquiescence cases, but contend that such a requirement would alleviate confusion among landowners.

The establishment of a boundary line by acquiescence for the statutory period of twenty-one years has long been recognized in Pennsylvania. [1] Two elements are prerequisites: 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of twenty-one years. [citation omitted] As recognized by the Superior Court and the common pleas court, the doctrine functions as a rule of repose to quiet title and discourage vexatious litigation. *See id.* at 592, 547 A.2d at 1220.

* * *

As President Judge Coffroth [of the Somerset County Court of Common Pleas] aptly observed, the reason why privity of estate should not be deemed necessary to support tacking in this setting is, simply, because a prospective purchaser will see the fence or similar marking; given its "obvious presence as apparent boundary," he is therefore put on notice to inquire about its origin, history, and function. [citation omitted] [5] [12] ("After 21 years, the chips will be allowed to fall where they may, for reasons of equity and peace.").

Accordingly, we find the majority view (requiring only privity of possession) better suited to claims brought under a theory of acquiescence in a boundary. We hold, therefore, that tacking is permitted in such context upon sufficient and credible proof of delivery of possession of land not within (but contiguous to) property described by deed of conveyance, which was previously claimed and occupied by the grantor and is taken by the grantee as

successor in such interest.

The order of the Superior Court is reversed, and the case is remanded. . . .

* * *

Notes:

[1] *See Reiter v. McJunkin*, 173 Pa. 82, 84, 33 A. 1012 (1896) ("After 21 years of occupancy up to a fence on each side as a line fence, it is not material to inquire whether the fence is on the right line or not."); [citations omitted] ("a boundary line may be proved by a long-standing fence without proof of a dispute and its settlement or compromise") [citation omitted].

* * *

[5] "[A]cquiescence" in the context of disputed boundaries "denotes passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user." [citation omitted]

* * *

[12] [citations omitted] (indicating that "color of title [is] not necessary for tacking to provide continuity of possession of land, provided the land in question [is] contiguous to that described in a deed, and that lands both titled and untitled were part of a close, apparent by reason of physical boundaries such as fences or hedges." [citations omitted])

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Instructions

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the gray answer book or typed in answer screen number 3 of Exemplify. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.