



By James J. Demma, LS, Esq

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## Neighborly Disputes—Fences and Trees



**U**nlike most of my prior articles on reported appeals court cases this one deals with the topic of neighborly disputes. Although I do not have any hard statistics on the subject, it's been said that a majority of the civil cases being filed in our State trial courts, excluding family law disputes—matters like, divorce, separation, child custody and visitation rights—involve disputes between neighbors. Actually, it might be an oxymoron to call them “civil” cases, when most of these disputes could not in any way be referred to as being “civil.”

Personally speaking, I spend a lot of my office time on the phone talking about some minor encroachment by a neighbor's fence or wall, or water running off of an adjoining property into someone's basement, or how a joint driveway is supposedly being misused by a neighbor, or how tree branches extend over a property line, and so on

and so forth. Most complaints seem to be somewhat petty, and I can usually end the conversation and by saying: “Well, inches can equate to thousands of dollars in legal fees and costs . . .” a retort that usually puts an end to the alleged dispute. This is not to say, however, that there are not some very legitimate disputes that need to be solved by either mediation or by taking some form of legal action in trespass, ejection, or seeking damages for a nuisance.

Perhaps the reason for these disputes is that the new neighborhoods that are being created are just too overly regulated by homeowners' associations and land use covenants, with the dwelling units being sited too close to one another. Or maybe it's the ever increasing property values that make a person want to defend each and every square foot of his or her property with the backdrop of the concept of “a man's home is his castle.” (By the way, history buffs may be interested to know that this

expression is as old as the basic concepts of the English common law. This proverb can be traced back to 1581, but it was best said in 1644 by English jurist Sir Edward Coke (pronounced “Cook”) when he wrote: “For a man's house is his castle,” and “One's home is the safest refuge for all.”)

Whatever is the case, today a “man's castle” is not only his home, but includes his joint driveway and his backyard flower garden that is being encroached upon by a neighbor, and surveyors should be aware of the legal framework in which these disputes are being contested and argued.

### Black Letter Law

Of course surveyors know that all fences are straight and are located on the actual boundary line of a parcel of land! But this aside, the law gives great importance to an existing fence line as some evidence of the true boundary line. The “black letter law” on the subject of fences is that a fence may serve as a monument when called out in a deed and will control over courses and distances. Or, ancient fences used by a surveyor in his attempt to reproduce an old survey are strong evidence of the location of the original line. And, an existing fence can, *but not always*, be good evidence of adverse possession. You may then ask: what constitutes so-called “black letter law?” I would define it as being made-up of the principles of law, which are generally known and free from doubt or dispute. But then, is anything ever “free from doubt or dispute?”

Here is a test question. If you have a call in a deed that says: “thence continuing in the same straight line of the prior call and with an old fence line . . .” and the old fence line is not in “the same straight line” of the prior call, do you

run the line in the same straight line or with the old fence line?

In one appellant court case neighbor #1 built a fence on the common boundary line, which neighbor #2 found to be offensive and outrageous. In fact, the fence was so offensive to neighbor #2 that neighbor #2 engaged in such alleged acts of rude behavior that neighbor #1 filed a common law nuisance claim against neighbor #2. Some of the acts alleged were that neighbor #2 attempted to have the municipality revoke the fence permit; made threatening statements to neighbor #1's housekeeper; shouted at neighbor #1 around the midnight hour; and made rude gestures to neighbor #1 (we are talking about a certain finger). With respect to the alleged nuisance, the jury awarded neighbor #1 \$25,000 in damages.

It should be noted at this point the law defines a private nuisance generally as a nontrespassory invasion of another's interest in the private use and enjoyment of land.

However, the award in this fence case was overturned by the appeals court, it ruling that there is no recovery for having to endure rude gestures or words from a neighbor. As the court said, "in 21st century America, if giving a rude gesture of this sort were actionable, an avalanche of frivolous litigation would result," but just think about the time and attorney's fees it took to get to this point and then lose.

In quoting Robert Frost, you would think that "good fences make good neighbors," but maybe not always.

What is the law about who owns the tree that is straddling the boundary line and can you trim and cut the overhanging branches? All surveyors know that trees mentioned in descriptions of real estate may be treated as monuments if properly identified, and that such trees will govern the boundaries in preference to courses and distances. However, the black letter law goes further to state that a tree standing on the division line between adjoining landowners is generally considered the common property of

both proprietors as tenants in common; and that neither of the adjoining owners is at liberty to cut or remove trees on a boundary line without the consent of the other, although a property owner has the right to trim and cut off overhanging branches from a neighbor's tree.

With these concepts in mind, every reasonable, prudent surveyor should know that there is no right to cut down a tree or trim it back while conducting a survey, without the consent of the owner or owners of such growth. Such an act by the surveyor could certainly result in a trespass or nuisance action being filed, and sometimes, depending on state law, an award could be entered in an amount of three times the claimed damages!

The answer to the above fence line question, by a fairly recent Maryland appeals court decision, is that you run the line in the same straight line as called for in the prior call and not with the old fence line!

I would be interested in hearing from the readers about some of their War Stories with "neighborly" disputes. *AS*

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