independent of the rent due. In *Murtland v. English*, 214 Pa. 325, 62 A. 882, 112 Am. St. Rep. 747, 6 Ann. Cas. 339 (1906), it was held that the bases for the two remedies are different:

> "The damages awarded to a landlord for the detention of the premises, after the end of the term, do not arise out of contract, but are indemnity. Compensation is the proper measure of such damages."

See also, Anno., *Tenant's Failure to Surrender -- Damages*, 32 ALR 2d 582 (1953), Sect. 3, p. 587, which cites this case.

Following *Murtland*, Pennsylvania cases have held that the proper measure of damage is the direct damage suffered as a proximate and natural result of the deprivation of use and enjoyment of the property, because of the unjust detention by the tenant. *Taylor v. Kaufhold*, 368 Pa. 538, 84 A.2d 347, 32 ALR 2d (1951). *Maxwell v. Castiello*, 130 Pa. Super. 390, 197 A. 536 (1938), held that fair rental value is an element or may be evidence of the damages sustained by the landlord. That case did not hold, as the tenant suggests, that fair rental value is the measure of damages but only that it was evidence of the damages sustained. It does not follow from this that the two remedies are the same or that failure to seek rent constitutes a waiver of damages for unjust detention.

The tenant also argues that the owners have not sustained any damages because their breach of the implied warranty of habitability has removed all fair rental value from the premises. But, as has already been shown, there is no implied warranty of habitability in leaseholds, and the damages for unjust detention of the property that a landlord may seek to recover are not limited to recovering the fair rental value. Given these conclusions, it is difficult to see what effect the tenant's argument, even if valid, would have. It seems reasonable, therefore, to conclude that the owners are entitled to recover whatever damages they can prove under their complaint.

ORDER OF COURT

NOW, Ausust 12, 1977, the demurrers to the answer and new matter are sustained. An exception is granted to the defendant.

SHEARER v. KAUFFMAN, C. P. Franklin County Branch, Equity Docket Vol. 7, Page 63

Equity - Real Property - Boundary Dispute - Consentable Line Doctrine

1. The law favors the establishment and permanency of boundary lines, and the "Consentable Line Doctrine" is grounded in that policy.

2. Mere acquiescence in the location of a boundary line by adjoining owners does not establish a consentable line thereafter binding upon the adjoining owners and their successors in title.

3. The existence of either a dispute, consisting of conflicting claims of rights between adjoining owners, or uncertainty as to the location of a common boundary line, when coupled with the establishment of a line settling the dispute or uncertainty by the adjoining owners with the intention to settle permanently the location of the line, does create a consentable line thereafter binding upon the owners and their successors in title.

Kenneth E. Hankins, Jr., Esq., Attorney for Plaintiff

Robert E. Graham, Jr., Esq., Attorney for Defendants

ADJUDICATION AND DECREE NISI

KELLER, J., September 13, 1976:

This action in equity was commenced by the filing of a complaint on July 2, 1975, and service of the same upon the defendants on July 18, 1975. An answer was filed by the defendants on August 18, 1975, and served upon counsel for the plaintiff on the same date. A petition for preliminary injunction was presented on September 30, 1975, and an order signed the same date setting a hearing for October 23, 1975. Counsel for the plaintiff presented a motion for order of inspection to the Court and an order was signed on October 15, 1975, ordering and directing the defendants to permit entry upon their real estate for the purpose of inspection, including measuring, surveying, and photographing of the property. On October 23, 1975, hearing was held on the plaintiff's petition for preliminary injunction and by stipulation of the parties an order was entered the same date imposing certain conditions and responsibilities upon all of the parties, pending disposition of the issues after a full trial in equity. Trial was held on

December 15 and 16, 1975, and the Court in the company of the parties and their counsel viewed the property and disputed property line on December 24, 1975. All supplemental briefs have been submitted to the Court and the matter is ripe for adjudication.

This litigation arises out of a dispute between the plaintiff and the defendants as to the location of a common boundary line between their properties located in Letterkenny Township, Franklin County, Pennsylvania. The plaintiff contends that the defendants have encroached upon his land fifteen feet establishing a new common boundary line, and occupying said fifteen feet with a driveway and a corner of their trailer. The defendants assert the line adopted by them is correct and the boundary line contended for by the plaintiff is fifteen feet West of the correct location of plaintiff's boundary line and upon their lands.

We enter the following:

FINDINGS OF FACT

1. The relevant chain of title of the parties is:

(a) Simon F. Shearer and Laura Shearer, his wife, conveyed three tracts of real estate in Letterkenny Township, Franklin County, Pa., including the real estate of the plaintiff and the defendants,to Martin J. Leedy by deed dated February 21, 1934, and recorded in Franklin County Deed Book Vol. 250, Page 242.

(b) The same real estate was reconveyed by Martin J. Leedy to Simon F. Shearer, et ux on March 21, 1936, and the said deed is recorded in Franklin County Deed Book Vol. 415, Page 72. (Simon F. Shearer and Laura Shearer are the parents of Jacob F. Shearer, the plaintiff, and Frank A. Shearer, a predecessor in title of the defendants.)

(c) On June 22, 1946, Simon F. Shearer and Laura Shearer conveyed to Jacob F. Shearer, the plaintiff, the 7 acre more or less tract of real estate identified as Tract No. 3, in the Leedy to Shearer deed, and the deed was recorded in Franklin County Deed Book Vol. 354, Page 584.

(d) On April 15, 1952, Simon F. Shearer and Laura Shearer conveyed two tracts of real estate to Frank A.

BAR NEWS ITEM:

The Franklin County Bar Association will hold a special social meeting for members, and their spouses and/or guests, at the Copper Kettle, on Wednesday, November 2, 1977, beginning at 6:00 o'clock P.M. Buffet dinner at 7:00 o'clock P.M. Special note will be made of Glenn Benedict's 50th anniversary as a member of the Bar. Members should get in touch with John Sharpe or Tom Painter as to attendance.

PLEASE NOTE:

The State is requiring that fictitious name registration notices be advertised at least **one day prior** to the date listed for **filing** in the ad. In our case, therefore, the date for filing cannot be earlier than the **Monday following** the Friday of publication.

People should consult legal counsel about the formation of a business.

"When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws, nor that grievances may not arise, for the redress of which, no legal provisions have been made. I mean to say no such thing. But I do mean to say, that, although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed."

-Abraham Lincoln, Address before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838 (Ed. Note: In further exposition of the premise quoted in issue No. 2 of Vol. 1 of this Journal)

Shearer. Tract 1 contained 6 acres more or less and adopted the same courses and distances of Tract 1 of the Leedy to Shearer deed. Tract 2 contained 2 acres more or less and likewise adopted the same courses and distances as Tract 2 of the Leedy to Shearer deed. No contemporaneous survey was made of either tract. The deed was recorded in Franklin County Deed Book Vol. 462, Page 70.

(e) On March 18, 1955, Frank A. Shearer and Nora Shearer, his wife, conveyed a 153 perch tract adjoining the plaintiff on the West to Ruth H. Miller, mother of Nora Shearer. The description appearing in this deed was taken from the survey of John H. Atherton, dated January 17, 1955, and a copy of the survey was attached to the said deed. The deed was recorded in Franklin County Deed Book Vol. 463, Page 685.

(f) The real estate of Ruth H. Miller was sold by the Tax Claim Bureau of Franklin County to Paul Fahnestock on December 16, 1974, on unpaid tax claims entered by the Bureau for 1972, 1973. The Tax Claim Bureau deed contained no description other than the tax code number and was recorded in Franklin County Deed Book Vol. 708, Page 272.

(g) Paul Fahnestock and Nancy Fahnestock, his wife, conveyed the 153 perch tract of real estate to Richard E. Kauffman and Joy L. Kauffman, his wife, the defendants herein, by deed dated March 7, 1975, and recorded in Franklin County Deed Book Vol. 710, Page 565. The deed adopts the same description as appears in the Frank A. Shearer et ux deed to Ruth E. Miller.

2. At and prior to the time of the 1946 conveyance to the plaintiff, the three tract parcel of Simon F. Shearer and Laura Shearer had been treated by the owners as one single tract. Family farming was conducted on the tract later to be conveyed to Frank A. Shearer, and on the northern portion of the tract to be conveyed to the plaintiff.

3. The plaintiff and his father established a boundary line between the two tracts by agreement and without the benefit of measurements or the erection of any monuments or insertion of pins. The tract conveyed to the plaintiff was apparently

known in the Shearer family as the "upper tract."

4. The "upper tract" included a wooded area which paralleled the North-South boundary line between the two tracts and was located between eight and twelve feet East of the timber line; with the larger timber on the southern part of the tract and the smaller, younger timber to the North or rear. The plaintiff chose the "upper tract" in part because of the existence of the woodland.

5. In 1946, and at the time of the Simon F. and Laura Shearer conveyance to Frank A. Shearer, the westernmost tract contained no woods other than some fruit trees (described as an orchard) and open farm land. At the time of the conveyance to Frank A. Shearer the land was improved with a house, chickenhouse and workshop.

6. In 1955, Frank A. Shearer desired to subdivide his tract totalling eight acres more or less into three separate tracts, and he retained John H. Atherton, the county surveyor, to make the survey and subdivision for him.

7. This survey was commenced at the northwest corner of the Frank A. Shearer tract, identified as Point K on plaintiff's Exhibit 9. While establishing the northernmost line of the tract the surveyor, his crew, and Frank Shearer were met by the plaintiff, who accompanied them to the northeast corner of the tract, identified as Point C on plaintiff's Exhibit 9. The plaintiff and the defendants' predecessor in title agreed that the point selected by Surveyor Atherton would be their common corner and the surveyor set a pin or pipe at that corner. The surveyor, his crew, Frank A. Shearer and the plaintiff then proceeded on a South 29 degree 11 minute West course "shot" by the surveyor to a point which would be the northeast corner of the defendants real estate on the boundary line between the lands of Frank A. Shearer and Jacob F. Shearer. This point was also agreed to as being on the common boundary line and the surveyor set a pin described as a galvanized water pipe, Point B on plaintiff's Exhibit 9. The surveying party, plaintiff and Frank A. Shearer then continued on the same compass direction to the center of the dirt public road, where another pin was set. The plaintiff and defendants' predecessor in title then agreed pins had been set on their common boundary line. The plaintiff then returned to his home and Frank A. Shearer and the surveying crew continued with the subdivision of his tract, all as set forth on plaintiff's Exhibit 3.

8. At trial the plaintiff or his counsel made a free-hand drawing of the original Simon F. Shearer tract, bisected it with a North-South line, identified the easternmost or plaintiff's tract as Tract No. 1, and the western tract or original Frank Shearer Tract as Tract No. 2. The defendant's tract was identified as No. 3, and a tract immediately West of the defendant's tract identified as No. 4 is now owned by Clair S. Johnston. At the northernmost point of the North-South bisecting line is the letter "A", which is intended to identify the pin referred to in Finding of Fact No. 7, and on plaintiff's Exhibit 9 as Point C. An "X" at the northeast corner of Tract No. 3 on the bisecting line is intended to identify the pipe referred to in Finding of Fact No. 7, and also as Point B on plaintiff's Exhibit 9.

9. The plaintiff and his son, Jacob F. Shearer, Jr., planted Norwegian spruce trees and pine trees on Tract No. 1, but kept their tree planting between five and eight feet East of the property line identified on plaintiff's Exhibit 9 as extending in a southerly direction from Point C through Point B to Point A, and on plaintiff's Exhibit 1 as extending from Point A through Point X to Point B. This tree planting occurred between 1955 and 1961. The tree line set back a number of feet from the line extending from Point C through Point B to the public road on plaintiff's Exhibit 9 is readily observable on the land.

10. Subsequent to March 18, 1955, Ruth H. Miller built a cabin on her land and lived there for several years until her death. Mrs. Miller did not cultivate the fruit trees in the orchard, and after her death no care was given to the remainder of Tract No. 3, so it grew up in brush and small trees.

11. It can be observed that most of the trees growing on the defendant's land are quite small and relatively new growth.

12. Neither the plaintiff nor the predecessors of the defendants made any particular usage of the strip of land across which a line from Point C through Point B to Point A on plaintiff's Exhibit 9 would run. From time to time young people operated their motorbikes and snowmobiles along the line, and the plaintiff from time to time dragged wood in the area evidencing that it was not grown up with trees or other growth so as to be impassable.

13. The public road that adjoins the lands of the plaintiff

and the defendants on the South is Township Route 693, rather than T-591, as shown on several of plaintiff's survey exhibits.

14. Township Route 693 was paved subsequent to the John H. Atherton survey, and that pin could not be located by the parties, their witnesses or their counsel.

15. The pins located at Point C and Point B on plaintiff's Exhibit 9, and identified as Point A and Point X on plaintiff's Exhibit 1, are the original pins placed by John H. Atherton in 1955 at the places and on the lines approved and agreed to by the plaintiff and the defendants' predecessor in title, Frank A. Shearer.

16. Prior to the spring of 1975, no claim had ever been made by the plaintiff to lands lying West of the line running from point C through Point B to Point A on plaintiff's Exhibit 9, and no claim had ever been made by any person to lands East of the said line.

17. In approximately the month of May 1975, the plaintiff observed surveying pins had been set approximately fifteen feet East of the Point C through B to A line on plaintiff's Exhibit 9.

18. When the plaintiff informed the defendant, Richard E. Kauffman, that the pins were incorrectly located, the defendant declined to discuss the matter and suggested the plaintiff see Justice of the Peace Campbell.

19. In May 1975 the defendants caused an area partially on their land and eight to ten feet East of the Points C, B and A line on plaintiff's Exhibit 9 to be bulldozed clear for a distance of 160 feet more or less from the public road. At least one oak tree, six to eight inches in diameter, and three or four Norway spruce trees were removed in connection with the bulldozing operation from land East of the said line.

20. On June 24, 1975, counsel for the plaintiff advised the defendant, Richard E. Kauffman, of plaintiff's contention that he was encroaching upon the plaintiff's land in constructing his driveway, and demanded the removal of the driveway and that defendant cease and desist from further encroachment.

LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA, ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notices to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: December 1, 1977.

Harbaugh First and Final Account, Statement of proposed distribution and notice to the creditors of Alice L. Nangeroni, Executrix of the estate of Agnes N. L. Harbaugh, late of Waynesboro, Franklin County, Pennsylvania, deceased.

Kirson First and Final Account, Statement of proposed distribution and notice to the creditors of The Chambersburg Trust Company, executor of the estate of Mary L. Kirson, late of Chambersburg, Franklin County, Pennsylvania, deceased.

Pletcher First and Final Account, Statement of proposed distribution and notice to the creditors of Thomas M. Painter and Millard A. Ullman, administrators of the estate of Doris E. Pletcher, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

Lehman First and Final Account, Statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, executors of the estate of Carrie C. Lehman, late of Chambersburg, Franklin County, Pennsylvania, deceased.

Piper First and Final Account, Statement of proposed distribution and notice to the creditors of George W. Bair and Gertrude B. Bair, executors of the estate of Jewell Bair Piper, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

Brindle First and Final Account, Statement of proposed distribution and notice to the creditors of Harry W. Carbaugh, executor of the estate of Hazel H. Brindle a/k/a, Hazel V. Brindle, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

LEGAL NOTICES, cont.

Christ First and Final Account, Statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, executor of the estate of Helen A. Christ, late of the Borough of Chambersburg, Franklin County, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
Franklin County, Pennsylvania

(11-4, 11-11, 11-18, 11-25)

The following list of Trustees, Guardians of Minors, Guardians of Incompetents and Custodians Accounts will be presented to the Orphans' Court Division of the Court of Common Pleas, Franklin County, Pennsylvania, for CONFIRMATION on December 1, 1977:

Look First and Partial Account of Blair E. Morganthall, Edgar S. Morganthall and John W. Keller, Trustees for J. Lucille Look, under the will of Owen L. Morganthall, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
Franklin County, Pennsylvania

(11-18, 11-25)

BAR NEWS ITEM:

It has been suggested by the Court that attorneys practicing before the Bar of the 39th Judicial District of Pennsylvania consider converting over to 8½" x 11" size paper for pleadings, backers, and other Court filings when replenishing present supplies. Currently applicable on appeal, appellate rules require this papersize and use of such page size makes reproduction of the record easier. It should be noted, the appellate rules also require that all staples be covered.

"The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven,
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes: . . "

-William Shakespeare, *The Merchant of Venice*", Act IV, Sc. I, Portia's Argument to the Court of Venice

21. In November 1975 the defendants caused their mobile home to be installed on their lands. The southeast corner of the home, as installed, extends across the said A, B, C line a distance of approximately four to five feet. Gas tanks are also located on the East side of said line.

22. The first survey conducted at the request of the defendants occurred on or about April 3, 1975. The surveying party, using pins shown them by the defendants allegedly located at the northeast and northwest corners of his real estate, concluded that the defendants' northern boundary line was fifteen feet shorter than it should have been. When they extended the line an additional fifteen feet, turned the angle called for in the defendants' deed, and ran the proposed line toward the road, it crossed over a trailer on the plaintiff's land and stopped short of the public road. Concluding the boundary line could not run through the trailer, the party made various other measurements and turned other angles but apparently did not find pin B or C on plaintiff's Exhibit 9. After the party had spent half a day looking for pins, they set pins, identified on plaintiff's Exhibit 1 as "second pin" and "third pin" using the information they had developed and established the East boundary line of the defendant's land as running along a heavier tree line, but not using the compass course called for in the defendants' deed. The line, as located, did not touch the trailer previously referred to in this Finding of Fact. No draft was ever made of this survey showing what had been located on the land. It was not made clear whether this survey party had available to them or used the 1955 Atherton survey for any purpose.

23. The next survey was made at the request of the plaintiff and constituted a re-survey of the 1955 Atherton survey. Field work for this operation was performed on August 19, 26 and 27, 1975; October 20, 1975, and December 11, 1975. The field surveying party located and identified as existing iron pins set by Surveyor Atherton, pins at Points B, C and E on plaintiff's Exhibit 9. It was determined that the Atherton survey of the entire Frank A. Shearer closed within 1.45 feet; described as a "very decent closure". Relying upon the existing iron pins located and attributed to Atherton, and evidenced on the land such as tree lines, fence lines, woods lines, etc., it was concluded Points B, C, A, H, I, J, K and G, as shown on plaintiff's Exhibit 9, represented correct corners for the properties involved. On August 27, this survey party set iron pins at Points L and M on plaintiff's Exhibit 9. The party

on October 20, 1975 observed the southeast corner of defendants' trailer was, according to their survey, encroaching on the land of the plaintiff 4.29 feet. They also observed a utility pole located directly on the line they identified as the common boundary line of the parties.

24. On December 11, 1975, a third survey was made on behalf of and at the request of the defendants. This surveyor researched the chain of title to 1863, and by measurements on the ground concluded Simon F. Shearer actually received 1,004 feet frontage on the public road, rather than 994 feet, as called for by his deed. The surveyor also concluded the plaintiff, Jacob F. Shearer, occupied road frontage of 356.5 feet, rather than 346.5 as called for by the deed from Simon F. Shearer, et ux. to the plaintiff. The surveyor also concluded that the driveway of Clair S. Johnston, owner of Tract No. 4 on plaintiff's Exhibit 1, encroaches on the land of the defendants to the West.

25. A view of the premises on December 24, 1975, showed:

(a) A clear brush line extending southwesterly from Point K on plaintiff's Exhibit 9 to an open area immediately before reaching Point J on the Exhibit. There was one very old fence post on this line evidencing the existence of a property line at the location for an extended period of time.

(b) From Points I to E on plaintiff's Exhibit 9 there is a noticeable tree line, and a wire fence can be observed stretched along the tree line with the locust trees having grown around the fence to a substantial depth, indicating the existence of the fence line for an extended period of time.

(c) Between Points E and G of the same Exhibit, there is a tree line with partially tree-buried wire fencing observable.

(d) The iron pin at Point C of the said Exhibit is in a greenbrier patch surrounded by trees and well protected.

(e) The trees on the land of the plaintiff are substantially larger than those on the lands of the defendants.

26. No evidence of hostility or adverseness for a period of twnety-one (21) years was established by the plaintiff with regard to those lands located immediately to the East of the line extending from Point A through B to C on plaintiff's Exhibit 9.

27. The westerly boundary line of the plaintiff's property is the line extending from Point A through B to C on plaintiff's Exhibit 9. The easterly boundary line of the defendants' property is the line extending from Point A through Point L through Point M to Point B on plaintiff's Exhibit 9.

28. The defendants' trailer and appurtenances such as gas tanks encroach upon the land of the plaintiff.

29. The defendants, by clearing and bulldozing a driveway on the lands of the plaintiff, have encroached thereon.

30. The fair rental value of the land upon which the defendants have encroached is $20.00 per month from July 1, 1975.

31. No evidence was introduced as to the diminution in value of the real estate of the plaintiff by reason of the removal of top soil, an oak tree and a number of blue spruce trees by the defendants or their agents, as a part of the bulldozing operation in May 1975.

DISCUSSION

"While a 'consentable boundary line' connotes a new boundary line created by agreement of the parties, not every line assented to by the parties is a consentable line. In discussing the requirements of a consentable boundary line, the Superior Court stated in the early case of *Newton vs. Smith* (40 Pa. Super. 615, 1909), that: 'In order, however, to make such a line binding, it is necessary that there should be, first, a dispute; second, the establishment of a line settling the dispute; third, the consent of both parties to that line and the giving up of their respective claims which are inconsistent therewith'. Various other cases which have held that the parties were bound by a consentable line agree that these elements must be present. It must also be the intention of the parties to settle permanently a dispute or uncertainty as to the boundary in question.

". . . .

"It has been said that the consideration for the agreement is the compromise of the doubtful right and the giving up by the parties of their respective claims. In addition, the peace resulting from the establishment of the compromise line has also been said to be a sufficient consideration." 5 P.L.E. Boundaries; Section 21.

"An agreement between the owners of adjoining lots of land, establishing the boundaries of their lots, when executed, will be conclusive against them. If the parties agree on a particular point and measurements are made and noted accordingly, such measurements will control notwithstanding they do not correspond or agree with monuments on the land. It has also been said that when a boundary line is established as a consentable line, and there is no intention of fraud, no unfair dealing, neither party has more knowledge of a fact misconceived than the other had, the contract will bind.

"Once a boundary line has been fixed between adjoining owners, a purchaser from one of them will be bound by such line." 5 P.L.E. Boundaries; Section 22.

In the case at bar, the plaintiff relies upon the uncertain line established by him and his father in 1946, and definitely established by monuments (surveyor pins), courses and distances agreed upon by him and his brother, Frank A. Shearer, in 1955. In essence, the plaintiff's claim is based on the consentable line doctrine. The defendant asserts the doctrine inapplicable in the case at bar because no evidence was introduced of any "dispute" as to the location of the boundary line either between the plaintiff and his father, or between the plaintiff and his brother, Frank.

Perkins vs. Gay, 3 S&R 327 is one of the earliest appellate court cases in Pennsylvania addressing itself to the consentable line doctrine. Therein, Mr. Justice Gibbs held:

> "The establishment of this kind of boundary is always a matter of compromise, in which each party supposes he gives up for the sake of peace, something to which in strict justice, he is entitled. There is an express mutual abandonment of their former rights, upon an agreement that, whether they be good or whether they be bad, neither is to recur to them on any pretense whatever, or claim anything that he does not derive from the terms of the agreement. Each takes his

chance of obtaining an equivalent for everything he relinquishes, and, if the event turns out contrary to his expectations, so much the worse for him. If there be no intention of fraud, no unfair dealing and neither party has more knowledge of the fact misconceived than the other had, the contract will bind."

In *Adamson vs. Potts*, 4 Pa. 234, 237 the Supreme Court of Pennsylvania held, "A consentable line is fixed upon an overture or agreement between the owners.

In *Kirkpatrick, et al vs Vanhorn, et al*, 32 Pa. 131 (1858), it was stated, "A consentable line between actual settlors on vacant land has always been favourably regarded by the law." The Supreme Court stated at page 140: "Consentable lines are generally easily proved. They acquire that sort of notoriety in the neighborhood - there are so many witnesses of the acts and declarations of the parties recognizing a common boundary, that tradition is a safer medium of proof on this subject than on most others."

In *Ross vs. Gordon*, 146 Pa. Super. 417, 423 (1941), the Pennsylvania Superior Court stated: "One of the elements necessary to establish a consentable line is an intention to settle permanently a dispute or uncertainty as to the boundary in question."

While we agree with the defendant's contention that mere acquiescence in the location of a boundary line by adjoining lowers (as in *Beales vs. Allison*, 161 Pa. Super. 125 1947), is not the establishment of a consentable line thereafter binding upon the adjoining owners and their successors in title; it is the opinion of this Court that the existence of either a "dispute" (which we define as conflicting claims of rights between adjoining owners) or "uncertainty" as to the location of a common boundary line, when coupled with the establishment of a line settling the "dispute" or "uncertainty" by the adjoining owners with the intention to settle permanently the location of the line does create a consentable line thereafter binding upon the owners and their successors in title.

We, therefore, conclude Jacob F. Shearer, plaintiff, and Frank A. Shearer, predecessor in title to defendant, recognized the existence of an uncertainty in the precise location of their common boundary line; desired to permanently eliminate the

uncertain by establishing a definite boundary line before any third parties became involved in the uncertainty; and did go upon the ground and layout with the help of Surveyor Atherton their common boundary line. We conclude the line so laid out was a consentable line binding upon Jacob F. Shearer, plaintiff, Frank A. Shearer and his successors in title, including the defendant, and that line is identified on plaintiff's Exhibit 9 as running from Point A through L through M through B to C.

By way of comment and perhaps equally important with our conclusion that the boundary line contended for by the plaintiff adjoining the lands of the defendants is a consentable line binding upon them are the factors that:

1. The defendants have received under their deed essentially all of the real estate that they bargained for and it is thus difficult for the Court to comprehend what possible right they might have to demand more than was conveyed to them.

2. It further appears Frank A. Shearer received essentially all of the real estate that his parents intended to convey to him in 1952. Therefore, we find it difficult to recognize any right in his successors in title to claim more than was conveyed to him on the basis of the conclusion of defendants' surveyor that the plaintiff had ten feet more frontage than he should have under the deed description from his parents to him.

We conceive it axiomat that the law favors the stablishment and permanency of boundary lines. It is upon this policy of the law that doctrine such as the Consentable Line Doctrine have been grounded. If Simon F. Shearer and Laura Shearer acquire ten feet more frontage on the ground than their deed called for in 1936, and the East and West boundaries of the original Simon F. and Laura Shearer tract have stood unassailed for forty (40) years, we can see no useful purpose to be gained in now attempting to allocate the additional ten (10) feet in some manner other than that worked out by the Shearer brothers, who became the owners of the entire Simon F. and Laura Shearer tract.

DECREE NISI

NOW, this 13th day of September, 1976, the defendants, Richard E. Kauffman, and Joy L. Kauffman, his wife:

(a) Are enjoined from continuing to trespass on the real estate of the plaintiff and shall cease and desist from such trespass.

(b) Are required to remove their trailer and gas tank from the lands of the plaintiff and restore it to its former condition with the exception of the tree and brush removed on or before October 1, 1976.

(c) Shall pay to Jacob F. Shearer, plaintiff, rent for the real estate so occupied at the rate of Twenty ($20.00) Dollars per month from July 1, 1975.

(d) Shall pay the costs of these proceedings.

WRIGHT v. WRIGHT, C.P. Franklin County Branch, No. 25 January Term, 1977

Divorce - Alimony Pendente Lite - Counsel Fees - Expenses - Earning Capacity

1. The factors to be considered on a petition for alimony pendente lite, counsel fees and expenses are the need of the moving party, the ability of the respondent to pay, and the character, situation, and surroundings of the parties.

2. "Need of the party" does not mean that the petitioner must be destitute and dependant on charity in order to be awarded alimony.

3. Evidence of petitioner's earning capacity, compared with petitioner's actual income, is not relevant, in that the earning capacity rule has been applied only in cases where the respondent has deliberately reduced his income to defeat a claim for alimony.

4. The factor concerning the character, situation, and surroundings of the parties is held to mean that a party should not be forced, by the fact of having brought or being required to defend a suit in divorce, to live in a fashion far removed and beneath the couple's former lifestyle.

Lawrence C. Zeger, Esq., Attorney for Plaintiff

James M. Schall, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., October 11, 1977:

Peggy D. Wright commenced her action in divorce by filing a complaint on October 29, 1976, and the same was served upon the defendant, Gerald E. Wright, Sr. on November 5, 1976. Defendant filed his answer thereto on November 15, 1976, filing at that time also a power of attorney appointing James M. Schall, Esq. as his attorney and authorizing him to enter an appearance. On November 15, 1976, defendant also caused a Rule to be issued on the plaintiff to file a Bill of Particulars.

The plaintiff, on November 23, 1976, filed her petition for allowance of alimony pendente lite, counsel fees and expenses. On the same date the Honorable George C. Eppinger, P.J., signed an order granting a Rule upon the defendant to show cause why such award should not be made. The Rule upon the defendant was issued on December 1, 1976.

On December 13, 1976, the Rule was served upon the defendant. On December 17, 1976, the defendant filed his answer to the petition alleging that the plaintiff "has sufficient earning capacity and means and resources available to her", and that he is "unable to pay alimony pendente lite, counsel fees, and expenses and still maintain and support himself.

On February 18, 1977, the plaintiff filed her petition for appointment of an examiner and on the same date an order was signed appointing Russell S. Roddy, Esq., Examiner. As it subsequently appeared that Attorney Roddy was no longer eligible to serve as Examiner, an order was signed on March 8, 1977, revoking his commission and appointing Thomas B. Steiger, Sr., Esq., Examiner in his stead.

Notice having been duly given, the Examiner sat for the hearing on April 20, 1977. The plaintiff and the defendant each appeared in person and by counsel.

Briefs were submitted by counsel and the matter was argued before the Court on August 23, 1977. The matter is now ripe for disposition.