acquire a base fee would insure the right to reversion to the former owners. It can also be argued that a condemnee would be entitled to greater compensation if a base fee is condemned. Considering the terms and conditions of the "scenic easement", for all intents and purposes the owner of the land is deprived of virtually all uses of the land and most of those which are permitted must be with the approval of the Secretary.

Thus, if this statute says anything clearly, it is that the Secretary had the power to acquire property "by eminent domain in *base fee*" (emphasis supplied). Applying the appropriate rules of construction leads us to the conclusion that the Commonwealth does not have the power to condemn a "scenic easement". The legislature could readily grant that power, but the Court cannot imply it.

ORDER OF COURT

NOW, September 26, 1977, the order dated September 22, 1977, is amended and leave is granted to the Commonwealth of Pennsylvania, Department of Transportation, to file an amended Declaration of Taking within twenty (20) days of this date or suffer non pros.

EBERLY v. DIEHL, C. P. Franklin County Branch, A.D. 1977 - 181

Landlord-Tenant - Notice - Implied Warranty of Habitability - Waiver of Rent Due

1. Where a challenge to a Justice of the Peace Judgment is made on the basis of defective service of notice when the notice served by a Justice of the Peace not involved in hearing the case contained no mention of the fact that the server was a Justice of the Peace, and where no plausible showing is made of prejudice to the defendant thereby, a demurrer will be sustained.

2. Where in an action by amended complaint to regain possession of leased property, an implied warranty of habitability is raised as a defense, a demurrer to that defense will be sustained.

3. Where in an action by amended complaint to recover damages for wrongful possession of leased property, a defense is raised that the owners had waived their right to damages for the wrongful possession by the tenant since the owners did not ask in the complaint to recover rent due, a demurrer to that defense will be sustained.

David S. Dickey, Esq., Attorney for Plaintiffs

David Woodward, Esq., Attorney for Defendant.

OPINION AND ORDER

EPPINGER, P.J., August 12, 1977:

This is an appeal of an action to regain possession of leased property and damages for wrongful possession filed by the owners. Following judgment for the owners, Raymond L. Eberly and Rhoda E. Eberly, before a district justice of the peace, the owners filed an amended complaint in this court. Geraldine Diehl, the tenant, then filed an answer containing new matter, stating that the complaint should be dismissed (1) because notice to quit the premises was defective, (2) because the owners failed to maintain the premises in a habitable condition, and (3) because the owners had waived their right to damages for the wrongful possession by the tenant since they did not ask in the complaint to recover rent due. To this answer and the new matter the owners filed demurrers, contending that as a matter of law the defendant has raised no legal defense. These demurrers are now before the court.

I
SUFFICIENCY OF NOTICE

The notice to quit the premises was served on behalf of the owners by Robert Eberly. The tenant argues that because Robert Eberly is also a justice of the peace, the notice that he served was not in compliance with the Act of 1951, P.L. 69, art. V, Sect. 501, 68 P.S. 250.501. This argument is based on a line of cases that held that service of notice by a district justice, in a case *brought before that justice*, rendered any judgment in that case invalid. *Boyer v. Potts*, 14 S.&R. 157 (1826); *Palmeter v. Crowley*, 2 Just. L.R. 194 (Com. Pl., Erie 1902). In *Palmeter*, the court held that ". . [A] justice of the peace cannot act as agent for the plaintiff in the collection of a claim and then try the case, involving the same claim, before himself as

magistrate." *Id.*, at 195-196. This, of course, makes sense. He cannot be both an agent for a party and a judge in the case. It does not follow from this that a justice of the peace cannot legally serve a quit notice, when the case is not brought before him.

The notice that was served by the justice of the peace contained no mention of the fact that he was a justice of the peace. The tenant argues that service of notice may be a violation of the standards of conduct for justices of the peace. Even if it was, and it is not necessary for the court to decide that, there is no authority for allowing that to affect the validity of the judgment entered by another justice of the peace.

Without any authority explicitly holding that this service renders the judgment invalid, the tenant's only ground for challenging the service might be that she was somehow prejudiced by the service. But here, the defendant makes no plausible showing that she was. Therefore, the defendant's challenge to the judgment on the basis the service of notice must be rejected and the demurrer as to this point sustained.

II
WARRANTY OF HABITABILITY IN LEASED PREMISES

The tenant maintains that it is a valid defense to the action for possession to allege that the owners have failed to maintain the premises in a habitable condition. The tenant cites cases from other jurisdictions specifically upholding that conclusion and cases from Pennsylvania, from which the defendant wishes to infer that conclusion.

The tenant admits the current status of the law in Pennsylvania. There is only one case, a decision by the Philadelphia Common Pleas Court, *Derr v. Cangemi*, 66 D.&C.2d 162 (1974), that specifically upholds the warranty of habitability in *leased* properties. Contrary to that case, courts of several counties have recently followed the traditional rule in holding that the doctrine of *caveat emptor* applies to leaseholds. *Fox v. Seigel*, 73 D. & C. 2d 623 (Com. Pl. York Co. 1975); *Beaseley v. Freedman*, 70 D. & C. 2d 751 (Com. Pl. York Co. 1974); *Northchester Corp. v. Soto*, 58 D. & C. 2d 256 (Com. Pl. Bucks Co. 1972). Moreover, this year this court also

LEGAL NOTICES, cont.

ton Township, Franklin County, Pennsylvania, deceased.

Phoenix — First and Final account, Statement of proposed distribution and notice to the creditors of Lucy Brightful and Katherine Epps, Executrices of the Estate of Helen G. Phoenix, late of Waynesboro, Franklin County, Pennsylvania, deceased.

Deshong — First and Fnial account, Statement of proposed distribution and notice to the creditors of The Chambersbury Trust Company, Executor of the Estate of Lynn D. Deshong, late of Lurgan Township, Franklline County, Pennsylvania, deceased.

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

(10-7, 10-14, 10-21, 10-28)

SHERIFF'S SALES

Pursuant to Writ of Execution issued on Judgment D.S.B. 19776-1559 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, October 28, 1977 the following real estate improved as indicated:

ALL THE following described real estate lying and being situate in Fannett Township, Franklin County, Pennsylvania, bounded and limited as follows:

BEGINNING at a point in the center line of Pennsylvania U. S. Route 75 at its intersection with the northeasterly line of a public road and land now or formerly of Dewey Junkin; thence along said last mentioned public road North 52 degrees West 250 feet to an iron pin at other land of the grantors; thence by the latter North 43¾ degrees East 200 feet to an iron pin; thence by the same South 52 degrees East 250 feet to a point in the center line of said Pennsylvania U. S. Route 75; thence along the center line of said Route 75 and land now or formerly of Frank Ryder South 43¾ degrees West 200 feet to a point, the place of beginning. CONTAINING 1 acre 23 perches as per draft of survey by Ira B. Lake, Registered Engineer, from survey made August 4, 1964, copy of which is attached hereto. (Reference Deed Book 584, Page 825.)

And having erected thereon a single family dwelling of conventional design having a concrete block foundation, full basement area with cement floor. Exterior walls are of frame construction and brick veneer and having a asphalt shingle roof. Interior walls are plastered and is heated by Electric.

Seized and taken in Execution as the real estate of Anna Jane Parson Czapp, under Judgement No. D.S.B. 1976-1559.

Pursuant to Writ of Execution issued on Judgment A.D. 1977-351 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, October 28, 1977 the following real estate improved as indicated:

All the following described real estate lying and being situate in the Township of Montgomery, County of Franklin and State of Pennsylvania, bounded and limited as follows, to wit:—

BEGINNING at a point at the intersection of two (2) proposed fifty-foot (50 ft.) right-of-ways; thence in and by said right-of-way, North 54 degrees, 30 minutes West, 180 feet to a point at lands of Charles I. Sweeney; thence by the latter, North 21 degrees East, 220 feet to a point at other lands of said Charles I. Sweeney; thence by the latter, South 79 degrees East, 180 feet to a point at or near the aforesaid road or right-of-way; thence by the latter, South 21 degrees West, 300 feet to the place of Beginning. AND CONTAINING 1 acre, more or less; and being designated as Lot #4 on draft of lands made by Richard K. Fisher, R. E., dated March 25, 1967.

IT being the same real estate that Charles I. Sweeney, widower, by his deed dated the 17th day of September, 1968, and recorded in Franklin County Deed Book Volume 630, Page 663, conveyed the same to Frank E. Gordon, who with his wife, Gertrude Mae Gordon, are the Grantors herein.

And having erected thereon a single family dwelling, having a concrete block foundation, full basement area with concrete floor and having a asphalt shingle roof.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay $20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on November 16, 1977, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before November 30, 1977, distribution will be made in accord therewith.

FRANK H. BENDER, Sheriff of
Franklin County, Pennsylvania

(10-7, 10-14, 10-21)

SHERIFF'S SALES Cont'd

"Keep conscience clear, then never fear." — Poor Richard's Almanack

held that the doctrine of *caveat emptor* is still the law in Pennsylvania. *Pugh v. Holmes*, 1 Franklin Co. L.J. 8 (Com. Pl. 1977). There the court concluded that because Pennsylvania is primarily a common law state, the principle of *stare decisis* bound the court to follow precedent here that there is no authority for finding there is an implied warranty of habitability in lease transactions. Furthermore, the court found that there was an inherent contradiction in the defendant's asserting a defense of uninhabitability while refusing to leave the premises. Moreover, the court concluded that the decision to create such a warranty was with the legislature and not with a common pleas court and that, if such a warranty did exist, enforcement of it would be beyond the practical resources of the common pleas courts.

Here the tenant offers nothing that would cause the court to reject the decision in *Pugh*. Thus her claim that the warranty of habitability is a defense in this action for possession must be rejected.

III
WAIVER OF DAMAGES

The tenant also asserts that, because the owners did not ask to recover rent due but sought only possession, they had waived their right to recover damages for unjust detention. She argues that her continued possession is not unjust, because the notice to quit was defective. But the court has already concluded that the notice to quit was legal, so that the detention of the property is unjust.

Secondly, Diehl argues that the plaintiffs could not possibly have sustained any damage, because the property has a fair rental value of zero. This argument is predicated upon an inaccurate reading of the Act of 1951, supra, art. V, Sect. 502, 68 P.S. 250.502. This section provides that one of the items to be included in a complaint is ". . . the amount of rent, if any, which remains due and unpaid and the amount of damages claimed for unjust detention of the real property, if any."

Arguing, without any authority, the tenant asserts the failure to sue for rent due amounts to a waiver of any claim for damages. This conclusion is not borne out by the authorities. Damages for unjust detention is a remedy

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