

the Defendants. Sometime prior to the Gavitt survey of the HER Parcel, Leonard S. Reed and Carolyn E. Reed clear cut trees and installed a chain link fence. The Defendants presented no evidence as to when they erected the fence.

According to the Gavitt survey, the western boundary of the chain link fence extends several feet on to the HER Parcel. According to the Hopkins survey, the chain link fence is wholly located on the Reed Parcel.

On December 10, 2008 a Complaint was filed. Plaintiffs allege that the descriptions set forth in the Deed to the Defendants are erroneous, in that the descriptions set forth in the Jordan and Reed Deeds includes a strip of land along a common boundary between those two parcels which is owned by the Plaintiffs. This strip of land is approximately triangular in shape, and forty (40) feet at its widest point. Count I of Plaintiffs Complaint seeks judgment in quiet title to this strip of land. Count II seeks entry of judgment in ejectment and an Order requiring the Defendants to remove the portion of the fence that allegedly encroaches on the Plaintiffs' real property.

Trial was held on July 8, 2011. At the time of trial, the Plaintiffs introduced the survey and testimony of Joshua Gavitt. Mr. Gavitt testified that the HER Parcel is bounded on the north by real property owned by Charles Doll, II (hereinafter the "Doll Parcel") on the north and the east by the Jordan Parcel, which was formerly owned by Leonard S. Reed and Carolyn E. Reed, by the Reed Parcel which is situate south of the Jordan Parcel and by a parcel owned by Carolyn L. Eddy, H. Thomas Eddy and Connie Eddy (hereinafter the "Eddy Parcel").

In his survey of the HER Parcel, Mr. Gavitt established the northeast corner of the HER Parcel at a set “#5 Rebar” at the corner of the Jordan Parcel. Mr. Gavitt described the method he utilized in conducting his survey and in doing so testified regarding a previous survey performed by him in February, 2001 of the Doll Parcel, located along the northeast corner of the HER Parcel. Mr. Gavitt testified that in the course of conducting the Doll survey, he was able to identify two existing planted stones, and that the measurements in connection with the southern boundary of the Doll parcel and the southern boundary of what is now the Jordan Parcel verified for him the location of the northeast corner of the HER Parcel. Further, he testified that the descriptions in the chain of title in the northeast corner of the HER Parcel and the adjacent corner of the Jordan Parcel suggest that the corner is at a 90° angle. Mr. Gavitt testified that he was able to establish the location of the set “#5 Rebar” in location that was within approximately 3/8 of one inch of creating a 90° angle.

In establishing the eastern boundary of the HER Parcel, Mr. Gavitt testified that he set a drill hole in a large rock at the northeast corner of the “Eddy Parcel” consistent with the location of a planted stone identified in deeds dating back to 1893 and identified in a previous survey conducted of the Eddy Parcel by John E. Fischer. Following his survey in 2006, Mr. Gavitt went back to the property to attempt to locate the planted stone. Following the removal of a boulder, Mr. Gavitt uncovered what he believed was the planted stone identified in deeds dating back to 1893 and identified in Mr. Fischer’s survey. Mr. Gavitt testified that his survey revealed that the Defendants’ fence crossed the property line into the HER property.

At the time of trial, Mr. H. Thomas Eddy testified that he walked the boundaries of the Eddy Parcel with his grandfather when he was a little boy. Mr. Eddy testified that his grandfather identified to him a planted stone which was the boundary marker for the northwest corner of the Eddy Parcel and the southwest corner of the Reed Parcel, both along the boundary of the HER Parcel. Mr. Eddy was credible. Mr. Eddy testified that on June 2, 1994 the Eddy Parcel was surveyed by John E. Fischer.

Mr. Fischer testified at the trial of this matter in connection with his survey of June 2, 1994 of the Eddy Parcel. He testified that he located the northwest corner of the Eddy Parcel at the intersection of the southwest corner of the Reed Parcel, along the eastern boundary of the HER Parcel. He testified that he found a stone at that location, and that he noted on his survey "existing planted stone." Mr. Fischer testified that although the planted stone was not exactly where it was supposed to be based upon the deed calls, it was within a reasonable distance of the deed calls.

Portions of a "stone wall" or "stone row" are located near the eastern boundary of some portions of the HER Parcel. There are at least two large gaps in the stone wall, one at the southeastern boundary and one in the area of the boundary of the HER Parcel and the Reed Parcel, which is intersected by a township roadway. The stone wall is not straight, and is not situate directly on the boundary line of the HER Parcel, either under the Gavitt survey or the Hopkins survey. Mr. Fischer testified that the planted stone that he identified at the northwest corner of the Eddy Parcel was approximately 3 feet east of the stone wall. Mr. Gavitt testified that he set a drill hole in the planted stone and that it was within feet of the stone wall. Mr.

Gavitt testified that the stone wall is not straight along the eastern boundary of the HER Parcel, that it “drifts to the west” and that it “drifts back to the right” at the northeast corner of the HER Parcel. This was obvious on the land based upon this Court’s site view. Mr. Gavitt testified that his set “#5 Rebar” at the northeast corner of the HER Parcel is approximately 8 feet to the east of the corner of the stone wall where it turns along the southern boundary of what is now the Jordan Parcel.

In the subdivision survey conducted by Mr. Hopkins of the Jordan and Reed Parcels, Mr. Hopkins elected to rely upon the “courses and distances” in deeds of record that he located concerning the HER Parcel. According to Mr. Trowbridge who testified on behalf of the Defendants, it appeared that Mr. Hopkins failed to consider the location of the planted stone monument in preparing his survey. Mr. Hopkins’ survey made no reference whatsoever to a planted stone.

Although Mr. Hopkins accepted the same northeast boundary for the HER Parcel as that established by Gavitt, he located the eastern boundary of the HER Parcel approximately 40 or 41 feet west of the planted stone.

Following a review of the deeds and surveys introduced into evidence, together with this Court’s consideration of the testimony presented at trial, further buttressed by a site visit to the property at issue, this Court finds the testimony of Mr. Joshua Gavitt to be credible, and concludes that Mr. Gavitt’s survey of April 14, 2006 correctly identifies the location of the eastern boundary of the HER Parcel. The Court notes that Mr. Gavitt used the corner of a stone wall at the southeast corner of the HER parcel and a planted stone at the northwest corner of the Eddy real property, both consistent with boundary markers located and used by Mr. Fischer in his survey

of the Eddy Parcel on June 2, 1994. Mr. Gavitt surveyed a straight line from that planted stone to a point which he identified in the northeast corner of the HER Parcel, approximately 8 feet from the corner of a stone wall at that location. The Court notes that the location identified by Mr. Gavitt in the northeast corner of the HER Parcel is consistent with his survey of the Doll Parcel, and that corner he established creates a 90° angle.

It is well-settled law that in connection with the resolution of real estate boundary disputes, courses and distances must give way to monuments on the ground. Merlino v. Eannotti, 110 A.2d 783 (Pa. 1955). Parole evidence is admissible to establish the existence of such marks and monuments. New York State Natural Gas Corp. v. Roeder, 120 A.2d 170 (Pa. 1956). Under the totality of the facts established at trial, the methodology used by Mr. Gavitt to establish the eastern boundary of the HER Parcel is consistent with this principle of boundary retracement.

Approximately two days prior to trial, the Defendants informed the Plaintiffs that they intended to assert the common law defense of “boundary determined by consent” defense. On July 7, 2011 the Plaintiffs filed a Motion in Limine to preclude the defense based upon the fact that it had not previously been pled or alleged and no discovery had been conducted on the issue. By Order dated July 7, 2011 this Court denied the Plaintiffs’ Motion in Limine, but provided the Plaintiffs with an opportunity to provide rebuttal testimony at a later date if it was believed to be necessary due to the Defendants introduction of evidence on the boundary by consent issue. On July 19, 2011 this Court accepted rebuttal testimony pursuant to its Order of July 7, 2011.

The doctrine of consentable lines is “a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation.” Plott v. Cole, 547 A.2d 1216, 1220 (Pa.Super. 1988). There are two means of proving a binding consentable line: (1) by dispute and compromise; and (2) by recognition and acquiescence. Corbin v. Cowan, 716 A.2d 614 (Pa.Super. 1998).

In order to establish a binding consentable line by dispute and compromise, a party must prove: (1) a dispute with regard to the location of a common boundary line; (2) the establishment of a line in compromise of the dispute; and (3) the consent of both parties to that line and the giving up of their respective claims which are inconsistent therewith. Plott, *supra*, p. 1220.

The Plaintiffs in the present action do not, and have not, consented to the establishment of a line in compromise of the boundary line dispute. The evidence at trial included testimony that the Plaintiffs were informed upon purchasing the property that the line was on the east side of the stone fence. Mr. Eline testified that although he was aware that neighbors hunted on their property from time to time and erected a few no trespassing signs, from 1957 through 2006 the Plaintiffs believed that their property line was on the east side of the stone fence.¹

Mr. Hess testified that from 1958 to the present he never participated in any conversation in which a third party claimed the property between the stone fence and what he regarded as the property line. Mr. Hess testified that he never saw anyone build anything in the area at issue or farm in the area at issue. As the testimony at

¹ At the time of trial, it was stipulated that Mr. Leon Rider’s testimony would be substantially identical to the testimony of Mr. Eline.

trial clearly does not support the establishment of a line in compromise of the dispute by the parties, a consentable line by dispute and compromise cannot be found.

Recognition and acquiescence requires: (1) a finding that each party has claimed the land on his side of the line as his own; and (2) a finding that this occupation has occurred for the statutory period of twenty-one years. Corbin, *supra*. In reviewing the evidence presented regarding the Defendants acts of ownership to the disputed strip of land, this Court notes that the Defendants did not farm the land at issue, timber the land, clear the land, or erect game feeders on the land. The only testimony presented was Mr. Eline's recollection that maybe Mr. Hess had given Mr. Reed permission to erect a tree stand at one time, and testimony that the Defendants hunted the area and that at some point hunting signs were erected in the area near the fence. This Court does not find the evidence sufficient to support a finding of ownership to the disputed land by the Defendants.

Occupation by the Defendants arguably did take place when the deer fence at issue was erected, but the evidence established that the deer fence was not in place for the requisite twenty-one years.

Moreover, the courts have held, however, that some lines do not qualify as consentable lines. Defense counsel asserts that the stone fence should be regarded as the property line. In Fisher v. Pennsylvania Company, 3 Walk. 390, 1886 Pa. LEXIS 550 (Pa. 1886), the Pennsylvania Supreme court held that a consentable line was not found because the fence at issue was not continuous. The Supreme Court's opinion included the following:

The fence was not a continuous one to mark any designated boundary. It was merely disconnected portions to prevent cattle from trespassing on the track.

It was not, in any sense, a consentable line to define the boundary line between the company and the adjoining owner. Id. at 395.

In the case at bar it is undisputed that the stone fence at issue exhibited two breaks, of approximately 450 feet. The width of the fence is inconsistent, thicker at the base and thinner at the top. According to Mr. Eline, the base of the fence at some points is twelve feet and at other points is approximately six. The width at the top of the fence is two feet in some places and approximately four feet in others.

As the fence width is so irregular, this Court notes that it is practically impossible to utilize the fence as a boundary. Moreover, the Defendants have failed to prove the elements necessary to establish a binding consentable line.

ORDER

AND NOW, this 26th day of July, 2011, it is hereby ORDERED and DIRECTED as follows:

Judgment in quiet title is entered in favor of the Plaintiffs and the against the Defendants on Count I of the Plaintiffs' Complaint as follows: The Court finds that the eastern boundary of Plaintiffs' real property, as it adjoins the property of the Defendants, is correctly identified in the retracement survey prepared by Joshua Gavitt, dated April 14, 2006. The Court adopts the description of that boundary more fully set forth in the survey marked as Plaintiffs' Exhibit 2, and in the metes and bounds description introduced into evidence at the trial of this matter as Plaintiffs' Exhibit 3.

Judgment in ejectment is entered in favor of the Plaintiffs and against the Defendants on Count II of Plaintiffs' Complaint with regard to that portion of the

fence situate on the property of James B. Reed and Mary L. Reed, which extends over the boundary with Plaintiffs' property. The Defendants are DIRECTED to remove the encroaching portion of the fence within ninety (90) days of the date of this Order, and to repair any excavation to Plaintiffs' real property to a condition substantially similar to the condition prior to the installation of the fence. This should consist chiefly of smoothing the area and certainly no landscaping or planting is required. Costs of removal of the fence will be borne by the Defendant.

BY THE COURT,

Richard A. Gray, J.

cc: William P. Carlucci, Esquire
Garth Everett, Esquire
Gary Weber, Esquire