

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE BOARD OF PROPERTY**

**Forest Dale Farms, Inc.,
Plaintiff**

v.

**Commonwealth of Pennsylvania and
Pennsylvania Game Commission
Defendant**

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Docket No. BP 2004-0001

ADJUDICATION AND ORDER

HISTORY

On April 23, 2004, Plaintiff Forest Dale Farms, Inc.¹(herein Forest Dale), filed with the Board of Property (Board) a Complaint against the Commonwealth and the Pennsylvania Game Commission (PGC)² seeking title and possession to 80 acres of disputed land in Porter Township, Huntingdon County. The Complaint averred that Forest Dale and PGC shared a common boundary and that in 1852 the boundary became the subject of an agreed line between the parties' predecessors in interest. On May 7, 2004, PGC filed an answer denying that Forest Dale held legal title to the above land and averring new matter. On May 24, 2004, Forest Dale filed an answer to new matter.

On August 26, 2004, notice of a pre-hearing conference was issued. In accordance with the notice, counsel for the parties and the Board held a pre-hearing conference. At the request of the parties, the Board issued an order on October 14, 2004 allowing Forest Dale and PGC to pursue settlement discussions. On December 13, 2004, Forest Dale Counsel requested a hearing be scheduled. On August 4, 2005, after conferring with the parties, the Board issued a Notice of Hearing for November 4, 2005.

The Board held a hearing on that date, at the time and place scheduled. Presiding at the hearing were: Andrew Sislo, Esquire, Chief of Staff, Pennsylvania Department of State, as designee of Pedro A. Cortés, Chairman of the Board, and Secretary of the Commonwealth and Tanya Leshko, Senior Counsel assigned to the Department of General Services, designee of

¹ In the caption of the Complaint, Forest Dale was named as a partnership. At the hearing Forest Dale Counsel indicated that it was a corporation. The Board has *sua sponte* amended the caption of this case to so indicate.

² In this proceeding, the Commonwealth and PGC will be treated as a single entity.

Barbara Adams, General Counsel. Steven Fishman, Chief Counsel, designee of Dennis Yablonsky, Secretary of Community and Economic Development, was scheduled but unable to participate in the hearing.

Forest Dale was represented by David A. Ody, Esquire. Bradley C. Bechtel, Esquire, represented PGC.

Following the hearing, the Board directed simultaneous filing of briefs and reply briefs. PGC filed its post-hearing brief on February 3, 2006 and Forest Dale filed its brief on February 10, 2006. The matter is now before the Board for adjudication.

FINDINGS OF FACT

1. Plaintiff Forest Dale Farms, Inc., is a Pennsylvania corporation and the record owner of a certain tract of land in Porter Township, Huntingdon County. (Exhibit P-3)

2. Defendant Pennsylvania Game Commission is the owner of certain land in Porter Township, Huntingdon County which are a part of State Gamelands No. 118 which shares a common boundary line with the Forest Dale property. (Exhibit C-11)

Forest Dale Chain of Title

3. Forest Dale acquired the land known as the Hugh Cone Warrant in 1977 from the Estate of Helen O. Laird, widow of Robert M. Laird, by deed dated December 9, 1977, recorded in Deed Book 141, Page 632. (Exhibit P-3)

4. The deed describes the property in the following language:

TRACT No. 3—Being all that certain tract of wood or mountain land adjoining lands now or formerly of Lewis Goodman ...and William H. Phillips containing eighty (80) acres, more or less.³

5. Tract No. 3 described in Plaintiff's deed was first separately described in a 1992 deed from the Robert Laird Estate to Alfred Laird. (N.T 39)

6. The Hugh Cone Warrant names the Andrew Cone Warrant as the adjoinder on its southern line; the survey of the Warrant made in 1793, the year after the Warrant was issued, describes the course and distance for the line between it and the Andrew Cone Warrants beginning at a pine tree south 76° east 319 perches. (Exhibits D-1- D-4)

³ The authenticity of the deed was stipulated to by the parties. (N.T. 91) A copy appears in the Complaint as Exhibit A.

PGC Chain of Title

7. PGC acquired property adjoining the Forest Dale land on February 23, 1971 by a deed from Bessie Goodman, widow of Clarence L. Goodman, et al., granting all of the Andrew Cone Warrant and other tracts not at issue here to PGC. The deed was recorded on March 29, 1971 in Deed Book 94, page 458. (Exhibit D-12)

8. On August 22, 1899, Lew S. Goodman⁴ acquired the Andrew Cone Warrant and other land from David G. Alsop described as a tract of 1562 acres and 37 perches in Porter Township, Huntingdon County, known as the “Tussey Mountain Tract” bounded and described in accordance with a survey and plan made by J. Luden Henry in March and April, 1899. (Exhibit D-11)

9. The Andrew Cone Warrant describes the course and distance for the line between Andrew and Hugh Cone Warrants as beginning at a chestnut tree north 76° west 319 perches. (N.T. 98, Exhibit D-3)

10. After purchasing the property in 1971, PGC has placed posters and placards on the property conveyed including that portion of which Forest Dale claims title. (N.T. 111)

The Controversy

11. At some point in the early 1800s, Michael Wallace became the owner of the Hugh Cone Warrant. (Exhibit P-2)

12. At some time prior to 1852 a question arose between the owners of the Hugh Cone and Andrew Cone Warrants regarding the location of the line. (Exhibit P-1)

⁴ Goodman is identified in various deeds and surveys as “Lew,” “Louis”, or “Lewis.”

13. On May 5, 1852, agents for the owners of the two warrants agreed to appoint Jacob Cresswell, a surveyor, to establish a line and to record the line in Huntingdon County. (N.T. Exhibit P-1, Exhibit P-8)

14. On July 15, 1856, Robert Laird acquired 291 acres being parts of the Hugh Cone and Mary Kennedy Warrants from the Wallace Heirs, less the tract of land conveyed to Isenberg. (Exhibit D-9)

15. On February 24, 1864, the heirs of William Laird conveyed the 291 acres to William Phillips. (Exhibit D-8)

16. The northern boundary lines described in the Phillips and the Isenberg deeds is the same as described in the 1845 survey and an 1899 survey done by J. Luden Henry. (N.T. 109)

17. In 1899, J. Luden Henry prepared a drawing of a tract of land “lying on both sides of the Tussey Mountain which included the Andrew Cone and Hugh Cone Warrants. The drawing showed the Andrew Cone Warrant as owned by Louis [sic] Goodman and the Hugh Cone Warrant as owned by Phillips and Isenberg. (Exhibit P-4)

18. On the drawing is a triangular shaped tract bearing unbroken lines on the Hugh Cone side and a dashed, or broken line, on the Andrew Cone side and inscribed within its bounds bearing the legend “Claimed by R Laird’s Heirs.” (*Id.*)

19. On July 31, 1899, field notes in the possession of Africa Engineering Associates, Inc. (Africa) indicated that Henry and others met “to fix line between Hugh and Andrew Cone tracts.” (Exhibit P-7)

20. No document was recorded in Huntingdon County purporting to establish a compromise line between the two warrants. (Exhibit P-1)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter under Section 1207 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 337.
2. Forest Dale has not shown by a preponderance of the evidence that the boundary between it and PGC is the result of an 1852 compromise.

DISCUSSION

This is a dispute as to the ownership of a parcel of land of approximately 80 acres on Tussey Mountain in Porter Township, Huntingdon County. At issue are the two warrants of Andrew Cone and Hugh Cone. The Warrants were issued in 1793 and surveyed in 1794. (Exhibits D-1-D-4) Both warrants call for a common boundary line. The adjoining line is described by courses and distances in each warrant. The descriptions are mirror images of each other.

Forest Dale, whose title is derived from the Hugh Cone Warrant, argues that when the calls in the warrants are put on the ground there is a gap of an area of land in the shape of a pyramid of an estimated 160 acres, more or less. It contends that the parties' predecessors recognized the dispute and came to an agreement to resolve it by a compromise line. The existence of the agreement does not appear in any recorded document in the land records of Huntingdon County.

Forest Dale claims ownership of the Hugh Cone Warrant from property conveyed by a deed from Helen Laird, widow, recorded in Huntingdon County in 1977. The 80 acres are described as one of three tracts, and identifies the adjoining tract as formerly owned by Lewis Goodman and William H. Phillips.

The Defendant PGC owns State Game Lands No. 118 in Huntingdon County. Its property contains the whole of the Andrew Cone Warrant acquired by deed from Bessie Goodman, et al., heirs of Lewis Goodman, dated February 23, 1971 and recorded in Huntingdon County Deed Book 94, page 458, by which PGC purchased 1, 353.3 acres.

Forest Dale has the burden of proof to establish its right to possession of the tract by a preponderance of the evidence. A plaintiff in an action in ejectment must show the right to possession on the strength of its own title, not because of the weaknesses or deficiencies of the defendant. Moreover, in a boundary dispute, the evidence must be sufficient to identify and locate the land in dispute. *Hallman v. Turns*, 334 Pa. Superior Ct. 184, 482 A2d 1284 (1984).

Robert H. Shaffer, P.L.S., President of Africa Engineering Associates, Inc. (Africa) testified on behalf of Forest Dale. Africa has surveyed land in Huntingdon County from 1840 to the present. It has retained records of surveys and related land documents since its inception. (N.T. 18)

In or around 1978 Shaffer was employed by Forest Dale to investigate the sources of claims of itself and PGC to the same 80 acres on Tussey Mountain. (N.T. 43) Shaffer examined the various deeds of the Laird family which owned the Hugh Cone Warrant in the 1800s and until it was deeded to Forest Dale in 1977. When documents of record failed to bear fruit, he searched the early records of Africa. Records introduced at the hearing indicate that in 1995⁵, he discovered documents that in his view acknowledged the existence of a gap between the two warrants at the top of Tussey Mountain, and an apparent attempt to redraw the boundary line. He found an agreement, dated May 5, 1852, and notes and drawings which in his opinion recognized the existence of a need to fix the line sometime around 1852 and an intention to establish a line by a survey.

⁵ Shaffer did not testify directly as to when he discovered the documents referring to the establishment of a new line. However, handwritten at the top of the copy of the 1852 Agreement appears: "Found in Morris Twp Bundles 12/6/95."

Through Shaffer, Forest Dale introduced a copy of the agreement between S. Miles Green, agent for the Dorsey heirs and Samuel P. Wallace, agent for the Wallace heirs which called for the appointment of Jacob Cresswell, a surveyor, to establish a line between the two parties and to have that line recorded. (Exhibit P-1) Shaffer also identified a copy of a typewritten rendition of the agreement. Attached to the agreement was a typewritten rendition of the notes of Cresswell made on his May 5, 1852 survey on the ground of a division line between Green and Wallace. (Exhibit P-8)

Shaffer identified a copy of an 1870 drawing, which, he testified, showed a connection of the warrants. He believed the drawing he found in Africa's files was the drawing of either Simpson Africa, the founder of Africa, or his son J. Murray Africa. (Exhibit P-2) Shaffer also identified a copy of a typewritten transcription of the May 5, 1852 agreement in which the parties agreed to a survey by Jacob Cresswell and a typewritten copy of Cresswell's field notes dated May 5, 1852. (Exhibit P-8) Finally, Shaffer identified notes indicating that Simpson Africa, J. Murray Africa and J. Luden Henry in July of 1899 went out into the field again "to identify this particular problem area." (N.T. 61, Exhibit P-7)

Shaffer described the chain of title to Forest Dale's claim to the 80 acres. The Laird Family acquired the Hugh Cone Warrant in conveyances in 1856 and 1857 from the heirs of Michael Wallace, the first owner after Hugh Cone. In several conveyances from 1856 up to 1992 between members of the Laird family, the 80-acre tract was not separately described. In 1992, the 80-acre parcel was first described as an individual tract in a deed from the Robert Laird Estate to Alfred Laird. (N.T. 39)

In 1899, Lewis Goodman hired J. Luden Henry to survey the Andrew Cone Warrant. The survey did not recognize the existence of the gap claimed by Forest Dale.

Forest Dale relies on *Hostetter v. Commonwealth*, 367 Pa. 603, 80 A.2d 719 (1951) regarding the Ancient Document Rule. However, *Hostetter* merely stands for the proposition that ancient documents (over thirty years old where the transaction was so far in the past as to be incapable of direct proof by living witnesses) may be admitted as an aid to determine the intent of the grantor, or in this case the agreement between the parties. It does not change the quantum of proof necessary to establish a new line or the relocation of a line by agreement of the parties.⁶

Newton v. Smith, 40 Pa. Superior Ct. 615 (1909), a seminal case in the law of consentable boundary, recognized three elements that must be proved to establish a boundary by agreement. The Court noted: “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 that are inconsistent therewith.” *Id.* at 615. *See also, Inn Le’Daerda, Inc. v. Davis*, 241 Pa. Superior Ct.150, 360 A.2d 209 (1976).

In that case, Newton brought an action in ejectment against Kate M. Smith to enforce a line established by a surveyor and alleged to have been agreed to by the defendant and her husband. Newton claimed the actual conveyance did not convey all the adjoining land as intended and agreed to by the parties. A surveyor established a new line upon which Newton and the husband of Mrs. Smith agreed. The sole evidence as to the assent of Mrs. Smith was the testimony of the surveyor who said he pointed it out to her on the draft he made of his work on

⁶The law of consentable boundaries allows proof of the line to be shown by dispute and compromise, or by recognition and acquiescence. Forest Dale has not attempted to use or possess any part of the disputed land PGC has marked the boundary line that is described in its deed.

the ground. However, the surveyor declined to say that she assented to it in any way. On the issue of assent, the Court quoted *Perkins v. Gay*, 3 S&R 327, 331 (1817): “To establish a consentable line between owners of adjoining tracts, knowledge of and assent to the line as marked must be shown in both parties.”

The 1852 Agreement between Samuel Wallace and Miles Green as agents for the owners of the two warrants shows an agreement to hire Jacob Cresswell to survey and fix a line. No evidence was introduced which shows that Jacob Cresswell drew a line in 1852 and presented the line to the owners. Shaffer testified that the Cresswell field notes made on May 5, 1852 describing going out on the land with axmen and locating monuments and corners with the property owners and others joining in the walkabout conformed to his knowledge of how compromise lines were located in those days. One can infer from the field notes that Cresswell drew a division line between the lands of Green and Wallace. (Exhibit P-8) To say that is so, however, does not establish the placement of the line on the ground. His notes indicate that Isenberg, an adjoining property owner was with him. He made no mention in his notes of the presence of either Green or Wallace, or that they agreed to the line that he drew as lawful agents for the owners of each warrant. To follow the instruction of *Perkins v. Gay*, the line must be marked down someplace so that it may be shown to the parties so that they may consent to it or not, as the case may be. And, following *Newton*, the proponent of the new line must present sufficient evidence to show that each party assented to the new line.

Shaffer also testified that the J.Luden Henry map of surveys made in March and April 1899 supports Forest Dale’s claim. On its face, however, the map (Exhibit P-4) indicates Henry’s belief that the 1852 line represented an area claimed by the Laird heirs. At most this

evidence indicates that the Lairds and other owners of the Hugh Cone Warrant believed a compromise had been struck. The 1899 survey maps are some evidence of what certain prior owners thought they owned. However, it is not direct evidence of an agreement.

The difficulty with the Forest Dale position is that without the agreement recognizing a new line in evidence, it is impossible to say what the parties may have agreed to after the resurvey. Thus, the evidence in this case is not of a sufficient quality to meet the requirements of *Perkins v. Gay and Newton*.

Therefore, the following order is entered.

**COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROPERTY**

**Forest Dale Farms, Inc.,
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v.

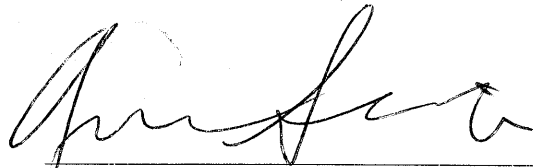
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ORDER

AND NOW, this **eleventh** day of **May, 2006**, in consideration of the foregoing findings of fact, conclusion of law and discussion, the Board of Property hereby finds that Plaintiff Forest Dale Farms, Inc., has not established the right of possession to the 80 acres of land claimed by plaintiffs and defendants in their respective chains of title. It is so **ORDERED**.



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