THE DOCTRINE OF CONVENTIONAL LINES

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I. Introduction

The purpose of this article is to provide a comprehensive guide to the doctrine of conventional lines, which allows neighbouring parties to establish binding boundaries between their properties. While the doctrine is accepted law throughout Canada (except where ousted by statute),[1] the great majority of the case-law originates from New Brunswick and Nova Scotia, no doubt because of the early settlement of those provinces and the inadequacy of the early surveys. This article begins with a review of the policy considerations underlying the doctrine, as these shed considerable light on some of the more troublesome doctrinal issues, and then proceeds to a systematic consideration of the judicial resolution of the practical issues arising in applying the doctrine.

The doctrine of conventional lines may be concisely stated as follows: if neighbouring parties intend to settle the boundary between them, then any boundary line agreed to by them is binding on the parties and their successors in title[2] notwithstanding that it is not the true line according to the deeds or Crown grant.[3]

II. Policy

An excellent explanation of the policy and historical context of the doctrine of conventional lines is found in the widely cited case of *Davison* v. *Kinsman*:

> It is notorious that in the early settlement of this Province few of the descriptions in grants or deeds were made from actual surveys. The surveyors residing in the country were but few, and those few not remarkable for their accuracy; nor could a large portion of the settlers bear the expense of employing them. In fact, the actual location of those settlers was almost a matter of guesswork; but they did locate themselves on what they supposed to be the lots granted or conveyed to them, and adjusted their boundaries with each other as best they might. When at

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[1] *Grasett* v. *Carter* (1884), 10 S.C.R. 105 [hereinafter *Grasett*].

[2] "It cannot be disputed that the lessors of the plaintiff, deriving their title from Foster Woodberry, stand precisely in his situation ..." *Woodberry* v. *Gates* (1845), 3 N.S.R. 255 at 257 (C.A.) [hereinafter *Woodberry*]; *Phillips* v. *Montgomery* (1915), 43 N.B.R. 229 at 249 (C.A.); "In my view the boundary agreement made by the owners of their respective lots is binding not only on them but also on their respective successors in title, who occupied up to the line agreed upon" *Hayes* v. *Driscoll* (1973), 5 N.B.R. (2d) 767 at 780 (C.A.), Hughes C.J.N.B. for the Court.

[3] The Crown itself may also be bound by a conventional line: see *infra* note 89.

> the termination of the American Revolution the Loyalists removed in great numbers to this Province, many surveyors of much higher attainments than those I have alluded to accompanied them, and soon discovered innumerable mistakes in boundaries which had been adjusted between adjoining owners.
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> This would have produced a fruitful field of litigation had not the Court upheld the principle that where the parties had mutually established the boundary between them upon the land they should be bound by it, unless it could be shewn that any unfair advantage had been taken by one over the other. At that early period, and for some time thereafter, land was selling for sixpence and one shilling per acre, and one hundred acres would not have produced money enough to defray the expense of a survey. If to save the expense the parties, in mutual ignorance of where the line between them would in strict accuracy run, agreed to establish such a line as was then satisfactory to both of them, the Court would not allow either to depart from it.[4]

Thus the primary aim of the doctrine is to reduce the expense of determining boundaries both by allowing the parties to determine their own boundaries, thus avoiding expensive inquires,[5] and by enforcing the agreement the parties arrive at, thus eliminating the cost of recourse to the courts. In order to reduce the costs of dispute settlement, finality of the decision arrived at by the parties must be encouraged. It is not enough simply to protect the actual reliance by the parties on the line. Not only would litigation be required to determine the degree and nature of the reliance, but, more important, if only actual reliance on an agreed line were protected, it would still be necessary to have recourse to the courts to settle the line itself.

That finality and not simply reliance is being protected is illustrated by the fact that a conventional line established by conduct may be binding even though the actual value of the reliance interest may be much less than the value of the disputed land.[6] For example, in the case of selected logging in a woodlot where the value of the reliance interest in the line is only the stumpage, the adverse claimant who seeks to challenge a conventional line will not only be estopped from claiming certain logs were cut from his property but will also be estopped from denying the conventional line itself. In other words, by acquiescing in a relatively

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[4]See *Davison* v. *Kinsman* (1853), 2 N.S.R. 1 (C.A.) at 2-3, Haliburton C.J. [hereinafter *Davison*].

[5]"It was well known that this was not the true line, and that the true line could not be located without expense which no one desired to incur" *A.G. Ont.* v. *Booth* (1923), 53 O.L.R. 374 (C.A.) at 386-7 [herinafter *Booth*].

[6]See *infra* note 45 and accompanying text.

small reliance, an adverse claimant may lose rights which are significantly more valuable.[7]

This is not as unfair as it may seem, because the acts of the claimant in reliance on the supposed line puts the adverse claimant on notice that the line in question is being treated as the true line, and, in effect, requires the adverse claimant to object now or forever be silent. The adverse claimant is thus given a fair chance to dispute the line before it is finally settled. The estoppel then arises not because of the reliance itself, but because the adverse claimant did not challenge the line even after having been given a fair opportunity to do so. This promotes finality while allowing each party sufficient opportunity to challenge the line. If the courts were only to protect actual quantifiable reliance, parties would not be able to plan confidently with reliance on the boundaries. The unquantifiable and unprovable, but nonetheless real losses resulting from having one's plans frustrated, would not be recoverable.

A competing concern is fairness. A conventional line can potentially be unfair either procedurally or substantively. Procedural unfairness would arise if the circumstances in which the agreement was made are such that it would be unfair to hold one of the parties to the agreement. As will be shown, this concern is reflected in various aspects of the doctrine.[8] That which may be termed substantive unfairness may arise if as a result of the agreement one party ends up with less land than that party would have been entitled to had the matter been settled by a court.

The problem of striking the correct balance between substantive fairness and the concern for finality can be a subtle one. The easiest cases are such as described in *Davison*, in which the dispute is over boundaries described in the original grants. Any substantive unfairness is minimal because these early boundaries were so inaccurate that it is hardly possible to speak of a "true" boundary; any judicial decision would be little more than a third opinion, and the issue of substantive unfairness can hardly be said to arise.

In cases involving the retracement of more modern surveys where the true line can be discovered, albeit at some and perhaps considerable, expense, the concern for substantive unfairness may be greater, as it is more plausible to say that one party may be losing some part of their land. Nonetheless the same basic rationale justifies the doctrine: if conventional lines were not binding, it would be impossible

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[7]This is consistent with the general rule in estoppel by representation that the person making the representation is estopped from denying it once it has been relied upon, regardless of the extent of the loss incurred thereby: see Spencer Bower & Turner, *Estoppel by Representation*, 3rd ed. (London: Butterworth's, 1977) at 112-144 [hereinafter Spencer Bower & Turner].

[8]See *infra* Part III, E., 4., a. Doctrine.

to establish a definitive boundary without the expense of recourse to the courts. While in some sense it is unfair for one party to lose land as a result of settling the boundary by a conventional line, the extent of the unfairness can be measured by the value of the land lost. The potential unfairness to either party, as measured by the value of the land potentially lost, must be weighed against the cost to both parties of going to court.

Fortunately, this balancing of costs need not be undertaken by the courts, as the doctrine induces the parties themselves to make this decision. *If both the parties are aware that they are settling their boundaries with finality, the parties can be taken to have decided for themselves that any possible loss of some portion of their property is more than compensated for by the fact that their dispute will be settled without the expense of going to court.* If either party believes that they would lose too much land that party will not agree to the proposed boundary, leaving the dispute to be settled in court. And while we expect that in general the conventional line will be more favourable to one party than to the other, the perceived unfairness is minimized because neither party knows who has lost and who has gained.

As we shall see, the courts are not primarily concerned with whether the agreement was substantively unfair to one of the parties (i.e. whether the conventional line was established in accordance with the true line), as this would defeat the objective of finality and invite litigation.[9] In general terms the approach taken by the courts to reviewing the agreement arrived at by the parties can be compared to the approach taken in reviewing the decision of an inferior but expert tribunal. The court will ensure that a decision was indeed made, and that it was arrived at with procedural fairness, without subterfuge or fraud on the part of either party, but the substantive decision will not be reviewed unless it is grossly erroneous.

III. Requirements for the Establishment of a Conventional Line

A. General

Establishment of a conventional line requires an agreement between the parties to recognize some line as the boundary between the properties. This recognition may be express, either orally or writing, or by conduct.[10] The evidence to support a conventional line should be "clear and definite", since the

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[9]See *infra* Part III, B. Discoverability.

[10]See *Wilbur* v. *Tingley* (1949), 24 M.P.R. 175 at 181 (N.B. C.A.) Richards C.J. [hereinafter *Wilbur*].

parties thereby give up their strict legal rights.[11] However, this does not mean that direct evidence of a written or oral agreement is required: an agreement may be inferred from other evidence, for example from the existence of a blazed line which has long been lived up to.[12]

B. Discoverability

In some cases the parties may agree to a conventional line when the deeds are either erroneous or so ambiguous that the true boundary cannot be established.[13] However, the true line need not be undiscoverable in order for a conventional line to be validly established.[14] This is demonstrated both by cases in which no finding is made as to the true line because this is irrelevant once a conventional line is established,[15] and, most clearly, in cases in which a conventional line is upheld even though a different line is held to be the true line according to the deeds or prior occupation.[16] The boundary need only be uncertain in the sense that it is not precisely known to the parties at the time of the agreement. Put another way, the parties must be attempting to settle their boundary in good faith, and if an agreement as to a boundary is used as a ruse for transferring land, it is not a conventional line and would be caught by the *Statute of Frauds*.[17] So long as the parties are attempting to settle their boundary in good faith, they need not attempt to follow the deed precisely and they may establish a conventional line

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[11]*Lewis Miller & Co.* v. *Clow* (1918), 52 N.S.R. 1 (C.A.) Russell J. at 9. Also, evidence of one party as to an agreement may be regarded suspiciously when the purported line is in that party's favour and the other party to the agreement is dead: *McGregor* v. *Webber* (1917), 51 N.S.R. 226 (C.A.).

[12]See *infra* Part III, F., 1., a. Nature of Conduct.

[13]See e.g. *Grasett*, *supra* note 1; *Gallant* v. *Dunn* (1907), 2 E.L.R. 322 (P.E.I. S.C.); *Lawrence* v. *McDowall* (1838), 2 N.B.R. 442 (C.A.) [hereinafter *Lawrence*]; *Joyce* v. *Smith* (1985), 66 N.S.R. (2d) 406; *Crossland* v. *Dorey* (1977), 27 N.S.R. (2d) 139 (T.D.) aff'd on appeal (1978) 28 N.S.R. (2d) 91 (C.A.).

[14]In particular, the statement in *Canadian Encylopedic Digest*, vol. 3, 3d ed. (Toronto: Thomson Professional Publishing Canada, 1992) [hereinafter *C.E.D.*] at Title 19 §42, "The concept of a conventional boundary ... rests on the prerequisite that another, the true boundary line of division, cannot be found, that it is uncertain and undeterminable, that it is lost, and not merely that it is unknown because sufficient enquiries have not been made or surveys performed," is not correct. The authorities cited are *Grasett*, *supra* note 1, and *Bea* v. *Robinson* (1977), 18 O.R. (2d) 12 (H.C.) [hereinafter *Bea*]. *Grasett* does not stand for this proposition, and *Bea* was wrongly decided: see *infra* Part IV.

[15]See for example *Perry* v. *Patterson* (1874), 15 N.B.R. 367 (C.A.); *Jollymore* v. *Acker*, (1915) 49 N.S.R. 148 (C.A.) [hereinafter *Jollymore*].

[16]See e.g. *Doe d. Carr* v. *M'Cullough* (1842), 3 N.B.R. 460 (S.C.) [hereinafter *McCullough*]; *Woodberry*, *supra* note 2; *Davison*, *supra* note 4; *Inch* v. *Flewelling* (1890), 30 N.B.R. 19 (C.A.) [hereinafter *Inch*]; *Wilbur*, *supra* note 10; *MacMillan* v. *Campbell* (1951), 28 M.P.R. 112 (N.B. C.A.) [hereinafter *MacMillan*]; *Kingston* v. *Highland* (1919), 47 N.B.R. 324 at 328 (K.B.) [hereinafter *Kingston*].

[17]See *Jollymore*, *supra* note 15 at 157.

even though they are aware that the line they establish is not the true line. For example, a valid conventional line is established if, rather than attempt to follow an unclear deed, the parties run a straight line to mark their boundary, knowing that this does not correspond exactly to the deed.[18]

The policy reason that the line need not be undiscoverable is straightforward: the true line might be discoverable, but only at a high cost, for example through extensive surveying or recourse to the courts to interpret the deeds. If the parties are able to arrive at a mutually satisfactory resolution of the problem at much less cost, they should be encouraged to do so.

C. *Onus of Proof*

If the true line is proven, by deed or otherwise, the onus is on the party claiming ownership by virtue of a conventional line to show either that a conventional line has been established or that he has acquired title to the disputed area by adverse possession.[19]

D. *Relevance of a Dispute*

It is not necessary that there be a dispute in order to establish a conventional line,[20] but the existence of a dispute is relevant, since acquiesence in the face of

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[18]See *Inch*, *supra* note 16 at 26 wherein Allen C.J. said:

> [The surveyor] was employed to run a straight line between two given points without regard to the course of his line, or its agreement with any deed or plan ... The jury also found that both parties agreed to adopt the line which [the surveyor] had run, and that they afterwards treated it as the dividing line between their respective properties. It is therefore quite immaterial whether his line was run according to the course laid down on a plan, or in a deed, or not.

See also *Kingston*, *supra* note 16 at 328.

[19]*Murray* v. *McNairn* (1952), 30 M.P.R. 200 (N.B. C.A.) Hughes J. at 213, Harrison J. at 206 [hereinafter *Murray*]; *Re Hunter* (1978), 23 N.B.R. (2d) 130 (C.A.) at 133 (true line was shown by deed and located on the ground); *Goodwin* v. *Saurette* (1990), 110 N.B.R. (2d) 287 (Q.B.) at 298, in which the onus of proof was a significant factor in the decision [hereinafter *Goodwin*].

This rule must be distinguished from the rule which applies in establishing the true line, namely that once the occupation line has been settled and used, the onus of proof rests on the party who seeks to disturb established possession: see *Palmer* v. *Thornbeck* (1876), 27 U.C.C.P. 291 at 294-5 and the cases cited therein [hereinafter *Palmer*], and *Kingston*, *supra* note 18 at 329-30. This rule is simply a reflection of the principle that a well established line of occupation is good evidence as to the location of the original line.

[20]See *Jollymore*, *supra* note 15, Russell J. at 157 "[a]s to the necessity for a dispute, I really cannot see why a line agreed upon for the purpose of preventing future disputes should not be as effectual as a line agreed upon because of an existing dispute."; see also *MacMillan*, *supra* note 16 at 120.

dispute can be taken as abandonment of the claim, whereas acquiesence in the absence of dispute does not carry a similar inference.[21]

E. Line Established by Express Agreement

1. Intention to Determine the True Line

Though perhaps trite to say it nonetheless bears saying that the agreement must be an agreement *to settle the boundary.* If a surveyor is hired, not to settle the boundary but to determine the true line, then the parties are not estopped from disputing that the line is correct within a reasonable time thereafter, unless there has been reliance upon the line.[22] Immediate repudiation of the survey may be evidence that the parties did not intend the survey to establish the line between them.[23] However, if (as is very commonly the case) a surveyor is hired to run a

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[21]See *Murray*, *supra* note 19 at 210-11 Hughes J.:

> if there had been a dispute as to the ownership of the land cut over, and with knowledge of this dispute, the plaintiff had permitted the cutting by the defendant without pretext, there would be ground for an estoppel. The plaintiff would then have been acting with knowledge that his claim was repudiated by the defendant who was asserting his ownership of the lot, and the plaintiff's conduct would then be evidence of the abandonment of his own claim ...
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> Where, however, a line between two adjacent lots has been set out in the wrong place and there is no dispute, the mere acquiesence in its location, as in this case, and the occasional cutting of trees up to such line, does not furnish evidence of estoppel and either owner may assert his right to have the line correctly run ...

[22]See *McCullough*, *supra*, note 16, Parker J. at 466:

> where a surveyor is employed to run, not a conventional line, nor according to his discretion, but according to the courses of grants or deeds, and has materially though unintentionally deviated, and the assent thereto is made in error; for example as in the present case, where a straight line parallel to the side lines was intended, but the line was run crooked so as to make a width of sixty rods instead of forty in the rear, and to give the defendants one hundred and fifty instead of one hundred acres; I should think it open to correction at any reasonable time.

Note that this statement is *obiter dicta* as, on the facts, it was found that sufficient time had passed that the line could no longer be disputed.

Similarly, when the surveyors are engaged to settle a dispute by surveying the line, they are bound to make a formal survey and cannot simply agree on a line amongst themselves: *Snowball* v. *Ritchie* (1888) 14 S.C.R. 741 rev'g 26 N.B.R. 258.

[23]See *Forrest* v. *Turnbull* (1909), 14 O.W.R. 478 (H.C.) aff'd (1909) 1 O.W.N. 150 (Div. Ct.) [hereinafter *Forrest*]. Note though that if the totality of the evidence shows that the parties did intend to settle the line repudiation, even though immediate, will not overturn a conventional line.

boundary line according to a deed, but which is intended to settle the boundary, then it does not matter that the line is not correct.[24] The distinction then is between parties intending to be bound by the true line, which they wish the surveyor to determine, and the parties intending to be bound by the line which the surveyor determines, which they wish him or her to run according to the deeds and grants. In the first case the parties are not bound unless the line has been relied upon, but in the second case they are bound. This distinction is sometimes a fine one, so that the presence or absence of reliance may be a deciding factor.

2. *Manifest Error and Fraud*

An agreement made under a manifest error is not binding unless it is relied upon. While this "manifest error" exception was set out in the early leading Nova Scotia case of *Woodberry* v. *Gates*, it is rarely applied, so that the question of what constitutes a manifest error is not entirely clear.[25] It is evident that error as to the location of the true line will not suffice, as a conventional line is binding even if it is not the true line.[26] I suggest that in this regard comparison with judicial review of an administrative tribunal for lack of procedural fairness is pertinent. The correctness or incorrectness of the outcome is not in issue; what is important are the circumstances under which the agreement was made. If the parties are to settle their dispute fairly, it is important that both parties are aware of the circumstances which would affect their rights. For example, an agreement would be made under a manifest error if the parties wished to settle their boundary according to a deed which they misinterpreted.[27] In contrast, if they correctly

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[24]See *Wilbur*, *supra* note 10.

[25]The exception was set out but not applied in *Woodberry*, *supra* note 2. One case in which it was applied is *Roach* v. *Ware* (1886), 19 N.S.R. 330 [hereinafter *Roach*]. A father divided his land, with the division line to run west from a given point, and deeded the southern portion to his son, Valentine (who then deeded the land to the defendant, Ware). The remainder went to his wife, Mrs. Roach. The line was run by Mrs. Roach in the absence of her son, and it did not run due west but north of west, to the advantage of the mother. This line was held not to be the true line. The son later said that he was satisfied with the line as run, but he never himself checked that the line was run according to the deed. On appeal, it was held, following *Woodberry*, that there was a "manifest error" in running of the line. As there was no reliance on the line by the mother or anyone claiming through her, the defendant was allowed to prove the true line. Despite the application of the exception this case is not very helpful in identifying what constitutes "manifest error", as the exact nature of the error was not described, other than to state that the line run was "clearly erroneous". *Roach* may perhaps be better interpreted as a case in which the surveyor was hired to run a true line, so that the parties are not subsequently estopped from disputing its accuracy: it was said at 334 that Valentine's assent was given "while relying on the correctness of the surveyor's work, which turned out to be clearly erroneous".

[26]See *supra* note 16.

[27]See *Reddy* v. *Strople* (1910), 44 N.S.R. 332 (C.A.) at 337-8 applying *Woodberry* in the context of an error in the interpretation of the deed: rev'd on the facts (1910), 44 S.C.R. 246.

interpreted the deed, but erred in laying out the line on the ground, there would be no manifest error.

A fortiori an agreement is not valid if induced by fraud.[28]

3. *Threat of Legal Action*

An agreement is valid notwithstanding that it was made under threat of legal action.[29]

4. *Is Reliance Necessary?*

a. *Doctrine*

The clearest example of the establishment of a conventional line is described by Ritchie C.J. in *Grasett* v. *Carter*:

> where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination, and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties.[30]

This scenario, with both an express agreement to establish the boundary and substantial reliance on that boundary once established, is very common, but both elements are not required. An express agreement is not essential so long as there is sufficient reliance on the line,[31] and conversely if there is an express agreement, reliance on the line is not necessary for it to be binding.

It is often suggested that reliance is essential to the establishment of a conventional line even when there is an express agreement between the parties. This view has two main roots: the passage cited above from the decision of the Supreme Court in *Grasett*, and the related view that the doctrine is based on estoppel *in pais* or estoppel by representation, for which reliance, or alteration of position by the party claiming estoppel, is an essential element.

The above cited passage, though, while establishing that the agreed line is binding in those circumstances, cannot be taken to mean that recovery can *only*

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[28]See *Lawrence*, *supra* note 13 and see *Wilbur*, *supra* note 10 Richards C.J. at 182.

[29]*Ibid.*, *Wilbur*, Richards C.J. at 182-3, Harrison J. at 191; see *Perry* v. *Patterson*, *supra* note 15.

[30]See *Grasset*, *supra* note 1 at 110-1. See the similar statement by Strong J. at 127, and note the brief concurrence by Fournier J. to the same effect at 128-9.

[31]See *infra* Part III, F. Line Established by Conduct.

be had in those circumstances. As noted by Russell J. in *Jollymore* v. *Acker*:

> [In *Grasett*] there was ... clear evidence of prejudice to support an estoppel. It was unnecessary to say what the law would have been had not such circumstances existed, and whatever was said on that point was, therefore, *obiter dictum* ... No doubt [Ritchie C.J.] was speaking with a view to the facts of the particular case then before the court. He certainly did not mean that nothing else but a building would serve the purpose of an estoppel and he did not say whether there might or might not be a sufficient estoppel, if such an element were necessary, arising out of the very fact of a deliberate convention and the implied agreement on both sides to abandon the right to have the true line established.[32]

While the statements of law in *Grasett* were *obiter dicta* to the extent that they suggested that reliance is an essential element, it might nonetheless seem to follow that if the doctrine is built on estoppel by representation, some element of reliance is required.

It is not clear, however, that the doctrine is founded solely on estoppel, although estoppel by representation is one way of characterizing the doctrine which is certainly applicable when there has been reliance on the line in question.[33] If an express agreement has been made this is simply a matter of contract, not estoppel, and the only question is whether there is sufficient consideration for the contract to be enforceable. The answer is that mutual consideration is found in the settling of boundaries and the avoidance of further disputes,[34] or, similarly, in each party giving up any claim they might have to land on the other side of the line.[35] The two separate bases for enforcing the conventional line, estoppel and contract, were noted by the Ontario Court of Appeal in *Sutherland* v. *Campbell*:

> When it is asserted that a line between the lands of two persons has become a conventional line superseding the true line, some situation making it inequitable and improper that the true line should be the measure of the right of the so-called

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[32]*Supra* note 15 at 155. In *Grasset*, *supra* note 1, both Henry J. at 129-30 and Strong J. at 122 state explicitly that had nothing been done but running the line, the respondent would not have been bound to it, but these remarks are *obiter dicta* on the facts.

[33]See for example, *McCullough*, *supra* note 16 Chipman C.J. at 465, "[The principle] undoubtedly operates as a species of estoppel in pais ...".

[34]As was said in *Penn* v. *Lord Baltimore* (1750) 27 E.R. 1132 at 1136:

> though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet is a mutual consideration on each side ... and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries.

[35]See *Grasett*, *supra* note 1, Strong J. at 122.

> trespasser must be shewn. This may be an agreement for consideration or a standing-by while the other party changes his position.[36]

The doctrine is also sometimes treated as being a matter of evidence:[37] it is suggested that the agreement between the parties is the best evidence as to the parties' view of the location of the line[38] or as being an admission against the interest of the party who later sought to challenge the line.

This second approach was taken in the early leading Nova Scotia decision of *Woodberry*, in which, after considerable dispute, the adjoining owners of woodland finally staked out an agreed boundary. Bliss J., for the Court on appeal, quoted Lord Denman regarding estoppel, noting that the rule was "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things existing at the same time."[39] Bliss J. went on to note that in the case at hand it might be doubted whether this rule was satisfied, "for it may be said that there has not been any such change of his previous condition on the part of [the claimant] in consequence of his agreement with [the adverse claimant], so as to bring him within this rule."[40] Nonetheless, Bliss J. thought the issue of reliance to be irrelevant in this case, as reliance is only relevant when the adverse claimant would otherwise be entitled to explain away the admission (that is, the agreement to the line), for example as being made under manifest error:

> The rule then, is this – the admissions of a party are in all cases evidence against him. In some cases they may conclude him; in others they may be contradicted or explained. But if no contradiction or explanation is offered – if the acts and acknowledgments of a party are of such a nature that they can admit of no explanation – or if no facts can be adduced to shake or affect them – then I take it that they have the same force – operate as strongly against him, and conclude him, as they do in the other case [where there is reliance]. He cannot in one, any more than in the other, be permitted to set aside his own admissions – to defeat

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[36](1923), 25 O.W.N. 409 (C.A.) Hodgins J.A. at 409 [hereinafter *Sutherland*].

[37]Of course, estoppel is traditionally considered a branch of the law of evidence (see Spencer Bower & Turner, *supra* note 7 at 7), but this is mainly to emphasize that it is not a cause of action in itself. The traditional requirement of reliance on the representation in question does not fit easily into the evidentiary characterization.

[38]*Kaneen* v. *Mellish* (1922), 70 D.L.R. 327 (P.E.I. C.A.) [hereinafter *Kaneen*]: a conventional line "derives its validity from either or both of two considerations: – 1. By estoppel and 2. As evidencing the interpretation which the parties place upon their respective boundary rights." at 330-1.

[39]See *Woodberry*, *supra* note 2, quoted at 257-8.

[40]*Ibid.* at 258.

> his own agreements – by opposing to them other facts which, leaving the admission and the agreement untouched, seek to destroy them on other grounds.[41]

In other words, reliance is not an essential element of a conventional line. The admission (agreement) is binding from the time it is made except in some circumstances (manifest error) where it can be explained away. Reliance by the other party would bar the admission from being explained away even in these limited circumstances thus giving rise to an "absolute" estoppel.[42] The distinction is well illustrated by *Woodberry* itself, where the Court was of the view that since nothing had been raised which might explain the admission it was binding notwithstanding that it had not been relied upon, so that the issue of reliance was irrelevant.

This approach is useful in explicating the nature of a manifest error: the error must be one such as would explain the admission (for example, the agreement to the line) as being faulty; simply to assert that the line was not correct is not sufficient, as it does not explain why the admission was made.

Bliss J. explained the principle not in technical terms, but as resting on the need for the law to act as the guardian of good faith:

> Who does not see that it would be a breach of good faith if these admissions and these agreements could thus be set aside? The affairs of life could not be carried on with safety unless such conduct could be relied on with perfect certainty. It would doubtless be more prudent — better in any respect — if the parties in such cases executed deeds to perfect their intentions; but men, especially in these remote situations, do not generally conduct their business with a legal advisor at their side; and though in some matters technical and legal difficulties may interpose to defeat their arrangements, the law will generally be found subservient to justice, as I think it is here.[43]

This is a clear statement of the need for finality.

It should also be noted that even when there is reliance by one of the parties, this reliance may be minimal, so that to deny one party the right to assert the true line goes far beyond what is necessary for the party who relied on the line to not be disadvantaged. For example, in some cases the reliance in issue was selected harvesting of trees.[44] In such a case the reliance on the conventional line certainly would make it unjust to allow the party claiming the true line to claim stumpage for the trees cut. However, if protection of the reliance interest were

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[41] *Ibid.* at 259

[42] *Ibid.* at 259.

[43] *Ibid.* at 260.

[44] See *infra* Part III, F., 2. Degree of Reliance Required.

all that was at stake, a suitable remedy would be to allow one party to assert the true line in the future, while denying recovery of stumpage for trees cut before the true line was asserted. That the courts in these situations have estopped the parties entirely from disputing the conventional line, shows that it is an interest in finality, and not simply the protection of the reliance interest, which is at stake.

Whichever approach is taken, it is important that technical distinctions do not overwhelm the sound policy underlying the doctrine, namely that parties should be able to settle their boundary with finality without the need for recourse to the courts. In *Davison* Haliburton C.J. remarked that:

> I will not shock the ears of my Black Letter brethren by declaring that [the parties] are estopt from disputing [the line], lest I should sink under the weight of wax that such a declaration might heap upon me. The less technical phrase used by the Court in *Doe v. Roper* will accomplish all that justice requires in such cases, and I shall merely repeat in this case what was said in that, *they are concluded by their agreement and precluded from questioning the correctness of a line of division thus adjusted.*[45]

b. Case-law

We have seen that the early Nova Scotia case of *Woodberry* was clear in holding that reliance was not essential. A similar position appears to have been adopted in what is perhaps the first reported New Brunswick case on conventional lines, *Lawrence* v. *McDowall*, in which the trial judge's charge to the jury, which was sustained on appeal, was that "if they were fully satisfied of the Defendant's having consented to the line run and marked by [the surveyor], *this consent would be sufficient to give the Plaintiffs possession of the land up to that line*, and such possession would enable them to sustain this action."[46]

The most extensive discussion of the requirement of reliance is that of the New Brunswick Court of Appeal in *Wilbur* v. *Tingley*.[47] A dispute over a boundary had arisen as neighbours were cutting trees on adjoining woodlots, and a surveyor was employed to fix the line. The line set was agreed to by the parties, and compensation agreed (and partly paid) by the plaintiff for having cut over the line. The plaintiff very soon thereafter became dissatisfied with the location of the line, and engaged another surveyor who established a different line, which was more favourable to the plaintiff. The plaintiff thereupon refused to pay the remaining compensation which would have been owing had the line originally agreed to been binding and brought an action to recover the money which had

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[45]See *Davison*, *supra* note 4 at 5 [emphasis in the original].

[46]See *Lawrence*, *supra* note 13 at 443, [emphasis added].

[47]See *Wilbur*, *supra* note 10.

been paid. The trial judge found that the second line was the true line, and not the first line which the defendant claimed as the conventional line, and noted:

> In the case at bar there was no recognition of a line by the plaintiff for any length of time, and he tried to have it revised as soon as he could secure the services of a land surveyor ... There were no fences built on that line, no cultivation on either side up to it.[48]

He held that because there was not sufficient reliance on the line by the defendant the line was not conclusive and binding. Thus the issue of whether reliance is required was therefore squarely raised.

The Court of Appeal was unanimous in reversing the decision at trial. Harrison J. stated bluntly that:

> It has never been the law of this province that before a conventional line could be established there must have been a fence built upon it or that it must have been recognized for any specific length of time.[49]

Similarly, Hughes J. stated "No length of time is necessary after an agreement is reached. The erection of a fence on the agreed line is not necessary."[50] Richards C.J. offered the following succinct summary of the law:

> Time is not a vital element in an agreement respecting a conventional line. Once the agreement is made unconditionally it is effective immediately and in the absence of fraud cannot be cancelled or repudiated at the will of one of the parties. When there is no immediate recognition of a line as a conventional line, time may be an element in determining an agreement by relation to subsequent conduct of the parties.[51]

Another case in point is *Inch* v. *Flewelling*[52] in which a surveyor (Kerr) was employed to run a straight line between two points to serve as a boundary. On appeal it was noted that,

> The jury ... found that both parties agreed to adopt the line which Kerr had run, and that they afterwards treated it as the dividing line between their respective properties ... It is true that [the jury] also found that [the defendant] and his father objected to that line within a reasonable time after it was run, and refused to be bound by it. But this, I think, does not affect the question ... Although the jury have found that [the defendant] and his father objected within a reasonable time, to be bound by Kerr's line; I think that if there was no fraud used to induce

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[48] *Ibid.* quoted by Harrison J. at 188.

[49] *Ibid.* at 189.

[50] *Ibid.* at 195.

[51] *Ibid.* at 183.

[52] See *Inch*, *supra* note 16.

> them to consent to the line, and they did not do so under any erroneous belief as to the effect of it, they are bound by it.[53]

This statement echoes the approach taken in *Woodberry*.

Similarly, in *McIntyre* v. *White*[54] the plaintiff, in the course of a dispute, signed a letter expressly agreeing to a line which he subsequently challenged. On appeal, it was held that:

> That letter in my opinion creates no estoppel in itself – *nothing has been done or omitted to be done by the plaintiff in consequence of it.* The letter, however, is an admission by the defendant, after seeing the plan and hearing what the surveyor said and knowing what he did about the premises, that Malone's survey was correct. There was a true dividing line fixed by the conveyances, capable of being ascertained by measurement and the defendant admitted that Malone had located it on that plan according to the boundaries given in the conveyances. The question for the judge was whether that line or some other line was the correct one and he accepted the defendant's admission and the evidence of the surveyor and others as establishing the Malone line as laid down as the correct line.[55]

In *Jollymore* v. *Acker* Russell J., noted that there was no indication of reliance on the line in the leading cases in which a conventional line had been held to be established, and concluded that "I greatly doubt if there be any need for evidence of anything done or suffered by either party on the strength of the line having been established to render the agreement binding."[56] Further, the New Brunswick Court of Appeal has stated that:

> It is well established that no length of time is required to make such an agreement [regarding the boundary between neighbouring properties] effective and the erection of a fence along the agreed line was not necessary to make the agreement binding on the parties to it.[57]

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[53]*Ibid.* at 26, 30, 33. Allen C.J. also noted (at 31) that "There is also ample evidence that the [the defendant] afterwards, in various ways, treat Kerr's line as the dividing line ..." but this was raised mainly to show that there was evidence to support the jury's finding that the Kerr line had been adopted by the plaintiff as the conventional line. In other words, the acts by the defendant were not necessary to establishing the conventional line but were merely evidence that one had been established. In any event, the acts by the party who now sought to object to the line (in this case the defendant) in living up to the line are obviously not acts of reliance by the party seeking to uphold the conventional line. In this case there was no evidence that the party seeking to uphold the line had relied upon it to his detriment, except that the parties put up a fence.

[54](1911), 10 E.L.R. 248 (N.B. C.A.) aff'g 40 N.B.R. 591 (S.C.) [hereinafter *McIntyre*, cited to E.L.R.].

[55]*Ibid.* at 603-4 Barker C.J. for the Supreme Court *en banc* on appeal, emphasis added. It should be noted that by the time the case came to trial there had been significant reliance on the line.

[56]See *Jollymore*, *supra* note 15 at 156, Longley J. concurring, Drysdale J. holding that there was reliance on the facts, and Graham C.J. dissenting.

[57]See *Hayes* v. *Driscoll*, *supra* note 2 at 779, Hughes C.J. citing *Wilbur*, *supra* note 10; although this was *dicta*, as the agreement had been made over 100 years before trial, and there had been reliance.

The law on this point would therefore appear to be well established, but for the New Brunswick Court of Appeal decision in *Re Hunter*.[58] In the late 1920s Maxwell Green, the predecessor in title of the defendant Mervin Green and the plaintiff, Blair Hunter, had disputed the location of their boundary. In the usual manner they hired a surveyor, Rutledge, to establish the line and, again as is usual, both parties were present when the line was run. Maxwell Green suggested that he pay for running two strands of barbed wire for part of the length of the line and Hunter pay the surveyor, and this was done. It appears that the only use of the land by Hunter was for the occasional cutting of wood. On these facts, the trial judge held that the parties had agreed that the line should be their boundary, and they lived up to it by blazing trees along the line which was not marked by a fence. Unfortunately, Rutledge had been sloppy in his work, and in the early 1970's, the defendant engaged another surveyor, Lingley, who was able to find good evidence of the original line, which did not correspond with the Rutledge line. It was found at trial (which finding was affirmed on appeal) that the Lingley line was the correct line according to the original grant. The question was therefore whether the Rutledge line was a conventional line.

At trial Stevenson J. held that the Rutledge line was established as the boundary, but this was reversed on appeal. In part,[59] the Court of Appeal held that "the acts of [Hunter] in cutting wood on the disputed area and continuing the Rutledge line by spotting it approximately once every five years are not sufficient to estop the appellant and his predecessors in title from repudiating the line."[60] This holding is very difficult to reconcile with the cases reviewed above which have held that no acts of reliance are necessary in the face of an express agreement, although certainly if there had been no clear agreement that the Rutledge line be the boundary, then acquiescing in the blazing of trees would not be sufficient to create an estoppel.[61]

It seems that the court was influenced by the fact that Rutledge had undoubtedly erred in setting the first line. However, cases are plentiful holding that a conventional line may be established even though it does not represent the true line,[62] and to depart from these cases would greatly undermine the principle

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[58]See *Re Hunter*, *supra* note 19.

[59]See, *infra*, Part III, H. Parties for a discussion of the other main issue.

[60]See *Re Hunter*, *supra* note 19 at 137.

[61]See *infra* Part III, F., 1., a. Nature of Conduct Required.

[62]See the cases cited *supra* note 16.

of finality. It is to be hoped that *Re Hunter* represents an aberration rather than a change in the law.[63]

F. Line Established by Conduct

1. Relevance of Conduct

Conduct is potentially relevant in two different ways, which should be distinguished. First, the conduct of the parties may be evidence of a past express agreement recognizing the line. For example, an express agreement as to the boundary may have been made by the parties' predecessors in title, but because of the passage of time, no direct evidence, such as a written agreement or testimony as to an oral agreement, can be produced. The conduct of the parties in the recent past may nonetheless allow the court to infer the existence of the earlier agreement.

Secondly, the conduct of the parties may be used to infer their agreement to a particular line as the boundary between them. In such a case, the conduct must be such as to show that the parties intended and implicitly agreed that the line should be the boundary between them. Normally this requires that one party rely on the line and that the other party acquiesce in this reliance. In some circumstances acquiesence alone may sufficient. For example, if the parties expressly agree to run a line for the purpose of establishing a boundary, and the line is run in the presence of both parties, either party may dispute the accuracy of the surveyor's work when the line is run, in which case no line is established[64]; but in the same circumstances, acquiesence in the line can be taken as agreement that it should be the boundary, without a subsequent reaffirmation.[65] On the other hand, if a line is run unilaterally by one party, even though that party intends to establish the boundary, and the other party knows of that intention, acquiesence in the line and its maintenance in the absence of dispute or significant reliance by the other party is not sufficient to establish a binding line, as this behaviour is consistent with an intention not to settle the boundary, but merely to put off the

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[63] *Ferrier* v. *Moodie* (1885), 12 U.C.Q.B. 379 (C.A.) also indicates that agreement alone without acts of possession cannot establish the boundary between properties. However, it appears to have been effectively overruled soon afterward: see *infra* Part III, J. Adverse Possession.

[64] See *Goodwin*, *supra* note 19 discussed *infra* Part III, F., 3. Reliance by Subsequent Purchaser.

[65] *Steeper* v. *Harding* (1884), 24 N.B.R. 143 at 146. See also the remark of Hughes J. in *Wilbur*, *supra* note 10, at 195 that "delay in objecting may and frequently does establish acquiesence", which also referred to a situation in which the parties had agreed to settle their boundary.

question.[66] Even if one party acquiesces not because she wishes to postpone the dispute, but in the belief that the line is the true line, in the absence of significant reliance by the other party, she will not be estopped from disputing the line on discovering her mistake.[67] *A fortiori* if one party occupies only up to a certain line in ignorance of the true line, he is not estopped from claiming the true line if the neighbour has not acted in reliance.[68]

Conduct which does not imply recognition of a particular line, but which nonetheless implies a misapprehension as to the location of the boundary, will not give rise to a conventional line, but may give rise to a more limited estoppel.[69]

a. Nature of Conduct Required

When the conduct of the parties is used to infer an agreement, the conduct, for instance, maintenance of blazes or occasional cutting of wood up to the line,[70] need not be reliance of such a nature as would give rise to an estoppel on its own; the conduct need only provide sufficient evidence that an agreement had been reached in the past. On the other hand, if the conduct alone gives rise to the estoppel, it must be such as would in itself make it inequitable to allow one of the parties to assert the true line.

This is well illustrated by a comparison of *Sullivan* v. *Lawlor*[71] with *Lake* v. *Dobson Lumber*.[72] In *Sullivan* there was no evidence of an express agreement and the line claimed as a conventional line was old and not clearly established. The trial judge was willing to infer an agreement from the evidence that the line had generally been lived up to by the parties, but the Court of Appeal reversed, holding that there was neither sufficient evidence of an agreement between the adjoining owners, nor evidence that the claimant had "ever actually cut timber or

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[66] See *Murray*, *supra* note 19 Harrison J. at 211; *Sutherland*, *supra* note 36; *Sullivan* v. *Lawlor* (1981), 45 N.S.R. (2d) 325 (C.A.) [hereinafter *Sullivan*] discussed *infra* at notes 70-77 and accompanying text; *O'Melia* v. *Himmelman* (1985), 69 N.S.R. (2d) 271 (existence of a short section of fence in the disputed area did not establish that there had been an agreement to establish the boundary); *Piers* v. *Whiting* (1923), 50 N.B.R. 363 (no evidence that the parties had agreed to the line in question).

[67] See *McDonald* v. *McDonald* (1867), 7 N.S.R. 42 [hereinafter *McDonald*].

[68] *Byram* v. *Violette* (1893), 32 N.B.R. 68 (C.A.) Tuck J. at 74.

[69] See *infra* Part III, F., 1., b. Remedy.

[70] *Murray*, *supra* note 19, was such a case, in which the claimed line was of unknown origin, and had been acquiesced in but never accepted by both parties as marking the boundary. The only act of reliance was the occasional cutting of trees up to the line, and it was held that this was not sufficient to give rise to an estoppel.

[71] *Supra* note 66.

[72] (1982), 52 N.S.R. (2d) 431, aff'd on appeal 59 N.S.R. (2d) 445 [hereinafter *Dobson Lumber*].

otherwise used or occupied"[73] the strip of land in dispute. The Court's statement that there was no evidence of an agreement is not entirely accurate; there was no direct evidence, but the trial judge had inferred an agreement from the existence of a blazed line and the fact that the parties lived up to it. However, given that the line was very poorly marked and difficult to follow, and without any direct evidence of an agreement, a holding by the Court of Appeal that there was not sufficient evidence to infer an agreement would be justifiable. Similarly, the Court of Appeal's statement that there was no evidence of use of the disputed strip is not entirely accurate, as the trial judge based his decision primarily on the fact that the use and occupation of the lands by the parties followed the claimed conventional line.[74] However, the Court of Appeal's decision is justifiable on the basis that in the absence of sufficient evidence of an agreement, the use and occupation of the lands, which consisted primarily of occasional logging, was not sufficient to set up an estoppel.

In *Dawson Lumber*, as in *Sullivan*, there was no direct evidence of an express agreement to establish a boundary, but the trial judge inferred that it had been established and blazed by predecessors in title to the parties. Subsequently the parties and their predecessor in title "over the years maintained the blazes. They treated it as the boundary line in their use of their respective lands."[75] The only use of the land was "for cutting from time to time ... [t]he defendants' and the plaintiff's predecessors in title have occupied the lands as one does with wild lands. There was no evidence about taxes by either party."[76] The trial judge further noted that "[t]he defendant has acted to his detriment by cutting on the area to the north of the line 'B-E' and constructing a road."[77] Again, there is no finding in the decision as to whether the road would have been built even without reliance on the line in question; but the area in dispute was ten acres of a 200 acre lot, so that it seem unlikely that the location of the line was decisive in determining whether the road was built. The distinguishing feature seems to be primarily that in *Dawson Lumber* the line was clearly marked with old blazes which had been more recently "brightened up", whereas in *Sullivan* the line could barely be found. While the state of the blaze is not relevant in itself, but the evidence supporting an inference of an agreement was much stronger in *Dawson Lumber* than in *Sullivan*.

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[73]See *Sullivan*, *supra* note 66 at 335.

[74]*Ibid.* at 327.

[75]See *Dobson Lumber*, *supra* note 72 at 441-2.

[76]*Ibid.* at 442.

[77]*Ibid.* at 442.

b. Remedy

If the conduct of the parties does not imply recognition of a particular line, but it does imply a reasonable misapprehension as to the true boundary by one party which is acted upon by that party and acquiesced in by the other party, then an estoppel will be set up, but only to the extent of the actual reliance. This possibility is raised by the decision of Dickson J. in *Quartermain* v. *Stevens*.[78] In that case, when the plaintiff acquiesced in treating a line of trees as marking the boundary between the properties (with no evidence of an express agreement that the trees mark the boundary), he was estopped from asserting his rights to the portion of the property upon which the defendant had erected a building, but he was entitled to assert his rights to the "hitherto abandoned portion of his land upon which his neighbours had not exercised rights of ownership."[79] In such a case it is not entirely accurate to call the result a conventional line, since the entire line is not binding: it is better described simply as an estoppel.

This result must be applied carefully. It is the general rule in estoppel by representation that the person making the representation is estopped from denying it once it has been relied upon regardless of the extent of the loss incurred thereby.[80] From this it follows that if the acquiesence in the supposed line during construction of a house on the true line is taken as a representation that the supposed line is in fact the true line, then the adverse claimant should be estopped from asserting that the line is not in fact the true line along its entire length. It seems then that the case should be taken as one in which it was not established on the facts that there was agreement that the line of trees constituted the boundary. Making a determination as to the nature of the implicit representation may be very difficult. In building his house were he did, the claimant was certainly relying on an implicit representation that he owned the land on which the house was built. However, it is arguable he had also relied on the line along its entire length and not just at the particular place where the house was built, as he may have intended not just to build a house on his own property, but to build a house at a certain distance from the property line.

2. Degree of Reliance Required

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[78](1971), 4 N.B.R. (2d) 266 (Q.B.) [hereinafter *Quartermain*].

[79]*Ibid.* at 272-3. Dickson J. treated this as a case in which the plaintiff was entitled to dispute the conventional line after having discovered that the location was mistaken. In so doing he relied on the statement of Henry J. in *Grasett*, *supra* note 1, which I have argued was *obiter dicta* and does not reflect the law. He also relied on *McDonald*, *supra* note 69, which was a case in which there had been no significant reliance on the line by the party who wished to confirm it.

[80]See Spencer Bower & Turner, *supra* note 7 at 112-144.

It is difficult to specify the degree of reliance which is needed to establish a conventional line by conduct alone, as there are very few cases in which a conventional line is established through conduct alone without either direct or indirect evidence of an express agreement, and because such questions necessarily turn on the particular facts of each case. *Dobson Lumber* provides some help in this area. Some further assistance may also be had from cases in which, despite direct evidence of an express agreement, the courts indicated that reliance was a necessary element and so considered whether the reliance was sufficient on the facts. These cases should be used carefully. I have argued that reliance is not essential and that consideration of reliance in these cases was strictly *obiter dicta*. Further, as discussed above, it may be that a greater degree of reliance is required when it is claimed that a conventional line is established on the basis of reliance alone. Nonetheless, these decisions may provide some guidance in indicating how much reliance is necessary to establish a conventional line lacking an express agreement. In this context it has been held that some logging along with improvement of the woodlot by cutting out dead and diseased trees, and building a road, which provided access to the lot of which the disputed area was a part, was sufficient reliance to establish a conventional line.[81] Similarly, sufficient alteration of the defendant's position was found because the defendants "have been permitted to cultivate the fields, to cut firewood, to lumber over the property, and to sell stumpage, to mark out the boundaries year after year ... with the acquiesence of the plaintiffs,"[82] and in a case in which the fence was maintained by both parties and "the plaintiff and his predecessor in title exclusively had cut wood and timber up to the brook fence and had pastured and watered their cattle there".[83]

3. *Reliance by Subsequent Purchaser*

The important issue of reliance on a line by a subsequent purchaser was raised in *Goodwin* v. *Saurette*.[84] A line between the properties in question had been established and blazed by the defendant's predecessor in title. The plaintiff was present when the line was established, but he had not agreed that the line was properly run or that it should constitute the boundary, and consequently no conventional line was established. The plaintiff nonetheless acquiesced in the line for many years and the blazes were clearly maintained and renewed. The

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[81]See *Crossland* v. *Dorey*, *supra* note 13. It is not clear from the decision whether the road would have been built even without reliance on the line in question: the area in dispute is not mentioned, although it is apparently a relatively small portion of a seventy acre lot.

[82]See *MacMillan*, *supra* note 16 at 120.

[83]See *Kaneen*, *supra* note 38 at 331. However, it was also held that the fence was on the true line, so that the conventional line and true line corresponded.

[84]See *Goodwin*, *supra* note 19.

defendant bought the property after the line had been established, and there was evidence that he had inspected the boundaries as indicated by the blazes before purchasing the land. However, the defendant used the property solely for recreational purposes up until the time of the dispute. The plaintiff continued to acquiesce in the boundary until the defendant began to cut trees on the property, at which time the plaintiff disputed the line. It was held that in these circumstances there was not sufficient reliance on the land to give rise to an estoppel.

I submit that while *Goodwin* was correctly decided on its facts, it should be applied carefully. Two competing concerns are at stake. We do not wish to force a neighbour to jump to take legal action simply because his neighbour has seen fit to unilaterally establish a line, but neither do we wish to establish a rule which would mean that well marked boundaries could not be relied upon, so that any prospective purchaser would need to personally inquire of all the neighbours as to the accuracy of the boundaries, no matter how clearly established they appear to be. The focus of the inquiry should be on whether it was reasonable for the party who established the line and subsequently sold the property (the vendor), to rely on the neighbour's acquiesence as being an acknowledgement of the accuracy of the line. This is simply to emphasize the general rule set out at the beginning of this section, namely that the conduct establishing the line must be such as to show that the parties intended and implicitly agreed that the line be the boundary between them. The neighbour would then not need to take legal action to defend his boundary, but would only need to make it clear to the other party that he did not agree to the line, as was done in *Goodwin*. The purchaser will not have direct knowledge of the circumstances under which the line was made, but he can nonetheless confidently rely on a well-marked line if he has recourse against the *vendor* of the property if the line did not in fact represent the boundary. The vendor's liability if the apparent boundary were subsequently corrected against the purchasers would be founded on negligent misrepresentation. The vendor is certainly a party who has special knowledge regarding the circumstances under which the boundary was established, and it would not require an explicit statement to constitute a representation that the apparent boundary was the true boundary. Of course, the representation would have to have been material to the purchase price in order for the action to be sustained.

G. Statute of Frauds

A conventional line does not fall within the *Statute of Frauds*, as it does not alienate land or affect title. This was clearly established in the earliest cases, in

which the applicability of the *Statute of Frauds* was the main issue.[85] Since establishing a conventional line does not involve alienation of property, it appears that it does not contravene any statutory prohibition against subdivision of land.[86]

H. Parties

A conventional line may be established by owners of adjoining parcels or their agents.[87] The parties must be neighbours, so that one party cannot unilaterally establish a line either to his advantage or his detriment.[88] The Crown may bind

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[85]See *Lawrence*, *supra* note 13 Chipman C.J. at 443: "There was no question of title between the parties, but merely a question of boundary." See also *Davison*, *supra* note 4; *Wilbur*, *supra* note 10, Hughes J. at 195; *Grasett*, *supra* note 1, Strong J. at 122: "it would appear that an agreement to a conventional line is not within the *Statute of Frauds* ..."; *Penn* v. *Lord Baltimore*, *supra* note 36, Lord Hardwicke at 1135: "To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits". The *Statute of Frauds* was not specifically considered: the issue arose because it was argued that the nature of the grant (in the American colonies) was such that alienation by the grantees from the Crown was not possible. The remark is *obiter dicta*, as Lord Hardwicke also held that the land could be alienated.

[86]It has consistently been held that boundaries established by quitclaim deeds used to acknowledge acquisition of land through adverse possession do not contravene any statutory prohibition against subdivision, and do not require planning approval because such a transaction does no more than bring the deed into compliance with existing possessory title: see *Re Turner and Turner Funeral Home Ltd.* [1972] 2 O.R. 851, 27 D.L.R. (3d) 30; *Re Duthie and Wall* (1979) 24 O.R. (2d) 49 (H.C.); *MacMain* v. *Hurontario Mgmt Services Ltd* (1980) 14 R.P.R. 158. This confirms what is perhaps obvious, that acquisition of property through adverse possession, without a quitclaim deed, does not contravene any prohibition on subdivision. Any possible transfer of land in establishing a conventional line is certainly no more objectionable than that involved with acquisition of land through adverse possession.

[87]See *Jollymore*, *supra* note 15.

[88]See *Archibald* v. *Morrison* (1868) 7 N.S.R. 272 (C.A.) [hereinafter *Archibald*], where an owner of land bounding on Crown land established a line as his boundary which did not go up to the limits of his grant. It was held that a subsequent grantee of adjoining land could not thereby claim up to the line established by the first owner, in derogation of the first owner's grant, for neither the Crown nor the subsequent adjoining owner had been parties to the line.

itself by a conventional line.[89] The parties may and often do hire a surveyor to run the line, but this is not essential to establishing a conventional line.[90]

The ability of a potential purchaser to enter into a binding agreement regarding the boundary of the property to be purchased is the subject of some dispute. In Nova Scotia, in *Spencer* v. *Benjamin*[91] the Court of Appeal has recently held that a conventional line could be – and, on the facts, was – established by agreement between a prospective purchaser who subsequently did purchase the land, and the owner of the adjoining land.[92]

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[89]See *Booth*, *supra* note 5 at 386-7 Middleton J., aff'd on appeal:

> When the early grants [of timber licences] were made, there was doubt as to the location of the boundary, and the Robertson line was run for the purpose of establishing a conventional boundary between these berths. It was well known that this was not the true line, and that the true line could not be located without expense which no one desired to incur; and this line was run, with the concurrence of the owners of the adjoining berths, by the surveyor chosen by the Crown to define the limits in a way which would bind not only the owners but also the Crown.

See also *Belding* v. *Hallet* (1847) 5 N.B.R. 359 [hereinafter *Belding*] holding that a Crown grant erroneously run is not open to correction after being relied upon for sixteen years, notwithstanding that it is not the true line according to the grant. But cf *Mersereau* v. *Swim* (1914) 42 N.B.R. 497 (C.A.) [hereinafter *Mersereau*], where it was said that "I know of no mode, apart from special statutory authority, by which the Crown can convey land otherwise than by grant under the Great Seal" at 523. This statement is *obiter dicta*, as in that case the claimed agreement was not an agreement at all, as the relevant letter from the Crown said on its face that "the matter is not yet settled". Further, this *dicta* conflicts with the established proposition that settling of a conventional line is not an alienation of land; it also conflicts with the historical fact that the original Crown grants were very poorly laid out, and the only means of establishing their limits was to use the lines established by the Crown surveyors on the ground, even if these were not consistent with the deed.

[90]See *Jollymore*, *supra* note 15 and *Kingston*, *supra* note 16.

[91](1975), 11 N.S.R. (2d) 123 (A.D.) [hereinafter *Spencer*].

[92]The Court noted at 136 that "[i]t is true that when such representation was made the respondent was not then the owner of the...land," but held that since the representation was made with the intention that it be relied upon, and because it was relied upon, it was binding. *Spencer* was followed on similar facts in *Hill* v. *MacLean* (1991) 100 N.S.R. (2d) 205 (T.D.).

However, in *Re Hunter*[93] the New Brunswick Court of Appeal held that only the owner or an agent of the owner can make a binding conventional line. This means that a potential purchaser, who, wishing to the know the boundaries of the land before purchase, had the boundary surveyed and agreed with the adjoining owner to abide by the line so determined, and then, relying on this line, purchased the property, would not be able to claim that a conventional line had been established.[94]

The Court in *Re Hunter* relied on an earlier Nova Scotia Court of Appeal decision in *Smith* v. *Anderson*[95] in which it was held that a prospective purchaser who apparently had entered into a valid contract for the purchase of the land, and who did subsequently purchase the property, is not competent to enter into an agreement to establish a conventional line. The reason given for this rule in *Smith* was simply that "There may seem to be little difference between the position of an owner and that of a prospective purchaser who afterwards buys the land; but the old judges, who adopted the principle, were of the opinion that its limitations

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[93]See *Re Hunter*, *supra* note 19. In *Re Hunter* the applicant's property was apparently family property. The applicant, Blair Hunter, his parents and his children lived on the land, but title to the property was vested in the applicant's aunt at the time when the applicant and the owner of the adjoining property, Maxwell Green, had the line between the properties surveyed, and agreed that the line so established would serve as the boundary between the properties. By the time of the application, the aunt had conveyed the property to the applicant. The adverse claimant, Mervin Green, was the successor in title to Maxwell Green (and apparently the grandson). It was held that the agreement had not established a conventional line because the applicant was neither the owner nor the agent of the owner at the time the line was agreed to. While it might be possible to suggest that the applicant did not in fact rely on the line in deciding to acquire the property, as it was family property which would have been passed down in any event, the statement of law, citing *Smith* v. *Anderson* (1942) 16 M.P.R. 287 (N.S. C.A.) [hereinafter *Smith*], clearly applies to any potential purchaser.

[94]These were substantially the facts in *Smith*, *ibid.* although it may be that the purchaser had already entered into a binding agreement of purchase and sale. The state of the transaction was that:

> [The defendant] had purchased the property from the owner, who was in the United States, the deed had been executed and was in the bank at New Glasgow and would be delivered to the defendant on payment of the purchase price. What the defendant said about it was: "I had the lot, the deed was in the bank *and I wanted a settled line before I paid for it*"

Smith at 292 [emphasis added]. However, even if the defendant had entered into a binding agreement to purchase the property, this would not be a distinguishing feature. In *Re Hunter*, *ibid* which followed *Smith*, there was no such binding agrement to purchase the property. Further, the decision in *Smith* itself made no real mention of this point, and certainly did not turn on it. And in any event, it would be absurd to say that a potential purchaser who had not entered into a binding agreement to purchase the property could enter into a binding conventional line, but would be precluded from doing so after having entered into an agreement to purchase the property, but could once again establish a conventional line once the deal was closed.

[95]*Ibid.*

should not be extended."[96] Even in accepting this proposition, the court doubted its logic.

Illogicality may sometimes be accepted as the price for certainty in the law when precedent is ample and clear, but *Smith* cited only a single precedent on this point, and that case, *McDonald* v. *McDonald*[97] does not stand for the proposition for which it was cited. It is true that in *McDonald* Johnstone E.J. said that he did not wish to see the principle of conventional lines extended beyond the principles already laid down, but the context had nothing to do with the status of purchasers. Rather, the defendant who sought to challenge the claimed conventional line which had been run by the adjoining landowner (the plaintiff) without the agreement of either the defendant or the defendant's predecessor in title.[98] In other words, the plaintiff sought to hold the defendant to a line which the plaintiff had run unilaterally, and it was this proposed extension of the earlier cases to which the Court objected.

The rule set out in *Re Hunter* and *Smith* is not only based on weak authority, it is very difficult to accept on broader principles. While I have suggested that the doctrine of conventional lines is not based solely on estoppel, and goes beyond estoppel in cases where an express agreement is made but not relied upon, it certainly does not oust estoppel. On the basic principles of estoppel by representation, a person (the neighbour) who made representations to another (the prospective purchaser) with the knowledge that those representations will be acted upon and they are acted upon (in purchasing the property) to the detriment of the person to whom the representation is made (the purchaser would have paid less for the land if the true line had been known, or perhaps would not have purchased the property), then that person will be estopped from denying the representation. Even if a conventional line was not established in these circumstances, the purchaser would undoubtedly succeed on the basis of pure estoppel by representation. It should be noted that in *Smith* Hall J., holding that no conventional line was established because of the status of the parties, noted that "the only possible defence was one of estoppel" and it was not raised in the original pleading or in the amendment after trial.[99] It seems that the result of *Re*

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[96]*Ibid.* Graham J. at 290.

[97]*Supra* note 67.

[98]*Ibid.*, Dodd J. at 61 "There is not a tittle of evidence that [the defendant's predecessor in title] ever acknowledged the line claimed by the plaintiff, or that he was aware that such a line existed ...". The defendant was not present when the line was run, nor is there any indication that he was aware of the circumstances under which it was run. The defendant did not take possession of the property until two or three years after the plaintiff ran his line. He acquiesced in the line for four or five years after taking possession of the property, but challenged it as soon as he became aware that the line might not be accurate.

[99]See *Smith*, *supra* note 93 at 293.

Hunter and *Smith* is that a landowner who wishes to rely on a conventional line established with the neighbouring landowner before the purchase, may do so, but she must plead estoppel rather than a conventional line. This is an unfortunate technicality, especially in view of the close relationship between the doctrine of conventional lines and estoppel.

It appears, on the basis of *Spencer*, that the rule in *Smith* is no longer good law in Nova Scotia. While *Smith* was not specifically discussed in *Spencer* the cases are irreconcilable on the facts. *Re Hunter* can be distinguished from *Spencer* and *Smith* on the basis that the claimant in *Re Hunter* had not entered into an agreement to purchase the land at the time the line in question was agreed to, although he did subsequently acquire the land. It might therefore be argued that, although the rule is more broadly stated, *Re Hunter* could be confined on its facts to cases in which the potential purchaser had not yet entered into a agreement to purchase, and where there is such an agreement, *Spencer* applies. However, this distinction is a technical one. On the facts in *Re Hunter* it appears that the property was family property, and while the claimant had not entered into a formal agreement to purchase the land at the time the agreement was made, it was nonetheless clear that he would acquire the land in due course. Further, the distinction is not a particularly logical one. If a potential purchaser agreed to a line with the adjoining landowner and then entered into an agreement to purchase the land, her claim on the basis of estoppel alone would be just as good as if she had entered into the agreement first, and then entered into the agreement to purchase. It seems pointless to require the purchaser to plead estoppel in the first case, but to claim a conventional line in the second.

In conclusion, the rule set out by the Nova Scotia Court of Appeal in *Spencer* is preferable to that set out in New Brunswick in *Re Hunter*, and it is to be hoped that *Re Hunter* will eventually be reversed on this point. Until then a landowner in New Brunswick seeking to claim a line established before the purchase was complete is advised to plead estoppel in addition to claiming a conventional line.

I. Relationship with Adverse Possession

While the issue of adverse possession is strictly beyond the purview of this article, a boundary inconsistent with the deed can be established by adverse possession or a conventional line, and the two are often pleaded in the alternative. The relationship between the two should therefore be clarified.[100] As the previous

[100]Note that the *C.E.D.*, *supra* note 14, vol. 3, Title 19 §46, cites a number of cases discussed in this article for the proposition that "The mutual agreement of the parties in fixing the boundary line between them constitutes a valuable consideration and a specific performance may be ordered in respect of it." While this statement is accurate, the cases cited do not stand for this proposition, but concern the issue of act sufficient to establish possession for the purpose of the *Statute of Limitations*

discussion has shown, acquiesence in an established boundary accompanied by significant acts of reliance on the line will establish a conventional line, but acquiesence in a line alone, with no evidence of intention that the line was established to settle the boundary, and without significant reliance on the line, is not sufficient to establish a conventional line.[101] However, in the same circumstances, that is, a line established and blazed but with no agreement that it shall be the boundary, acquiesence in the line combined with acts of occupation which would be insufficient to established a conventional line may be sufficient to establish possession for the purposes of the Statute of Limitations.[102] In other words, circumstances insufficient to ground a claim of a conventional line may be sufficient to establish a claim to the property on the basis of adverse possession.

A slightly different example is one in which there is evidence of an agreement to establish a boundary but no reliance whatsoever on the boundary. *Bernard* v. *Gibson*[103] was such a case, and the Ontario Court of Appeal held that possession for the purposes of the *Limitations Act* can be established on the basis of constructive possession based on the agreed line, even without acts of occupation which would be required to establish possession in the absence of an agreed line.[104] In this case a conventional line was arguably established, but it was not

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in cases in which there is no evidence of an agreement to abide by the boundary in question.

[101]See the discussion, *supra*, Part III, G. Line Established by Conduct.

[102]See *Steers* v. *Shaw* (1882) 1 O.R. 26 (Q.B.) aff'd 1 O.R. 30 (C.A.) holding adverse possession established on the basis of acquiesence in a blazed line through a woodlot, with at least occasional cutting on both sides up to the line. There seems no basis for a conventional line, as the court found that the plaintiff had always intended to dispute the line; nor does it seem that there were sufficient acts of reliance in the absence of an express agreement. Nonetheless, acquiesence in the line was held to establish possession under the limitations act. Similarly in *McGregor* v. *Keiller* (1885) 9 O.R. 677 adverse possession was established by cutting timber up to the line and by the fact that both parties abided by the line. The acts of possession of were described as "cutting wood"; the extent of the cutting, eg occasional or regular, selective or extensive, is not clear from the case. In *Hughes and Hughes* v. *Speight, Speight and O'Dell* (1979) 28 N.B.R. (2d) 191 (Q.B.) a fence had originally been erected to restrain cattle and not to demarcate the boundary, and thus it did not constitute a conventional line. However, subsequent owners treated it as the boundary, and after 30 years of acquiesence, it was held that the paper title holders had lost title due to adverse possession.

[103](1874) 21 Gr. 195 (Ont. C.A.) [hereinafter *Bernard*].

[104]*Ibid.*, Strong V.-C. at 202: "Although no beneficial enjoyment was had by either party of so much of the land as lay upon either side of the line running through the wood-land, I am of the opinion that each party must be considered to have had since 1851, such a possession according to that line as is sufficient to constitute a title under the *Statute of Limitations*." See also *Appleby* v. *Secord* (1882) 22 N.B.R. 377 in which it was held, at 381-2, that actual possession up to an agreed line is not required, "and any act of possession on any part of the land, would extend such possession up to the line agreed upon" for the purposes of adverse possession. Again, it appears that the case might have been decided solely on the basis of a conventional line, but this was not necessary as there had been possession for more than twenty years.

necessary to decide the question once it was decided that the possession was sufficient for the purposes of the limitations act.[105]

Ferrier v. *Moodie*,[106] again in the Ontario Court of Appeal, appears to be contrary to *Bernard*. In *Ferrier* a line was established, cleared in part and blazed along the rest. It was held that the action must be on adverse possession alone, and must show actual possession, not just constructive possession, as constructive possession applies only when there is occupation under a colour of right; and that merely agreeing to and designating the line was not sufficient to prevent the true line from being established.

> The defendant could not rely upon the agreement alone, if there were in fact one established to run a line between the parties, and that such a line was designated more than twenty years ago, without also shewing some visible occupation or possession of the land. The mere agreement and designating the line would not of themselves establish an actual possession of the land.[107]

This also implies that mere agreement is not sufficient to establish a conventional line, as otherwise the occupation would have been under colour of right and constructive possession would have applied.

However, the subsequent case of *Shepherdson* v. *McCullough*[108] in the same court is consistent with *Bernard*. In *Shepherdson* the parties marked out a line and treated it as their dividing boundary for more than ten years. Part of the land was enclosed, but part was not, and both parties lived up to the line in the unfenced part, where the line was blazed, and cut up to it but refrained from cutting across it. It was held that the plaintiff had gained title to the entire land up to the boundary. Cameroon J. stated:

> I am clearly of the opinion that if two persons actually living on parts of the same lot verbally agree that a particular line shall be deemed the boundary between

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[105]*Ibid. Bernard*, Strong V.-C. considered arguments both for and against the establishment of the conventional line, and expressly declined to decide whether one was established. Blake V.-C. clearly held that a conventional line could be established, even without the limitations act, simply on the basis that the line was established on the basis of a survey "had between the parties for the express purpose of defining their rights as to their respective lots, the paying by each party of the share of the surveyor's expenses, the putting up of a fence, and the settlement of the cost this matter in the same way, and the acting on this line for upwards of fourteen years..." at 212, and "[w]here with this intention parties settle on certain boundaries, I think they should be kept to them, unless they bring themselves within those rules under which this Court relieves parties at time from such arrangements." at 212-3. Spragge C., at 200-1, would have held that there was no conventional line established, but on the basis that there was no evidence that there was no agreement that the line should constitute the boundary.

[106]*Supra* note 63.

[107]*Ibid.* at 382.

[108](1882), 46 U.C.Q.B. 573 (C.A.) [hereinafter *Shepherdson*].

> them, and they go on using the land in the same manner as they would have done if the true boundary had been the same as their conventional line, each party must be considered in the actual possession of the land on his own side.[109]

While Hagarty C.J. noted:

> there was a line mutually established, marked and visible as the agreed on boundary, Then if the evidence establish that the parties by their acts for the requisite length of time clearly treat such line as their dividing boundary, I do not see why it may not be properly left to a jury to say if there have not been the possession of one and the exclusion of the other for the necessary time.[110]

Armour J., dissenting, relied heavily on *Ferrier*, but the majority did not mention it at all. By ignoring *Ferrier* when it was clearly raised and on point, and coming to an opposite conclusion on the facts, the majority appear to have effectively overruled *Ferrier*.

While *Shepherdson* does not address the issue of whether agreement without reliance is sufficient to establish the boundary in the absence of passage of sufficient time under the *Limitations Act*, overruling *Ferrier* on the issue of whether agreement is sufficient to establish possession it greatly weakens *Ferrier* as authority for the proposition that simple agreement is insufficient to establish a conventional line.[111]

The case where a boundary is acquiesced in, although it may not have been agreed to settle the boundary, is sometimes confused with cases in which adverse possession is established in a fenced portion of a lot, and the question is whether this gives a right to have the boundary between the parcels determined by prolongation of the fence, *without any evidence of acquiesence in that prolongation,*

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[109] *Ibid.* at 609.

[110] *Ibid.* at 581.

[111] It should also be noted that in *Charbonneau* v. *McCusker* (1910) 22 O.L.R. 46 (C.A.), which concerned a blazed line run through a wooded area, it was stated that if plaintiff had accepted the line, there was nothing to prevent him changing his mind, as there was nothing done in reliance. *Ferrier* and *Bernard* were cited for the point. There is nothing in *Bernard*, *supra* note 104, to support this apart from Strong V.-C.'s statement at 203-4 that:

> On looking into the American authorities I have, however, been unable to find any case in which a parol agreement to be bound by a particular line has been held conclusive, without the adjunct of either long continued possession sufficient to give a title or...or such standing by and acquiesence in the acts of the opposite party on the faith of the established boundary as would on ordinary principles constitute an equitable estoppel.

As noted *supra* note 106, this was a "however" contrasting the American cases with English ones, and Strong V.-C. expressly declined to decide this point. In any event, the statement was *obiter dicta* as the court found that there had been no agreement to accept the line.

whether marked or unmarked, as the boundary.[112] The law in such a case was clearly laid out in *Charbonneau v. McCusker*[113], in which the parties ran a line, but:

> it is plain that there was then no acceptance of this line and agreement to be bound by it on the part of the plaintiff.
>
> . . .
>
> Neither, in my opinion, can anything that took place afterwards bind the plaintiff to go by that line.
>
> . . .
>
> That the having a fence on an agreed line part of the way, however, does not give the right to have that extended all the way, as the line, seems to me to have always been consistently held by the Courts from the earliest to the most recent times.
>
> It is true that there are many cases, such as *Shepherdson* v. *McCullough* and *Steers* v. *Shaw*, where the line formed by the protraction of a fence has been held to constitute the boundary line, but there was always a line run, put or marked out, and observed and acted upon by each party exercising acts of ownership according to it; and it was this observing of the line that was decisive, and not the line claimed being the continuation of the fence.[114]

J. Relationship with Rules of Evidence

It should be pointed out that old fences or other evidence of the limits of possession which may be related back to the time when the plot was laid out are good evidence of the original location of the boundary. This is so even if there is no reliance on the fence, or no agreement that it serve as the boundary. In such a case the fence may be held to be the boundary even if the parties did not agree that it should, because it is evidence of the original boundaries. On the other hand, a fence agreed to is clearly not evidence of original boundaries.

IV. *Bea v. Robinson*

The case of *Bea* v. *Robinson*[115] deserves separate attention as it is a recent case which has greatly disturbed settled law regarding conventional lines. In it, Boland J. held that a conventional line can only be established when the true line is undiscoverable: "When a parol agreement as to a boundary is at variance with the

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[112]See *Huffman* v. *Rush* (1904) 7 O.L.R. 346 in which Meredith C.J. seems to doubt the authority of *Shepherdson*, but on the facts in *Huffman*, while there was a line, there was not sufficient evidence that the parties had respected it and intended it to be their boundary – to the contrary, some evidence that one party had been cutting over all of the lands in question. The result in *Huffman* is therefore quite consistent with *Shepherdson*.

[113]*Supra* note 111.

[114]*Ibid.* at 49-52.

[115]*Supra* note 14.

boundary that may be determined by reference to a deed or plan, then the agreement is an unenforceable attempt to convey land without the formal requirements of writing and registration."[116] This statement is simply wrong, as it is contrary to the explicit statements and the decisions on the facts in many cases, at all level of courts, which have held that once established, a conventional line is enforceable notwithstanding that it does not agree with the true line as shown by the deed: for example, there are many cases in which a conventional line was held to be established despite the fact that the true line was not only discoverable, but was actually subsequently established by further enquiry, as well as to cases in which it is not known whether the true line is discoverable because the point was held to be irrelevant once a conventional line was established.[117]

Boland J.'s decision rested on two main points. The first was that "In *Grasett* v. *Carter* one of the prerequisites for finding a conventional line was that there be uncertainty as to the dividing line of the two lots ...".[118] While in *Grasett* the true line could not be established, there is nothing in the case that justifies the inference that this is a prerequisite to the establishment of a conventional line. The closest is Ritchie C.J.'s statement that "where there may be a doubt as to the exact true line,"[119] the parties may establish a conventional line. There may well be a doubt as to the true line even though it would be discoverable through sufficient enquiry and expenditure of money, and in any event, the remaining decisions make no reference even to the need for a doubt. In any event, any statement on the issue in *Grasett* are *dicta*, since the true line was not discoverable. A true test of the law on this point would require a case where a conventional line was discoverable and the establishment of a conventional line was affirmed or denied. Nonetheless, on the sole authority of this dubious interpretation of *Grasett* Boland J. stated, "In my view, when the parties do not know the location of the line because they have made no inquiries or other attempts to discover it, that is not an uncertain boundary that can be varied by agreement."[120]

Boland J. also held that no conventional line was established because any such agreement would contravene the *Statute of Frauds*. After quoting the relevant provision Ontario *Statute of Frauds*, she continued with the following paragraph:

> If this section applied to the case at bar then the agreement regarding the fence would have created a tenancy at will, which could be determined at any time by the defendant. This would defeat the plaintiffs; however, it has been held in a

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[116]*Ibid.* at 19.

[117]See the cases cited *supra* notes 15 and 16.

[118]See *Bea*, *supra* note 14, at 17-8.

[119]See *Grasett*, *supra* note 1, at 110.

[120]See *Bea*, *supra* note 14, at 18.

> great number of cases, beginning with *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444, 27 E.R. 1132, that the *Statute of Frauds* does not apply to a settlement of a boundary by a conventional line because it is not an alienation of an estate in land. According to the theory of Lord Hardwicke in that case "the boundaries so settled" are presumed to be "true and ancient limits", not the result of any exchange of land. This reasoning makes a distinction between matters of title and matters of boundary, but I find this unacceptable in light of the fact that agreements for conventional lines are binding on the successors in title to the original parties: *Jollymore* v. *Acker* supra. This being the case there is no way in my mind to deny that title to the lands in question is determined by the agreement for the conventional line. Accordingly, the best the plaintiffs could have obtained by the agreement with the defendants was a tenancy at will which was unequivocally determined by their being ejected from the property, and, therefore, they cannot show a better title than to the defendants.[121]

It may be that Boland J. found the reasoning of Lord Hardwicke "unacceptable", but her conclusion that conventional lines are not within the *Statute of Frauds* was affirmed by the Supreme Court of Canada and has been applied in many decisions both ancient and modern, by trial courts and appellate courts.[122] While matters of policy increasingly inform the law, and rightly so, the need for certainty in law, reflected in the principle of *stare decisis*, is an important policy consideration in its own right. Justice Boland's attempt to singlehandedly rewrite the settled law on this matter is nothing short of astonishing.

Boland J. supported her argument with the remark that stated that "a boundary agreed upon by adjoining landowners can only be presumed to be the true and ancient limit of the property when there is no registered instrument to contradict the agreement."[123] While this is correct as a matter of logic, and it is true that this presumption was employed in some of the early cases, such as *Penn* v. *Lord Baltimore* it was soon overtaken by the extension of the doctrine to cases in which the true line was indeed discoverable, so that the presumption could no longer operate. As long ago as 1845, in *Woodberry*, it was recognized that this presumption was simply a fiction, and was not the true basis of the doctrine.[124] From that time, until Boland J.'s decision in 1977, we see no mention of this presumption as being the basis of the doctrine. To resurrect it now and use it to overturn more than a hundred years of the development of the law, is formalism run rampant. Boland J. herself admits that her decision is contrary to established precedent:

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[121] *Ibid.* at 18-19.

[122] See *supra* notes 86 and 87 and accompanying text.

[123] See *Bea*, *supra* note 14 at 19.

[124] *Ibid.* at 26, Bliss J. said that on the facts, she would be willing to make a presumption of a conveyance "if it were necessary to make it. But I do not consider it necessary."

> On the basis of *Grasett v. Carter, supra,* and the other cases referred to above, it would seem that a conventional line was established in the case at bar and that, therefore, the plaintiffs should succeed; however, I have not reached this conclusion for the reasons below.[125]

The law in the area is sufficiently clear that Boland J.'s conclusions would be remarkable simply because they are so clearly contrary to established law. The above passage, indicating that Boland J. consciously took it upon herself to alter established law in the face of numerous decisions from higher courts, is astounding. This decision is noteworthy as a study in judicial psychology, but it in no way reflects the law.[126]

V. *Conclusion*

The doctrine of conventional lines provides an admirably efficient and fair means of settling boundary disputes between neighbours while minimizing recourse to the courts. On the whole, the law in this area is logical and equitable, and only a few minor adjustments and clarifications are needed.

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[125]*Ibid.* at 17.

[126]The decision has also been doubted on a point relating to adverse possession in *Lewis* v. *Romita* (1980) 13 R.P.R. 188 (Ont. H.C.) at 194-5.