CONCLUSION

Since the buyers have not stated legal causes of action in their complaint, the demurrer must be sustained. The complaint, however, may be amended to correct the defects and leave will be granted to file an amended one.

ORDER OF COURT

NOW, September 12, 1977, the demurrer is sustained. The plaintiffs (buyers) are granted twenty (20) days from this date to file an amended complaint, if they are able as stated to be necessary in the opinion or suffer non pros. Exceptions granted to both parties.

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, OF SCENIC STRIPS ADJACENT TO LEGISLATIVE ROUTE 799, SECTION 1-S AND LEGISLATIVE ROUTE 799, SECTION 1-A-A, IN ANTRIM TOWNSHIP, C. P. Franklin County Branch, No. 3 February Term, 1974

Eminent Domain - Declaration of Taking - Scenic Easement - Base Fee - Statutory Construction Act

1. The Eminent Comain Code requires that notice be given to the condemnees including their right to challenge the condemnor's right to condemn the property by preliminary objections to be filed within thirty days of the notice.

2. The holder of a base fee, another term for a conditioned or determinable fee, has a complete right to possession and present enjoyment of property for the purpose for which it was taken, but there is a possibility of reversion to the previous owner should the purpose no longer exist.

3. Statutes granting eminent domain power are to be construed strictly and against the party given the power, with the power to be exercised only to the extent necessary to achieve the purpose for which the authority was granted and the condemnation instituted.

4. Unless the statute expressly provides that a fee simple absolute must be takin only an easement is acquired by the condemnor.

5. The power to exercise eminent domain authority is not presumed to exist unless it is given by legislative action or by necessary implication.

6. The State Highway law, Act of 1945, P.L. 1242, as amended, 36 P.S. Sect. 670-413.1 does not give the Secretary of the Pennsylvania Department of Transportation the power to condemn a "Scenic easement."

John C. Janos, Assistant Attorney General, Department of Transportation, Office of Chief Counsel, Attorney for the Commonwealth

J. Glenn Benedict, Esq., Attorney for Defendants

OPINION AND ORDER

Heard before Eppinger, P.J., Keller, J.
Opinion by Eppinger, P.J., September 26, 1977:

The Commonwealth purports to condemn a *scenic easement* on lands of Robert L. and Norma Grove (The Groves), under the authority of the State Highway Law, the Act of 1945, P.L. 1242, as amended sec. 413, 36 P.S. sec. 670-413.1, [1] The Groves have filed a petition to set aside the Declaration of Taking with "final order.". The matter was presented to the Court following the filing of an answer to this petition.

Where there is a petition to set aside an order, which is in effect a petition to strike, the Court may on its own motion

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1. "The secretary is hereby authorized to make a part of the establishment, construction, or reconstruction of State highways on the Federal-Aid Highway System, roadside and landscape development and scenic enhancement, including such sanitary and other non-commercial facilities as may be reasonably necessary to provide for the suitable accommodation of the public, and also including land that will be necessary for the restoration, preservation and enhancement of areas within and adjacent to such highways not to exceed one thousand (1,000) feet from right of way line. Any such roadside landscape and scenic developments may be undertaken as separate projects from highway construction or reconstruction where the secretary deems it proper, and the secretary may acquire property by gift or purchase not to exceed one thousand (1,000) feet from the right of way line and by imminent domain in base fee not to exceed five hundred (500) feet from the right of way line. . . ."

review the record and if any defects appear, take appropriate action.[2]

I. THE RECORD

On November 20, 1973, the Secretary of Transportation of the Commonwealth of Pennsylvania (Secretary), filed a Declaration of Taking of a so-called scenic easement containing ten terms and conditions seriously limiting the use of the property intended to be affected. The Secretary listed Robert Long and Oma Pearl Long, husband and wife, and Paul Meyers, executor of the A. L. Meyers estate, as owners of the property. On December 27, 1973, the Secretary filed a memorandum to the Prothonotary, stating that the Declaration of Taking was recorded in Franklin County Deed Book Vol. 694, Page 450. On January 21, 1974, R. S. Dunkleberger, Right of Way Agent, filed his proof of service showing that the Declaration of Taking had been served on the Longs and upon Paul Meyers.

Then, on February 7, 1975, the Secretary filed a petition for leave to amend the Declaration of Taking. This petition was filed because the Commonwealth discovered that Paul Meyers, executor of the A.L. Meyers estate, had sold land affected by the easement to the Groves. The Court issued a rule upon the Groves to show cause why the petition of the Secretary for leave to amend this Declaration of Taking should not be amended to show correctly the owner of the properties from which the scenic easement was condemned.

On March 25, 1975, R. S. Dunkleberger, filed his proof of service showing that the petition to amend the Declaration of Taking had been served upon the Groves on March 13, 1975.

On April 18, 1975, the Court signed an order making the rule absolute and granted leave to the Secretary to amend the Declaration of Taking to show correctly the names of the additional condemnees, the Groves. On May 13, 1975, an unexecuted proof of service was taken to the Prothonotary's office and was recorded, stating that the order of Court granting

2. See *Houck v. Carnavil*, 80 Montgy. 83, where the court on its own motion ordered a complaint stricken because it did not contain a verification.

leave to amend the Declaration of Taking was served on the Groves on May 8, 1975. The proof of service was intended to be completed by R. S. Dunkleberger, but he failed to sign it, which renders the statement of William F. Plank, the notary public, that the document was sworn and subscribed before him on 12 May, 1975, to be inaccurate, and raises a question of the service of notice itself. There is no record that an amended Declaration of Taking was ever filed or served on the Groves through a series of papers including the Court's orders of February 7, 1975, and April 18, 1975, the petition for leave to amend the Declaration of Taking and the terms and conditions of the "scenic easement" were recorded in Franklin County Deed Book Vol. 712, Page 812, on May 27, 1975.

Then on August 13, 1975, the petition to strike the supposed order of condemnation was filed by the Groves. A rule was issued and was served on the Secretary on August 13, 1975, and an answer was filed.

II. AUTHORITY TO STRIKE FINAL ORDER

The matter now comes before the Court to determine whether the petition to set aside the Declaration of Taking should be granted.

In his brief, the Secretary contends that the Order dated April 18, 1975, is a final Order confirming the Declaration of Taking as amended.

If that is the Secretary's contention, though we do not necessarily accept the proposition that our Order of April 18, 1975, is a final Order; then, in effect, a rule has been issued on the Secretary to strike off a judgment. A rule to strike off a judgment is in the nature of a demurrer directed to defects in the record. *Goldberg v. Altman*, 190 Pa. Super. 495, 154 A.2d 279 (1959); a judgment can be set aside only for irregularity or illegality appearing on the face of the record. *Products Corp. of Madway Eng. & Con.*, 210 Pa. Super. 498, 233 A. 2d 36 (1967); *Mountain City Savings & Loan Assoc. of Hazelton v. Bell*, 413 Pa. 67, 197 A.2d 608 (1963); *Malakoff v. Zambar*, 466 Pa. 503, 228 A. 2d 819 (1972).

III. LACK OF NOTICE

Generally, lack of adequate notice is a basis for setting aside a judgment, *Stolzenbach's Estate*, 346 Pa. 74, 429 A.2d 6 (1942). See Also 7 *Pa. Standard Prac.*, ch. 30, sec. 182 (rev. ed. 1961). Here, after filing the original Declaration of Taking, the Secretary discovered that he had not joined a necessary party, so the Secretary filed a petition for leave to amend the Declaration of Taking to correct this error. This petition to amend was served on the Groves. There is no adequate return of service showing that the order to make the rule absolute was served on the Groves. There is also no record that the Groves were ever served with the original Declaration of Taking. No amended Declaration of Taking was ever actually filed and served upon them and the papers filed in the Recorder's Office on May 27, 1975, in Deed Book Vol. 712, Page 861, do not, in the Court's opinion, constitute an amended Declaration of Taking. But even if they did, there is nothing in the record to show that these papers, which include the terms and conditions and a map showing the affected real estate were ever served on the Groves.

Section 405(c) of the Eminent Domain Code, the Act of 1970, P.L. 84, 26 P.S. 1-405(c), requires that notice be given to the condemnees and to emphasize its importance, specifies twelve items that must be contained in the notice. Among many others, there is a requirement that the condemnees be advised that they may challenge the condemnor's right to condemn the property by preliminary objections to be filed within thirty days of the notice. Here such advice was not given to the Groves, and the fact that they did not file preliminary objections cannot deprive them of the right to proceed as they have. See also 7 *Pa. Standard Prac.*, ch. 30 sec. 182 (rev. ed. 1961). This is in answer to the Secretary's contention that because the Groves did not file preliminary objections they are barred from ever contesting the purported condemnation of their property. We are unaware of the Secretary's general practice, but something must appear of record, perhaps a copy of the notice required by sec. 405(c) as served upon the condemnees. Short of that, there is no way the Court in reviewing the record, can determine whether proper notice was given condemnees or not.

For these reasons we will set aside or strike off the "final order", if that is what the parties deem our Order of April 18,

SHERIFF'S SALES Cont'd

1977, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before November 30, 1977, distribution will be made in accord therewith.

FRANK H. BENDER, Sheriff of Franklin County, Pennsylvania

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

PLEASE NOTE:

Legal notices relative to Fictitious Name Registrations should have a filing date listed as no earlier than the date of publication. Also, two proofs of publication are necessary for filing, and the notice must also be published in a regular newspaper of general circulation.

Our biggest problem with respect to these notices has come from persons, especially those not represented by legal counsel, who are not aware of the above requirements.

Mistakes in the above regards cause filing authorities to return the papers, and this doubles the advertising costs to the advertiser.

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

"Well done is better than well said."
— Poor Richard's Almanack

"That same light from our West seems to have spread and illuminated the very engines employed to extinguish it."
— Thomas Jefferson, letter to John Adams, January 11, 1816.

1975, to be. The purpose of this is to nullify any effect this Order may have to consummate or complete the condemnation of the Groves' property. We hold that the Secretary must at least file and serve an amended Declaration of Taking on the Groves and file a return of service showing that sec. 405(c) has been complied with.

IV. MAY THE COMMONWEALTH CONDEMN A SCENIC EASEMENT

The attack the Groves are expected to make in the preliminary objections that they will file as a result of the ruling above is whether the statute authorizes the condemnation of this type of scenic easement. If not, then the Court would have no authority to approve the condemnation if proper objection is taken. Sec. 413 of the State Highway Law, supra, as amended, seems to give the Commonwealth the right to acquire land for "scenic purposes" up to one thousand (1,000) feet from the right of way by gift or purchase and by condemnation in base fee not to exceed five hundred (500) feet from the right of way line. We realize that this matter is not strictly before us and may not be until preliminary objections are filed to an amended Declaration of Taking. However, we have examined the law and have reached some conclusions which the Secretary may want to consider as he contemplates further action.

A base fee is another term for a conditioned or determinable fee. The holder of a base fee has complete rights to possession and present enjoyment of property for the purposes for which it was taken, but there is a possibility of reversion to the previous owner should the purpose no longer exist. *Citizens' Electric Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 A. 2d 559 (1921); 1 *Pennsylvania Land Law*, sec. 23 (1938); Snitzer, *Pa. Eminent Domain*, sec. 402(b)-6.2.

A question was presented at argument in this case whether the eminent domain power granted by this section is limited to acquiring a *base fee* as opposed to a so-called scenic easement.

Neither the Groves nor the Secretary cite any authority to support their divergent readings of the statute. The former argue, in effect, that the statute means what it says and no more--that is, that the Commonwealth can take only a base fee

by condemnation. The Secretary, on the other hand, argues that the greater power--to acquire a base fee--includes the lesser power--to acquire an easement.

There do not appear to be any cases interpreting this section of the statute. Moreover, there are extremely few cases in which the condemnee argues that the condemnor is required to take more than it originally sought. See *Commonwealth of Pennsylvania By and Through the Pennsylvania Game Commission v. Renick*, 21 Pa. Com. 30, 342 A. 2d 824 (1975). Probably the best guide for deciding this case is to consider the statute in the light of two principles governing eminent domain. First, it has long been the rule that statutes granting eminent domain power are to be construed strictly and against the party given the power. See, for example, *Avery v. Commonwealth of Pennsylvania*, 2 Pa. Com. 105, 276 A. 2d 843 (1971); *Killinger v. City of Lebanon*, 10 Lebanon 48 (Com. Pl. 1964). Furthermore, the Act of 1970, P.L. 707, 1 Pa. C.S.A., sec. 1928(b) (4), requires that statutory provisions conferring the power of eminent domain be strictly construed.

Second, there is a policy that the power of eminent domain is to be exercised only to the extent necessary to achieve the purpose for which the authority was granted and the condemnation instituted. This rule is especially applicable when the legislature fails to mandate clearly what property interest the condemnor acquires. In *Commonwealth of Pennsylvania By and Through the Pennsylvania Game Commission*, supra, the condemnee argued that a section of the game laws that granted a commission the authority to "take title to lands" required the commission to take a fee simple absolute in the property. The Court, though recognizing the principle of strict construction, held that the statute granted the game commission the authority to take only that interest that was necessary for the purpose for which the property was taken, saying: "Unless that statute expressly provides that a fee simple absolute must be taken . . . only an easement will be acquired by the condemnor, if that is all it [the purpose] requires." Id. at 34, 342 A.2d 827. See also 3 *Nichols on Eminent Dominent*, sec. 9.2(1), (3), 3rd. rev. ed. 1974. The court concluded that "title to lands" did not specify any property interest and therefore, an easement could be taken under this authorization. (Emphasis supplied.)

Consistent with the holding of the *Commonwealth of Pennsylvania By and Through the Pennsylvania Game*

Commission, supra, we believe that the Secretary is limited here to taking a base fee because the term base fee does specify a property interest, a clearly defined one. We note that punctuation of the statute is rather confusing. If one assumes that the single comma after the word "purchase" is correctly used, then the whole clause consists of three elements. The first is that the Secretary may acquire by gift or purchase; the second authorizes acquisition, presumably also by gift or puchase of any lesser estate, necessary for the purpose intended, not to exceed one thousand (1,000) feet from the right of way line; the third grants the power to acquire "by eminent domain in base fee" property not to exceed five hundred (500) feet from the right of way line. This reading seems to us to be the most consistent with the punctuation and the content.[3] Moreover, this is the only way to give effect to the section of the clause beginning with "or lesser estate or interest".

This rule of strict construction to which the statute is subject, at minimum, means that the power to exercise eminent domain authority will not be presumed to exist unless it is given by legislative action or by necessary implication. *Foley v. Beech Creek Extension R.R. Co.*, 283 Pa. 588, 129 A.2d 845 (1925); see also Snitzer, *Pennsylvania Eminent Domain*, sec. 201(3)-2. Here there is no express authority granting a power to the Secretary to condemn anything other than a base fee (as distinguished from the general term "title to lands"), and there is no reason to imply the power to condemn an easement. Thus, the rule of strict construction contradicts the Commonwealth's argument that the greater power must include the lesser.

Moreover, limiting eminent domain to acquisition of a base fee reflects legislative intent to give greater protection to property owners. A scenic easement, such as the Commonwealth sought in this case, amounts to a substantial impairment of the owner's use and enjoyment of the property and of the value of the land. In the condemnation of the easement there is no requirement that should the road ever be abandoned, the land on which the scenic easement lies would revert to the property owner. But requiring the Secretary to

3. The Act of 1970, as amended, supra, 1 Pa. C.S.A., sec. 1923, and specifically subsection (b) permits the use of punctuation as an aid in the construtions of statutes enacted after December 31, 1964.

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

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

ORDER OF COURT

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

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

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

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

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

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

David S. Dickey, Esq., Attorney for Plaintiffs

David Woodward, Esq., Attorney for Defendant.

OPINION AND ORDER

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

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

I
SUFFICIENCY OF NOTICE

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