

page 282, Judge Wissler held:

“ . . . whether it was done within a reasonable time and what constitutes a reasonable time is a question of fact to be determined from the evidence. Details of evidence are not required to be pleaded; material facts are sufficient.”

Part D of defendant's demurrer is dismissed.

The defendant's last demurrer is in the form of a general demurrer. Pa. R.C.P. 1028(a) requires a party to specifically state the grounds relied upon in preliminary objections. In *Shannon v. Shearer*, 2 Frank. Co. L.J. 211 at 212 (1979), the defendant demurred to plaintiff's complaint on the ground that plaintiff had failed “to state a claim upon which relief can be granted.” We found such an objection to be a general demurrer prohibited by Pa. R.C.P. 1028(1) and it was dismissed. Accordingly, Part E of defendant's demurrer is dismissed.

We note that defendant's counsel addressed two issues in his exhaustive brief which were not raised in the preliminary objections. The merits of these contentions will not be considered since the matters are not properly before us by way of preliminary objections. *Commonwealth of Pennsylvania to Use of Morefield Communications, Inc. v. American Casualty Co.*, 26 Cumb. L.J. 261 (1976).

ORDER OF COURT

NOW, this 1st day of March, 1983, defendant's preliminary objection in the nature of Demurrer B and motion for a more specific pleading A are sustained. All other preliminary objections are denied.

The plaintiff is granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted plaintiff and defendant.

BEAVER V. JONES, C.P. Franklin County Branch, A.D. 1982 - 185

Ejectment - Defendants Mistake - Reasonable Attorney's Fees - Boundary Dispute

1. 42 Pa. C.S.A. Sec. 2503 (9) permits the awarding of counsel fees for any participant who, because of the conduct of another party in commencing a matter or otherwise was arbitrary, vexatious or acted in bad faith.

2. Counsel fees maybe awarded against a defendant who meets the criteria of the act, as well as a plaintiff.

3. Regardless of where a deed places a boundary, it is the intention of the parties that must govern when the issue is where the boundary line should be.

Philip S. Cosentino, Esquire, Attorney for Plaintiffs

Robert P. Shoemaker, Esquire, Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., January 4, 1983:

In this ejectment action, John and Susan Beaver, plaintiffs, are suing to require O. C. and Julia Jones, the defendant, to vacate a section of land which the Beavers say they erroneously deeded to the defendants. Plaintiffs attribute the erroneous conveyance to a mistake made by the surveyor who inadvertently inverted a distance. The draft prepared June 27, 1972 reflected the error and by a deed dated September 26, 1972 plaintiffs conveyed the parcel to defendants.

In 1974 the surveyor caught the mistake and informed Mr. and Mrs. Jones, but not the Beavers. On November 5, 1981, according to the complaint, while both parties treated the correct line as the boundary, the defendants erected a fence along the incorrect one. Knowing that the deed line is wrong, the Jones continue to possess the disputed strip and refuse to vacate it.

In a second count of the complaint, the Beavers ask that Mr. and Mrs. Jones be required to pay their reasonable attorney's fees and expenses, claiming that their possession of the land is the result of a mistake and their refusal to surrender it is vexatious, arbitrary and capricious.

Mr. and Mrs. Jones filed preliminary objections, including motions to strike and for a more specific pleading. As to these two, the plaintiffs agree to file an amended complaint complying with Pa. R.C.P. 1054(b) and Pa. R.C.P. 1019(a). The only matter

that is before us is the demurrer to the second count, a claim for attorney fees. In this demurrer the defendants say that the complaint fails to allege vexatious, arbitrary and capricious conduct on their part and that their possession of the land is lawful under the deed. We believe that the complaint does allege such conduct so the question is whether plaintiffs can legally recover attorney's fees, the pleadings being adequate to present this issue.

In the absence of express statutory allowance, a clear agreement between the parties, or some other established exception plaintiffs in this case cannot recover counsel fees from the defendants. *Corace v. Balint*, 418 Pa. 262, 210 A. 2d 882 (1965). The Act of 1976, July 9, P. L. 586, No. 142 Sec. 2, 42 Pa. C.S.A. Sec. 1726 provides that attorney's fees are not an item of taxable costs except to the extent authorized by Sec. 2503. That section states in subsection (9) that counsel fees may be awarded and taxed as costs for any participant who, because of the conduct of another party in commencing a matter or otherwise was arbitrary, vexatious or acted in bad faith.

This section was discussed in *McLaughlin v. Gerds*, 19 D&C 3d 294 (C.P. Warren Co. 1981). President Judge Wolfe observes as we do that the act is difficult to interpret. He feels Sec. 9 of the act is controlling when plaintiffs commence an action vexatiously or in bad faith and did not want to interpret the act as automatically subjecting any loser to the payment of counsel fees irrespective of the reasons for the dispute. While we are equally alarmed by this prospect, we do not think the act as written and as it applies to this case, may not give rise to a judgment against the defendants for attorney's fees.¹

As plaintiff's counsel have pointed out, a demurrer admits all of the facts that are well pleaded. *Commonwealth ex. rel. Duff v. Keenan*, 347 Pa. 582, 33 A. 2d 244 (1943). Here the facts that are admitted are that the parties intended to convey a certain tract of land; that the surveyor made a mistake and the deed given by the plaintiffs to the defendant about ten years ago conveyed a different tract; that shortly after this occurred the defendant knew that the surveyor had made a mistake; that about seven years after defendant found that out they erected a fence on the

¹ If the act is interpreted to authorize a judgment against defendants for attorney's fees where defendants act arbitrarily, vexatiously or in bad faith in a dispute, it may have the salutary effect of causing them to carefully examine their positions before a suit is instituted.

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line which was established as a result of the mistake and that when asked to deliver up the property to plaintiffs they have refused to do so.

A number of cases suggest that it is the intention of the parties that must govern when the issue is where the boundary line should be. We perceive this is true regardless of where the deed places it. See *Brolaskey v. McClain*, 61 Pa. 146 (1869), *Baker v. Roslyn Swim Club*, 206 Pa. Super. 192, 213 A. 2d 145 (1965), *Burhardt v. Rizzio*, 81 York 29 (1967), so it may be that even the defendants, if they are standing on what may prove to be tenuous grounds will be required to pay attorney's fees. Since a preliminary objection in the nature of a demurrer cannot be sustained unless the law says with certainty that no recovery is possible, *Annlurg v. City of Chester*, 224 Pa. Super 47, 302 A. 2d 491 (1973), we do not think it is proper to grant the demurrer and thus foreclose that possibility.

ORDER OF COURT

January 4, 1983, the defendant's demurrer to the second count is overruled. The defendant is granted twenty (20) days from this date in which to file an answer.

COMMONWEALTH V. PATTERSON, C.P., Franklin County
Branch, No. 14 of 1982

Vehicle Code - Speeding - Verification of Citation - Appeal

1. Where a state trooper issues a citation and another trooper verifies the citation before a District Justice, the citation is defective.
2. Pa. R. Crim. P. 54 (d) requires verification of a citation by a police officer who has knowledge of the facts therein.
3. All appeals from summary convictions are taken de novo and have the same effect as though the case had never been before the District Justice.
4. The fact that challenge to a citation was not raised before the District Justice does not preclude the court from considering the issue at a trial de novo.

Merrill W. Kerlin, District Attorney, Counsel for the Commonwealth

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