and notice to the creditors of Gordon Bankert, Trust Officer Valley Bank and Trust Company, executors of the estate of Kenneth Elmond McCleary late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

MCGEHEE First and final account, statement of proposed distribution and notice to the creditors of Edwinna McGehee Rotz executrix of the last Willand testament of Edna Robinson McGehee late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

PICKING First and final account, statement of proposed distribution and notice to the creditors of Aminda L. Strait, administratrix of the estate of Nellie Picking late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

REED First and final account, statement of proposed distribution and notice to the creditors of Timothy R. Reed, administrator of the estate of Phyllis B. Reed, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

SMITH First and final account, statement of proposed distribution and notice to the creditors of Nancy A. Wagner and C. Richard Smith executors of the estate of Clarence H. Smith late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

WENGER First and final account, statement of proposed distribution and notice to the creditors of Alfred M. Wenger, J. Ralph Wenger, Joel L. Wenger and Ab-ie Jane Wenger Oswald, executors of the Will of Alma E. Wenger late of Antrim Township, Franklin County, Pennsylvania, deceased.

WENTLING First and final account, statement of proposed distribution and notice to the creditors of Marvin H. Horst, executor of the last Will and Testament of Eva M. Wentling late of Guilford Township, Franklin County, Pennsylvania, deceased.

ZULLINGER First and final account, statement of proposed distribution and notice to the creditors of the Farmers & Merchants Trust Company of Chambersburg, executor of the estate of Marion H. Zullinger late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, Pa.
11-6-81, 11-13-81, 11-20-81, 11-27-81

SOUDERS v. LAWTHER MANOR, INC., C.P. Franklin County Branch, Equity Docket Volume 7, Page 275

Equity - Easement - Adequate Remedy at Law

1. An easement over another's land may be acquired by prescription, express grant, condition or reservation, implication, and necessity.

2. An action to quiet title does not completely displace general equity jurisdiction in that quiet title does not provide injunctive relief.

Thomas B. Steiger, Esq., Counsel for Plaintiffs

Gary D. Wilt, Esq., Counsel for Defendants

OPINION AND ORDER

KELLER, J., September 18, 1981:

This action was commenced on June 8, 1981, with the filing of a complaint in equity by the plaintiffs, Foster A. and Helen Jane Souders. The named defendants are Lawther Manor, Inc., and Nelson K. Gothie. Preliminary objections were filed by the defendants on July 17, 1981, in the form of a motion for a more specific pleading, motion to strike and a demurrer. Argument by counsel was heard on September 3, 1981, and the matter is now ripe for disposition.

Plaintiffs' complaint is based on their ownership of real estate in Franklin County containing approximately 115.1 acres. This land borders on a parcel owned by defendant corporation, containing approximately 213 acres and 94 perches, partly situated in Franklin County and partly in Fulton County. The dispute arises over plaintiffs' use of a road on defendant's land as a means of ingress, egress and regress to and from their tract of real estate.

Plaintiffs' prayer for relief requests the Court "to enjoin the Defendants from interfering with the Plaintiffs' use and enjoyment of the easement of passage over the Defendants' land to which the Plaintiffs are entitled." The complaint, however, fails to allege the necessary facts to support the existence of an easement over the defendants' property.

Pennsylvania courts have clearly held that an easement over another's land may be acquired in the following ways:

(1) by prescription, *Boyd v. Teeple*. 460 Pa. 91, 331 A. 2d 433 (1975);

(2) by an express grant, *Merrill v. Manufacturers Light and Heat Co.*, 409 Pa. 68, 185 A. 2d 573 (1962);

(3) by a condition or reservation, *Piper v. Mowris*, 466 Pa. 89, 351 A. 2d 635 (1976);

(4) by implication in favor of a grantor or grantee, *Reed v. Reese*, 473 Pa. 321, 374 A. 2d 665 (1976); or

(5) by necessity, *Burns Mfg. Co., Inc. v. Boehm*, 467 Pa. 307, 356 A. 2d 763 (1976).

In order to acquire an easement by prescription, the plaintiff must show that there was open and notorious use with the knowledge of the owner, and that the use was continuous and uninterrupted for the statutory period of 21 years. *Boyd*, supra: *Adshead v. Spring*, 248 Pa. Super. 252, 375 A. 2d 83 (1977). No such averments are found in plaintiffs' complaint. To the contrary, the only allegation made by plaintiffs in an attempt to set forth their claim of right is paragraph 8 of the complaint which reads as follows:

> "For a period of seventy-five (75) years or more the aforesaid mountain road was used by the Plaintiffs, their predecessors in title and other adjoining land owners as a means of ingress, egress and regress to and from their respective tracts of real estate."

Such averment is legally insufficient to establish the required elements of an easement by prescription.

The complaint also fails to allege the averments necessary to create an easement by express grant. Allegations sufficient to support the existence of an easement created by a condition or reservation are also absent from the complaint. ("Exhibit A" attached to plaintiffs' complaint does grant to the plaintiffs the use of a road, but counsel for the parties informed this Court that that road is not the road in dispute). The deeds attached as exhibits to the complaint are silent as to the creation of the particular easement which is the subject of this action by grant, reservation or exception.

In order to base the claim of right-of-way on the existence of an easement by implication, the complaint must allege a separation of title, continuous and obvious use before the title separation to show an intention to make the alleged easement permanent, and the necessity of the easement for the beneficial enjoyment of the land granted or retained. *Reed*, supra; *Philadelphia Steel Abraisive Co. v. Louis J. Gedicke Sons*, 343 Pa. 524, 23 A. 2d 490 (1942); *Stern v. Bell Telephone Co. of Pa.*, 301 Pa. 107, 151 A. 690 (1930). No such averments are found in Plaintiffs' complaint. Therefore, the cause of action appears not to be based on a claim of right due to an easement by implication.

Finally, in order to imply the grant or reservation of an easement by necessity, it must be shown that the claimant has no other mode of ingress or egress. *Burns Manufacturing Co., Inc.*, supra. Plaintiffs allege in paragraph 9 of their complaint that the road on defendant's land is an "important means of access to Plaintiffs' real estate." Such an allegation does not satisfy the requirement that there be a necessity to invade the private property of another. The absence of this essential allegation eliminates easement by necessity from consideration.

Since plaintiffs have failed to set forth a cause of action based on any one of these five theories, defendant's demurrer must be sustained, with leave granted to plaintiffs to amend their complaint to allege a cause of action.

The defendants have moved to strike the plaintiffs complaint on the grounds that plaintiffs have an adequate remedy at law via an action to quiet title. In the case at bar, the plaintiffs seek injunctive relief. No such relief may be granted in an action to quiet title. (See Pa. R.C.P. 1066). A court of equity should hear the entire controversy in order to do complete justice and avoid piecemeal litigation. *Trimble S. Inc. v. Franchise R. I. Corp.* 445 Pa. 333, 341 (1971). An action to quiet title does not completely displace general equity jurisdiction. *White v. Young*, 409 Pa. 562, 566 (1963); *MacKubbin v. Rosedale Memorial Park, Inc.* 413 Pa. 637, 639, 640 (1964). The defendants' motion to strike is without merit and will be dismissed.

The defendants have moved for a more specific pleading on the grounds that the plaintiffs have alleged that the lands of defendants are situate in Franklin and Fulton Counties, but have failed to allege whether the obstruction complained of is located in Franklin County. The objection is well taken, for this Court would have no jurisdiction if the obstruction is located in Fulton County. The motion will be granted.

ORDER OF COURT

NOW, this 18th day of September, 1981, the defendants' demurrer is sustained and paragraph 7 of the motion for a more

specific pleading is granted. All other preliminary objections are dismissed.

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of this date.

Exceptions are granted the plaintiffs and defendants.

MARKOWITZ v. ROTZ, C.P. Franklin County Branch, A.D. 1981 - 135

Landlord-Tenant - Termination of Lease - Security Deposit

1. What constitutes a termination in one case may not do so in another and the question of whether there has been a termination is a question for the jury.

2. A landlord is not required to return an escrow fund, with interest, where there has been a nonpayment of rent or any other breach of condition.

Edward I. Steckel, Esq., Attorney for Plaintiff

Rudolf M. Wertime, Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., October 16, 1981:

Michael Markowitz sued his landlords, Norman and Anna Rotz for double his security deposit of $500, plus interest and costs of suit. Defendants Answered with New Matter and Counter-claims both in assumpsit and trespass. Plaintiff demurred to defendant's pleading, arguing that the landlords have failed to state a cause of action. The argument is based on the terms of the Landlord and Tenant Act of 1951, P.L. 69, art. V, as amended, 68 P.S. Sec. 250.512 and on a claim that he sent defendants a "termination notice" and that they failed to provide him with a written list of damages to the leased property for which he is allegedly liable.

The Landlord and Tenant Act of 1951, supra, provides, in part:

> **(a) Every landlord shall within thirty days of termination of a lease or upon surrender and acceptance of the leased premises, whichever first occurs, provide a tenant with a written list of any damages to the leasehold premises for which the landlord claims the tenant is liable....**
>
> **(b) Any landlord who fails to provide a written list within thirty days . . . shall forfeit all rights to withhold any portion of sums held in escrow, including any unpaid interest thereon, or to bring suit against the tenant for damages to the leasehold premises.**

In his Complaint, the tenant alleges he informed the landlords that he was terminating the lease. Actually what the letter said was that he was leaving the rented house on a specific date, that he requested his security deposit and interest and notified the landlord of his new address. The landlords admit they received the letter but deny the effect was to terminate the lease.

What constitutes a termination in one case may not do so in another; the term is not easily defined exactly and all circumstances should be considered. Whether there has been a termination is a question for the jury. *See, e.g., Straw v. Sands*, 15 Chester 248, appeal quashed 426 Pa. 81, 231 A.2d 144 (1966) (existence of termination to be decided by jury on oral and written words and conduct of parties).

The landlords' pleading questions the contention that a termination occurred here. In ruling on a demurrer, we are required, at this point, to construe all doubts in favor of the landlords. *Strock v. York Bank & Trust Co.*, 94 York L.R. 105 (C.P., 1980). The landlord alleges that the tenant did not return possession of the leased premises, that he retained the key to the house, and left a washing machine, dog box and a telephone listed under his name there, facts which we believe are sufficient to preclude our granting the demurrer here. A demurrer should only be sustained in clear cases where it is certain there can be no recovery. 2 Goodrich-Amram 2d Sec. 1017(b):11; *Pike Co. Hotels Corp. v. Kiefer*, 262 Pa. Super. 126, 396 A.2d 677 (1978).

Under the Landlord and Tenant Act of 1951, supra, Sec. 250.512(a), 68 P.S. Sec. 250.512(a), a landlord is not required to return an escrow fund, with interest, for nonpayment of rent or any other breach or condition of the lease. The Landlords allege at least one breach of the lease: that there was an additional tenant on the premises for whom rent was due and also argued that the tenant's complaint says nothing about the term of the lease, which could be three years. In that event the tenant's "termination" would be a breach.