JUENGER V. GEYER, C.P. Franklin County Branch, Eq. Doc. Vol. 7, P. 330.

Equity - Easement by Prescription - Uninclosed Woodland - Way of Necessity - Indispensable party.

1. A complaint is not required to allege an easement does not pass through uninclosed woodland in that such an allegation is an affirmative defense.

2. A complaint alleging a way of necessity must show a common source of title between dominent and servient estates.

3. An indispensable party is one whose rights are so directly connected with the litigation that he must be a party of record to protect such rights and his absence renders a Court Order will.

4. Even where a person is necessary to a case, a Court may proceed without his joinder as long as there is no prejudice to any of the joined or possible parties.

William H. Kaye, Esquire, Attorney for Plaintiff

Robert E. Graham, Jr., Esquire, Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., September 23, 1983:

This dispute is whether plaintiff has a right of way across defendant's property. The lands of defendant lie between a public road and plaintiff's property. Plaintiff alleges that for a period of time in excess of twenty-one years he and his predecessors in title used a well-defined roadway over to defendant's land to gain access to the public road, and that defendant has since cabled the private roadway, posting a "no trespassing" sign in order to prevent plaintiff's ingress and egress.

In Count 2 plaintiff asserts that the right of way is one of necessity.

Defendant filed four preliminary objections. The first, a demurrer, argues that plaintiff's complaint is insufficient to establish a prescriptive easement in that it fails to allege the

easement does not pass through uninclosed[1] woodland. The Uninclosed Woodlands Act, 68 P.S. 411,[2] states:

> No right of way shall be hereinafter acquired by user, where such way passes through uninclosed woodland; but on clearing such woodland, the owner or owners thereof shall be at liberty to enclose the same, as if no such way had been used through the same before such clearing or enclosure.

A prescriptive right of way is established by the plaintiff showing that its user has been adverse, open, notorious, and uninterrupted for twenty-one years. *Boyd v. Teeple,* 460 Pa. 91, 94, 331 A.2d 433, 434 (1975); *Fec v. Mickail,* 438 Pa. 439, 441, 265 A.2d 800, 801 (1970). It is necessary for the plaintiff to rebut evidence that the property involved is uninclosed woodland if the defendant places this fact into issue after pleading the Act as an affirmative defense. See *Millhimes v. Legg,* 68 D.&C. 2d 412, 417 (Adams 1975); *Jefferies v. Mattson,* 71 D.&C. 2d 406, 408 (Chester 1974). We cannot agree with defendant's contention that plaintiff must plead a matter which should properly be raised as an affirmative defense. The demurrer will be overruled.

Defendant's second objection argues that plaintiff's prayer for a way of necessity is insufficient because it fails to show a common source of title between the servient and dominant estates. Plaintiff acknowledges that his complaint is defective in this regard. Therefore, the proper remedy is to grant plaintiff timely leave to amend its complaint. See Pa. R.C.P. Sec. .1033.

Defendant's third objection is that the matters pleaded in paragraph 10 of plaintiff's complaint are impertinent due to irrelevancy and should be stricken. These matters include reference to acts of defendants, defendants' refusal to permit passage to plaintiff's surveyor, and attempts by plaintiff to reach a compromise.

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[1] We choose to follow the statutory spelling of "uninclosed" for the sake of uniformity.

[2] 68 P.S. 411 was repealed by Act of December 10, 1974, P.L. 867, No. 293, Sec. 19, and subsequently reenacted by Act of July 1, 1981, P.L. 198, No. 61, which application is retroactive: "This Act shall take effect immediately and shall be retroactive to December 10, 1974, and shall be construed to continue the law on this subject which was in effect immediately prior to that date."

An impertinent matter is one which has no necessary connection with the action at hand, need not be proved, is irrelevant to the material issue, and should have no influence in the result. *Grubb v. Mahoning Navigation Co.,* 14 Pa. 302, 305 (1850); *The Maryland and Virginia Eldership of the Churches of God v. Martin,* 12 Adams L.J. 197 (1971). Thus, when an impertinent matter is pleaded, it is entirely appropriate to make a motion to strike such when it is unrelated to plaintiff's cause of action. *Hudock v. Donegal Mutual Insurance Co.,* 438 Pa. 272, 277, 264 A.2d 668, 671 (1970), footnote #2. Since these matters pleaded have no relevant connection with plaintiff's cause of action, we grant defendant's motion to strike paragraph 10 as impertinent.

Defendant's final objection is that we are without jurisdiction to render a decree because plaintiff has failed to join an indispensable party. It is contended, by defendant, that the claimed right of way also passes through the lands of Paul and Anna Reed, who are therefore indispensable parties, without whom any decree would be null and void for lack of jurisdiction. We do not agree.

In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by a particular litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction. *Columbia Gas Transmission Corp. v. Diamond Fuel Co.,* 464 Pa. 377, 379, 346 A.2d 788, 789 (1975).

We do not perceive the Reeds as indispensable to this disposition. No allegation has been made by either plaintiff or defendant that the Reeds have tried to interfere with plaintiff's access to the public road or have in any manner asserted their privileges as owners of the passage. Even were we to assume that the Reeds were necessary to this case, we could still proceed without their joinder as long as there was no prejudice to any of the joined or possible parties. *Mechanicsburg Area School District v. Kline,* 494 Pa. 476, 486, 431 A.2d 953, 959 (1981). Of course, defendants may on their own motion seek to join additional defendants under Pa. R.C.P. Sec. 2252, if they believe it is necessary to protect their interests in this matter. *Martinelli v. Mulloy,* 223 Pa. Super. 130, 299 A.2d 19 (1972).

Therefore, since the Reeds are not indispensable to this case, we hold that this court has appropriate jurisdiction.

ORDER OF COURT

September, 23rd, 1983, defendants' demurrer to Count 2 is

sustained. All other preliminary objections are overruled. The plaintiff is granted sixty (60) days from the filing of this Order to file an amended complaint.

RICHARDS v. RICHARDS, C.P. Fulton County Branch, No. 65 of 1981-C

Divorce - Alimony - Counsel Fees - Marital Misconduct

1. Marital misconduct is not to be considered in an action for alimony pendente lite.

2. The guidelines for determining alimony pendente lite are clearly different than those for determining alimony.

3. Child support, spousal support and alimony pendente lite are different in character and one is not to be considered when the other is awarded.

4. The award of counsel fees lie within the discretion of the Court and is not intended to lie in full reimbursement of fees charged.

5. An award of alimony pendente lite should be retroactive to the date of filing the petition.

Michael B. Finucane, Esquire, Attorney for Plaintiff

Robert B. Stewart III, Esquire, Attorney for Defendant

Stanley J. Kerlin, Esquire, Master

OPINION AND ORDER

EPPINGER, P.J., July 5, 1983:

On April 21, 1982, a hearing was held before the Master, Stanley J. Kerlin, Esquire, regarding the award of alimony pendente lite, counsel fees, expenses, and costs in which plaintiff requested $189.50 per week alimony pendente lite plus expenses incurred in the divorce proceeding to call expert witnesses and $2,444 for counsel fees. In his report, the Master recommended that the plaintiff, Patricia Richards, should receive $100 per week