

The court retains jurisdiction for making such further orders as may be required. The parties shall each pay their own costs.

MENTZER v. APPLEBY, C.P. Franklin County Branch, Equity Vol. 7, Page 168

*Equity - Pending Prior Action - Appointment of Board of View - Res Judicata - Establishment of Private Road*

1. Where an equity action involves the question of the ownership of a road and a petition is later filed to appoint a board of view to layout a private road across defendant's land, a disposition of the prior action would act as a bar to the present action on the grounds of res judicata.
2. The rule of res judicata does not require that the subsequent suit be identical in all respects to the prior suit and may bar a subsequent action even though it is based on a different right of action.

John McCrea, III, Esq., Counsel for Plaintiffs

Jerry A. Weigle, Esq., Counsel for Defendants

#### OPINION AND ORDER

KELLER, J., November 16, 1979:

Defendants have raised, by Preliminary Objection to the Petition for Appointment of a Board of View, the issue of whether the above captioned action is pending prior action which requires that the petition for the Board of View be dismissed. At present, the proceedings of the Board of View have been suspended by Order of Court dated February 14, 1979, pending a decision on the Preliminary Objections.

The Pennsylvania Supreme Court in *Hessenbruch v. Markle*, 194 Pa. 581, 593 (1900) stated the general principle of law on prior pending actions:

"A plea of former suit pending must allege that the case is the same, the parties are the same, and the rights asserted and the relief prayed for the same; and where the proof of the plea can be ascertained by an inspection of the record the court will determine the question without a reference."

This does not precisely describe the present actions in question. The parties to the Petition for Board of View include Terry Rosenberry, who is not a party to the suit in equity. Nevertheless, because of the issues raised in the equity action, "it appears a disposition of the prior action would act as a bar to the present action on the grounds of res judicata." *Petrasko v. Fellin*, 60 Luz. L. R. 186 (1969). The nature of the ownership of the road in question and the question of whether it is a public or a private road, is factually and legally essential to a determination by the Board of View as to the necessity and propriety of laying out a private road across the land owned by defendants. Therefore, it is proper to stay the proceedings of the Board of View pending the outcome of the prior action. *Petraska*, supra.

Petitioners urge that the provision for a Board of View is a "separate, and distinct statutory remedy which although bearing upon the original lawsuit, produce a different result and affect additional party rights." It remains a fact, however, that the plaintiffs wish to establish a right of way to their land over land owned by defendants. Their suit in equity and the Petition for a Board of View seek, by different legal methods and conflicting factual allegations, to achieve this end. A resolution of the suit in equity has the potential of barring action by the Board of View based upon a legal determination of the status of the land, the road, in controversy. The rule of *res judicata* does not require that the subsequent suit be identical in all respects to the prior suit. The court in *Bowers Estate*, 240 Pa. 388, 87 A. 711 (1913), clearly states that the rule of *res judicata* applies with the same strictness where the cause of action, although not technically the same, is so related to the cause of action in the prior litigation that the same matter essential to recovery in the second was determined in the first. *Bowers* is cited in *Loughran v. Matylewicz*, 367 Pa. 593, 81 A. 2d 546 (1951), where the court held that the appellee had established his ownership in a certain pond against appellant's predecessor in title, so that the issue of ownership determined in *Wm. Baylor v. W. S. Decker* was *res judicata* in *Loughran v. Matylewicz*. See also *Ottinger v. Walling*, 335 Pa. 77, 5 A. 2d 801 (1939); *Wallace Estate*, 316 Pa. 148, 174 A. 397 (1934).

In *Ottinger*, the issue was whether damages could be recovered for "maintenance" by a seaman in a second action for the same injury. The court held that "the prior judgment operates as an estoppel when the subject matter controverted

and determined is identical" even though "the subsequent proceeding may be upon a different right of action." *Ottinger*, 335 Pa. at 80, 5 A. 2d at 803. *Wallace's Estate* was a controversy among heirs to an estate over the status of certain shares of stock, whether they had been held by one heir as trustee or whether he owned them outright. Three successive suits were filed. The court addressed the issue of whether the prior decisions should be considered *res judicata* in the present action:

"Broadly stated, the rule of *res judicata* is that when a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject-matter then before the court." *Wallace*, 316 Pa. at 153, 174 A. at 399.

In the present case, the suit in equity will be determinative of the law as related to the subject matter before the court, the road in controversy. All parties who presently have an interest in the status of that road, or who subsequently acquire an interest in it, will be bound by that determination.

Exceptions were filed by the plaintiffs to the Adjudication and Decree Nisi filed December 18, 1978. No further action has been taken by either of the parties to dispose of the exceptions. No final decree has been entered disposing of plaintiffs' complaint alleging the existence of an easement over the lands of the defendants. Until this alleged right of the plaintiffs is finally disposed of there is no established necessity for a Board of View to lay out a private road over defendants' land.

#### ORDER OF COURT

NOW, this 16th day of November, 1979, the defendants Preliminary Objections to plaintiffs' Petition to Appoint a Board of View are sustained. The order of January 11, 1979, appointing a Board of View is vacated.

Exceptions are granted the plaintiffs.

GUNDER v. SIMMERS, C.P. Franklin County Branch, No. F.R. 1979 - 258C

SIMMERS v. GUNDER, C.P. Franklin County Branch, No. 22 of 1979

#### *Adoption - Involuntary Termination of Parental Rights*

1. Parental rights may be forfeited for failure to perform parental duties for a six month period, despite the absence of a settled purpose to relinquish parental claims.

2. A parent's problems with social life, marital difficulties, probation due to criminal convictions and financial pressure do not justify a failure to show an interest in her children.

3. A period of asserted hardship does not completely relieve a person of parental responsibilities.

*William F. Kaminski, Esq.*, Counsel for George E. Simmers and Terry L. Simmers

*J. Edgar Wine, Esq.*, Counsel for Rebecca Hollenshead Gunder

#### OPINION AND ORDER

KELLER, J., September 27, 1979:

Rebecca K. Hollenshead Gunder presented her Petition to Revoke or Amend Custody Order on March 13, 1979, and an order was signed the same date granting a Rule upon George E. Simmers and Terry L. Simmers to show cause why a change in custody should not be made, and setting May 7, 1979 at 1:30 o'clock P.M. as the date and time for hearing. Service of a true copy of the Rule, Petition and Order was made upon the respondents on March 17, 1979.

On March 21, 1979, George E. Simmers and Terry L. Simmers presented their petition to involuntarily terminate parental rights of Rebecca Hollenshead Gunder, and an order was signed the same date granting a Rule on the respondents to show cause why the prayer of the petition should not be granted; with the Rule returnable and hearing set for 9:30 o'clock A.M., April 3, 1979. The Petition, Rule and Order were served on respondent on March 23, 1979.