

LEGAL NOTICES, cont.

IN RE: : In the Court of  
: Common Pleas of the  
: 39th Judicial Dis-  
: trict, Penna.  
: Estate of Clarnece : Franklin County  
D. Ricker, : Branch  
Deceased :  
: Orphans' Court  
: Diviscion

NOTICE OF AUDITOR'S HEARING

NOTICE is hereby given that the under-  
signed Auditor, appointed by the Court of  
Common Pleas of the 39th Judicial District,  
Pa., Franklin County Branch, Orphans'  
Court Division, to determine the validity of,  
and legal questions raised by Objections to  
First and Final Account of Stanley F.  
Bloyer, Executor of the Estate of Clarence  
D. Ricker, deceased, pertaining to certain  
claims made against the above named deced-  
ent's estate and questions pertaining to the  
distribution of the fund in the hands of the  
accountant, will sit for the performance of  
the duties of his appointment in Courtroom  
No. 2 of the Franklin County Courthouse,  
Chambersburg, Pennsylvania, on Friday,  
April 4, 1980, at 10:00 o'clock, a.m., pre-  
vailing time, at which time and place all  
persons claiming any interest in the fund  
in the hands of the accountant should ap-  
pear and establish their claims or be for-  
ever barred from participation in the dis-  
tribution of said fund.

Timothy S. Sponseller, Auditor  
210 Chambersburg Trust Co. Bldg.  
Chambersburg, Pennsylvania 17201  
Telephone (717) 263-3939

(3-14, 3-21, 3-28)

NOTICE IS HEREBY GIVEN pursuant to  
the provision of the Act of Assembly of May  
24, 1945, P.L. 967 and its amendments and  
supplements of intention to file with the Sec-  
retary of the Commonwealth of Pennsylvania  
at Harrisburg and with the Prothonotary of  
the Court of Common Pleas of Franklin  
County, Pennsylvania, on April 15, 1980, an  
application for a certificate for the conduct-  
ing of a business under the assumed or fic-  
titious name of AMERICAN TRADING  
COMPANY with its principal place of busi-  
ness at P. O. Box 338, 1939 Wayne Road,  
Chambersburg, Pennsylvania.

The names and addresses of all persons  
owning or interested in said business are  
Richard E. Christman, 1939 Wayne Road,  
Chambersburg, Pennsylvania 17201.

H. Anthony Adams  
132 East King Street  
Shippensburg, Pa. 17257  
Attorney

(3-28)

LEGAL NOTICES, cont.

prospect of reuniting it without serious emotional harm to the  
child. (The Pennsylvania Supreme court has indicated in  
*Appeal of Diane B.*, supra at footnote 5, that both sections  
311(1) and 311(2) involve the duty of a parent to care for  
the child, and "decisions under one section may fruitfully be  
used in discussing the provisions of the other.")

The issue of custody in the present case, as in *William  
L.*, is not whether the state should intrude to disrupt an on-  
going family relationship between mother and children, but  
whether the state should seek to preserve in law a relationship  
which no longer exists in fact. The Court finds that to remove  
the children from the custody of foster parents would not be  
in their best interest. Their family ties have formed where  
mother placed parental responsibility four and one-half years  
ago, with George and Terry Simmers.

ORDER

NOW, this 27th day of September 1979, the petition of  
George E. Simmers and Terry L. simmers to terminate the  
parental rights of Rebecca Hollenshead Gunder in Heidi H.  
Hollenshead, born October 21, 1973 and Barry L. Hollens-  
head, born October 24, 1971, is granted. Custody of the said  
children shall remain in George E. Simmers and Terry L.  
Simmers. The petitioners are granted leave to proceed with  
the adoption of said children.

The petition of Rebecca Hollenshead Gunder for custody  
of said children is denied.

Exceptions are granted Rebecca Hollenshead Gunder.

MARTIN v. BELTZ, et al., C.P. Franklin County Branch,  
A.D. 1978 - 432

*Preliminary Objections - Demurrer - Landlord and Tenant - Breach of  
Implied Warranty of Habitability*

1. Preliminary objections in the nature of a demurrer to an answer to  
new matter and counterclaim will not be granted where the plaintiffs  
assert factual circumstances which may establish a defense to the  
breach raised by the defendants in New Matter.
2. An agreement between a landlord and a tenant shifting the cost of

repairs to the tenant is not clearly precluded under Pennsylvania law.

Forest N. Myers, Esq., Counsel for Plaintiff

David Woodward, Esq., of Legal Services, Inc., Counsel for Defendants

### OPINION AND ORDER

KELLER, J., November 30, 1979:

Defendants' preliminary objections to the answer to new matter and counterclaim are in the nature of demurrers to the answers to new matter and counterclaim counts I, II, III, and V. Defendants request the Court to adjudge the plaintiff's answers insufficient as a matter of law and enter judgment in favor of defendants and against the plaintiff as to defendants' defense of breach of implied warranty of habitability raised in new matter, and for the specific relief prayed for in counterclaim counts I, II, III and V.

Preliminary objections in the nature of a demurrer should be sustained only where it appears with certainty that the law will not permit recovery. *Papieves v. Lawrence*, 437 Pa. 373, 263 A. 2d 118 (1970); *London v. Kingley*, 368 Pa. 109, 81 A. 2d 870 (1951). Defendants assert in new matter that the oral lease agreement between defendants and plaintiff contained an implied warranty of habitability, and that this warranty was breached by the plaintiff's failure to remedy, after notice and reasonable opportunity to repair, specific defects in the dwellings structure and accommodations which rendered the dwelling "unfit for human occupancy throughout defendants' occupancy." (Answer, New Matter, paragraph 17.) Plaintiff's denial of the existence of the implied warranty of habitability cannot operate as a legal defense in view of the recent decisions in *Pugh v. Holmes*, Pa. Super. , 384 A. 2d 1237 (1978), aff'd Pa. , 405 A. 2d 897 (1979); *Fair v. Negley*, Pa. Super. , 390 A. 2d 240 (1978); *Beaseley v. Freedman*, Pa. Super. , 389 A. 2d 1087 (1978). Plaintiff's denials of the breach of the warranty, of the existence of the alleged defects, of the alleged "uninhabitable" condition of the premises, and of notice of any defects raise significant factual questions which may, under current case law, establish a defense to the breach raised by defendants in new matter. Plaintiff also asserts an agreement between the parties which shifted the cost of repairs to defendants. Such an agreement is not clearly precluded under Pennsylvania law, and its existence, if proven, could affect the outcome of this

action. See, *Fair v. Negley*, Pa. Super. , 390 A. 2d 240, 246 (1978) (Spaeth, J., concurring). Therefore, it would not be proper for the Court to sustain defendants' preliminary objection to plaintiff's answer to new matter.

The preliminary objections to plaintiff's answer to counterclaims counts I, II, III and V incorporate by reference the previously stated allegations and raise additional claims based upon the disputed facts of the rental agreement between the parties, the condition of the premises, and, in count V, plaintiff's actions and conduct toward defendants on specific dates in time. The Court cannot sustain defendants' preliminary objections to plaintiff's answer to counterclaims counts I, II, III and V. Plaintiff's denial of the existence of an implied warranty of habitability in the lease agreement between the parties, although in error, does not operate to preclude a defense of denial on the necessary breach of the warranty, and does not preclude a defense to the counterclaims by way of denial of the facts establishing the claims or assertion of additional covenants between the parties.

### ORDER OF COURT

NOW, this 30th day of November, 1979, the defendants' preliminary objections are dismissed.

Exceptions are granted the defendants.

COMMONWEALTH v. SCHILDT, C.P. Franklin County Branch, No. 488 of 1978

*Criminal Action - Reference to Prior Crime - Motion for Mistrial*

1. An isolated and unsolicited remark as to defendant's prior criminal record by a witness for the Commonwealth which is followed by cautionary instructions by the court does not constitute grounds for a mistrial.

District Attorney's Office

Public Defender's Office

### OPINION AND ORDER

EPPINGER, P.J., November 28, 1979:

Edwin Schildt, the defendant, was involved in a fight. He and his friend Ronald Green were on one side and