

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

WENDELL S. GAINER, JR., :
WILLIAM S. GAINER, JEANNETTE :
PRICE, EDWARD C. LEININGER :
and ROSANN LEININGER, his :
wife, DAVID W. RITTER, :
BEVERLY E. MOSER, MARK M. :
SITCH and ROSEMARIE SITCH, :
His wife, :
Plaintiffs :

Vs. : No. 09-0428

JESSE DELLEN and :
LESTER D. BOWER, :
Defendants :

Cynthia S. Ray, Esquire	Counsel for Plaintiffs
Marc S. Fisher, Esquire	Counsel for Defendant, Jesse Dellen
Lester D. Bower	Pro Se

DECISION AND VERDICT

Serfass, J. - December 30, 2011

Plaintiffs Jeanette Price, Edward C. Leininger, Rosann Leininger, Beverly E. Moser, Mark M. Sitch and Rosemarie Sitch seek recognition of an easement across a former railroad bed, now owned in part by the Defendants, Jesse Dellen and Lester D. Bower, in order to access a portion of their properties adjacent to the former railroad bed. The aforementioned Plaintiffs, along with Plaintiff David W. Ritter, also seek an easement over the former railroad bed from State Route 93 to access the same portion of their properties. Plaintiffs Wendell S. Gainer Jr.

and William S. Gainer seek an easement over the entirety of the former railroad bed.

In this action, the Plaintiffs argued that they are entitled to an easement over the former railroad bed as an express easement; easement by necessity; or an easement by implication. They also argued that they are entitled to an easement across the former railroad bed pursuant to the Railroad Act of 1949, 15 P.S. § 4101 (repealed 1978). After a non-jury trial and view of the subject properties held on July 11, 2011, we make the following:

FINDINGS OF FACT

1. The parties are owners of land that once had been a single parcel until the installation of railroad tracks in approximately 1853.

2. The Ritter property consists of approximately 82 acres in Packer Township and Weatherly Borough, Carbon County, as described in a deed dated July 12, 1996 which is recorded in Carbon County deed book volume 666 at page 442.

3. The Leininger property consists of approximately 41.31 acres in Packer Township, Lehigh Township and Weatherly Borough, Carbon County, as described in a deed dated December 17, 1979 which is recorded in Carbon County deed book volume 411 at page 364.

4. The Price property consists of approximately 28 acres in Lehigh Township and Weatherly Borough, Carbon County, as described in a deed dated August 2, 2003 which is recorded in Carbon County deed book volume 1627 at page 435.

5. The Moser property consists of approximately 24 acres in Packer Township and Weatherly Borough, Carbon County, as described in a deed dated November 10, 1997 which is recorded in Carbon County deed book volume 729 at page 100.

6. The Sitch property consists of unspecified acreage in Lehigh Township and Weatherly Borough, Carbon County, as described in a deed dated March 26, 2002 which is recorded in Carbon County deed book volume 1011 at page 127.

7. On or about January 4, 1988, a six (6) lot Final Subdivision Plan for Dellen was approved by the Packer Township Board of Supervisors and subsequently recorded in Carbon County map book 1 at page 981 on February 17, 1988.

8. The Dellen Subdivision is subject to an Agreement with the Packer Township Board of Supervisors, which is recorded in Carbon County miscellaneous book volume 058 at page 952.

9. The Dellen property consists of Lot 6 of the Dellen Subdivision, containing approximately 29.6 acres situated in Packer Township and Lehigh Township, Carbon County, as described in a deed dated April 6, 1993 which is recorded in Carbon County deed book volume 635 at page 334.

10. The Defendants' property consists of a former railroad bed (hereinafter "Railroad Bed"), which is approximately 80 feet in width, as described in a deed dated April 6, 1993 which is recorded in Carbon County deed book volume 635 at page 334.

11. Bower owns the portion of the Railroad Bed that crosses his property, and Dellen owns the portion of the Railroad Bed that extends from the eastern boundary of his property through the properties of Ritter, Leininger, Moser, Sitch and Price.

12. The railroad tracks were removed by the Lehigh Valley Railroad Company sometime between 1965 and 1969.

13. The deeds regarding the Leininger, Sitch and Price properties recognize the existence of a claim of ownership in/right of way over the Railroad Bed.

14. Deeds contained in the chain of title for the Dellen and Bower properties recorded in Carbon County deed book volume 295 at page 387 and volume 295 at page 392 contain covenants subjecting those properties to "visible easements and restrictions of record" and the "rights of adjoining landowners to cross said premises" over any private road or road crossing.

15. The Gainer property consists of Lots 3, 4 and 5 in the Dellen Subdivision, containing approximately 27, 13.5 and 13.5 acres, respectively, situated in Packer Township, Carbon County, as described in deeds dated August 19, 1996, October 25, 1988,

and June 19, 1995, respectively, which are recorded in Carbon County deed book Volume 668 at page 854; volume 510 at page 745 and volume 623 at page 802, respectively.

16. The Bower property consists of Lots 1 and 2 in the Dellen Subdivision, containing approximately 14.7 and 13.5 acres respectively, situated in Packer Township, Carbon County, as described in a deed dated April 18, 2000 which is recorded in Carbon County deed book volume 1587 at page 74.

17. Dellen previously shared ownership of his property with several partners, who acquired the property via deed dated December 24, 1986 which is recorded in Carbon County deed book volume 477 at page 448.

18. The Railroad Bed snakes through and bisects the properties of Ritter, Moser, Leininger, Price and Sitch into two sections: a northern and a southern parcel.

19. The northern parcels of the properties of Ritter, Moser, Leininger and Sitch have access from a public highway.

20. The southern parcels of the properties of Ritter, Moser, Leininger and Sitch are without direct access to a public roadway, and are landlocked by the Railroad Bed, the property of third parties, the Quakake Creek, and mountainous terrain.

21. The Price property is located entirely on the southern side of the Quakake Creek, and therefore has no direct access to a public roadway, and is landlocked by the Railroad Bed, the

property of third parties, the Quakake Creek, and mountainous terrain. Its location is best depicted in Plaintiff's Exhibit 18, "Right of Way and Track Map," as a parcel identified as "No. 1."

22. The sole means of ingress and egress for the Dellen Subdivision is over the Railroad Bed, beginning at State Route 93 and passing through the properties of Bower, Gainer and Dellen, and continuing through the properties of Ritter, Leininger, Moser, Sitch and Price.

23. The Agreement governing the Dellen Subdivision provides that the use of the Railroad Bed is limited to its service as an access road to the lots in the subdivision.

24. The Railroad Bed provides the only feasible access to the southern parcels of the properties of Ritter, Leininger, Moser, Sitch and Price, as those parcels are landlocked by the Railroad Bed, the property of third parties, the Quakake Creek, and mountainous terrain.

25. Ritter and Mrs. Leininger have used the Railroad Bed in order to access the southern parcels of their properties from State Route 93, and for activities including, but not limited to, obtaining water and walking.

26. Other persons not parties to the instant litigation have also accessed and used the Railroad Bed from State Route 93

over the years for activities including, but not limited to, obtaining water, walking, and picking blueberries.

27. The Lehigh Valley Railroad Company, one of the predecessors in interest of the Defendants' property, allowed the general public to cross both its land and a footbridge over the Quakake Creek, which it constructed near the boundary of the Ritter and Dellen properties.

CONCLUSIONS OF LAW

1. "Easements may be created by express agreement, by implication, by estoppel, or by operation of law." Kapp v. Norfolk Southern Ry. Co., 350 F. Supp. 2d 597, 607 (M.D. Pa. 2004). "Easements may also be created by prescription." Id.

2. Approval by a municipality of a subdivision plan does not affect private easement rights. Potis v. Coon, 496 A.2d 1188, 1192 (Pa. Super. 1985).

A. Express Easement

1. "An express easement may be created by an express grant or reservation in the deed or instrument." Id. "[W]hen the terms of an express grant of an easement are general, ambiguous, and not defined by reference to the circumstances known to the parties at the time of the grant, the express easement is to be construed in favor of the grantee,...and the easement may be used in any manner that is reasonable." Lease v. Doll, 403 A.2d 558, 562 (Pa. 1979).

2. An express easement over the Railroad Bed is provided for in the deeds recorded in Carbon County deed book volume 295 at page 387 and volume 295 at page 392, as each deed contains covenants subjecting the Defendants' properties to "visible easements and restrictions of record" and the "rights of adjoining landowners to cross said premises" over any private road or road crossing.

3. Since the evidence demonstrates that the Railroad Bed was an open, notorious and visible use on the Defendants' properties, each of the Plaintiffs is entitled to an express easement over the Railroad Bed from State Route 93.

B. Easement by Necessity

1. An easement by necessity is created when, after severance from an adjoining property, a piece of land is without access to a public highway. Bodman v. Bodman, 321 A.2d 910 (Pa. 1974).

2. In order to establish an easement by necessity, a property owner must prove 1) the titles to the property in question and the property over which the alleged easement exists had once been held by one person; 2) this unity of title had been severed by a conveyance of one of the tracts; and 3) the easement was necessary in order for the owner of the property in question to use his land, with the necessity existing both at

the time of the severance and at the time of the exercise of the easement. Graff v. Scanlan, 673 A.2d 1028 (Pa. Cmwlth. 1996).

3. An easement implied on the grounds of necessity is always of strict necessity; it never exists as a matter of mere convenience. Possessky v. Diem, 655 A.2d 1004 (Pa. Super. 1995).

4. "Strict Necessity" in the context of access to a public road requires that the property be without any access to a public road following the original severance. Phillipi v. Knotter, 748 A.2d 757, 761 (Pa. Super. 2000).

5. Where the servient estate abuts a public roadway and the only access to the dominant estate is by easement over the servient estate, and where the properties were originally held jointly, it has long been the rule that an easement arises of necessity. Tomlinson v. Jones, 557 A.2d 1103, 1105 (Pa. Super. 1989).

6. The unity of title of the Plaintiffs' properties, once a single parcel, was severed when the railroad tracks were installed in approximately 1853.

7. The necessity of the easement over the Railroad Bed from State Route 93 existed at the time of the original severance and continues to exist at the present time, because each of the Plaintiffs' southern parcels, along with Price's northern parcel, do not have any access to a public highway independent of the Railroad Bed.

8. As a result, Ritter, Leininger, Moser, Price and Sitch are entitled to an easement by necessity over the Railroad Bed from State Route 93 to access the southern parcels of their respective properties. Also, since Price's northern parcel does not enjoy any access to a public road, Price is entitled to an easement by necessity to access the northern parcel of her property as well.

9. Since the Gainers presently enjoy access to their property from State Route 93 pursuant to the Dellen Subdivision Plan, they are not entitled to an easement by necessity, because the "strict necessity" required to grant such an easement does not exist as to the Gainer property.

C. Easement by Implication

1. "It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property." Hann v. Saylor, 562 A.2d 891, 892 (Pa. Super. 1989).

2. "[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be."

Tosh v. Witts, 113 A.2d 226, 228 (Pa. 1955). This is so "irrespective of whether or not the easement constitutes a necessary right of way." Id.

3. "An easement by implication may be acquired where the intent of the parties is clearly demonstrated by the terms of the grant, the surroundings of the property and other res gestae of the transaction." Hann, 562 A.2d at 892.

4. "Easements by implied reservation are based upon the theory that 'continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of the necessity for the use.'" Daddona v. Thorpe, 749 A.2d 475, 481 (Pa. Super. 2000).

5. An ordinary right-of-way, such as a road, a path or an alley, has been held to be continuous. Burns Mfg. Co., Inc. v. Boehm, 356 A.2d 763, 767 (Pa. 1976). Where an easement arises by implication, as opposed to necessity, the easement encompasses an entire right-of-way. Scoppa v. Myers, 491 A.2d 148 (Pa. Super. 1985).

6. "In determining whether the circumstances under which a conveyance of land is made create an implied easement,...the following factors are important: (a) whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made

against a simultaneous conveyee, (e) the extent of the necessity to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties." Thomas v. Deliere, 359 A.2d 398, 399-400 (Pa. Super. 1976).

7. "[N]o single factor is dispositive and no purely mathematical weighing of factors is possible in determining whether an easement should be implied." Flaherty v. DeHaven, 448 A.2d 1108, 1112 (Pa. Super. 1982).

8. "[I]n the greater number of cases, it is the necessity of the use of the land to the claimant that contributes most to the implication of an easement." Id. "However, as the degree of necessity decreases, the need to refer to other factors suggestive of an intent to create an easement increases substantially." Id.

9. "When a right or title is of ancient origin or where the transaction under investigation is so remote as to be incapable of direct proof...the law, of necessity, relaxes the rules of evidence and requires less evidence to substantiate the fact [in] controversy." Tomlinson, 557 A.2d at 1105.

10. Given the landlocked nature of the Plaintiffs' properties, the necessity to use the Railroad Bed to access said properties is of a great degree.

11. Given that the original severance occurred in approximately 1853, the testimony presented by the Plaintiffs that the Railroad Bed was used for various activities and for access to their properties, along with the fact that the railroad company permitted the general public to use the Railroad Bed, provides sufficient evidence to support the existence of an open, visible, permanent and continuous servitude establishing an easement by implication. See Tomlinson, supra.

12. Accordingly, each of the Plaintiffs is entitled to an easement by implication over the length of the Railroad Bed.

D. Easement Pursuant to the Railroad Act of 1849

1. In relevant part, the Railroad Act of 1849 provides the owners of property adjacent to a railroad an easement by operation of law in the form of a right of way across the railroad that bisects their property. 15 P.S. § 4101 (repealed 1978), quoted in Estate of Spickler v. County of Lancaster Bd. of Comm'rs, 577 A.2d 923, 924 (Pa. Super. 1990).

2. Easements under the Railroad Act of 1849 arise at the time of severance, run with the land, and become vested in subsequent purchasers of the land. Id. at 925.

3. Since the Railroad Bed clearly bisects the properties of Ritter, Leininger, Moser, Price and Sitch, said Plaintiffs are entitled to an easement across the Railroad Bed to access their respective properties pursuant to the Railroad Act of 1849.

4. Ritter has previously been granted an easement pursuant to the Railroad Act of 1849 across the Railroad Bed in order to reach his southern parcel. See Ritter v. Dellen, No. 97-1811 (C.P. Carbon 2000).

5. Ritter has also previously been granted an easement by necessity across the Railroad Bed from his northern parcel to access his southern parcel by the Superior Court of Pennsylvania in Ritter v. Dellen, 804 A.2d 70 (Table) (Pa. Super. 2002) (unpublished memorandum).

6. Accordingly, for purposes of the instant matter, the Court need only grant Leininger, Moser, Price and Sitch an easement across the Railroad Bed to access their respective properties pursuant to the Railroad Act of 1849.

VERDICT

AND NOW, to wit, this 30th day of December, 2011, this matter having come before the Court for a non-jury trial, the Court finds **IN FAVOR** of the Plaintiffs, Wendell S. Gainer, Jr., William S. Gainer, Jeannette Price, Edward C. Leininger, Rosann Leininger, David W. Ritter, Beverly E. Moser, Mark M. Sitch, and

Rosemarie Sitch, and **AGAINST** the Defendants, Jesse J. Dellen and Lester D. Bower, and hereby grants the Plaintiffs easements pursuant to this Decision and Verdict as follows:

1. Each of the Plaintiffs is granted an express easement over the Railroad Bed from State Route 93;
2. Plaintiffs Ritter, Leininger, Moser, Price and Sitch are granted an easement by necessity over the Railroad Bed from State Route 93 to access the southern parcels of their respective properties;
3. Price is granted an easement by necessity over the Railroad Bed from State Route 93 to access the northern parcel of her property;
4. Each of the Plaintiffs is granted an easement by implication over the length of the Railroad Bed; and
5. Plaintiffs Leininger, Moser, Price and Sitch are granted an easement across the Railroad Bed to access their respective properties pursuant to the Railroad Act of 1849.

Pursuant to Pa. R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the Decision and Verdict if no motion for post trial relief has been filed under Pa. R.C.P. No. 227.1 within ten (10) days after notice of the filing of this Decision and Verdict.

The Plaintiffs shall cause this Decision and Verdict to be

indexed in the Miscellaneous Book at the Carbon County Recorder of Deeds Office within ten (10) days of the entry of the final judgment.

BY THE COURT:

Steven R. Serfass, J.