

COMMONWEALTH OF PENNSYLVANIA

THE STATE BOARD OF PROPERTY

**DONALD L. BUSSARD and BARBARA J. BUSSARD,
EDWARD F. LYNCH and CAROL L. LYNCH,
Petitioners**

v.

**COMMONWEALTH of PENNSYLVANIA,
DEPARTMENT of CONSERVATION and NATURAL RESOURCES,
Respondent**

DOCKET NO. BP-2018-0005

FINAL ADJUDICATION AND ORDER

**Jason E. McMurry, Esquire, designee of the
Secretary of the Commonwealth, Chairman**

**Robert Teplitz, Esquire, designee of the
Secretary of Community and Economic Development**

**Jullia A. Sheridan, Esquire, designee of the
General Counsel**

**Department of Community and Economic Development
Commonwealth Keystone Building
400 North Street, 400 Plaza Level
Harrisburg, PA 17120**

TAB

HISTORY

This matter comes before the State Board of Property (Board) to determine ownership of certain real estate within this Commonwealth otherwise claimed by the Commonwealth. By petition filed on September 4, 2018, Donald L. Bussard and Barbara J. Bussard and Edward F. Lynch and Carol L. Lynch (Petitioners) sought a declaratory judgment that Petitioners and not the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources (Respondent) are the rightful and lawful owners of certain real property located in Southampton Township, Bedford County, Pennsylvania.

On September 24, 2018, Respondent filed preliminary objections to the petition, and on February 22, 2019 filed a supporting brief. On March 28, 2019 Petitioners filed a brief in opposition to the preliminary objections, and on April 12, 2019 Respondent filed a reply brief. By order dated May 16, 2019, the Board sustained Respondent's certain preliminary objections as to insufficient specificity and overruled as moot objections in the nature of demurrers.

On January 6, 2020, Petitioners filed an amended petition. On January 21, 2020, Respondent filed preliminary objections to the amended petition and on February 12, 2020 Petitioners filed a response. On August 21, 2020 Respondent filed a brief supporting its preliminary objections. On September 24, 2020 Petitioners filed an opposition brief, and on October 9, 2020, Respondent filed a reply brief.

The Board¹ deliberated this matter at its meetings October 15, 2020 and April 15, 2021, and now issues this adjudication and order as a final determination of Petitioners' petition.

¹ Board member Robert Teplitz, Esquire has recused and has not participated in the deliberations or determination of this matter. Then Board member Basil L. Merenda, Esquire participated in the deliberations on October 15, 2020. Subsequent to those deliberations, the General Counsel designated Jullia A. Sheridan, Esquire to sit in his place. Ms. Sheridan reviewed the entire record prior to participating in the Board deliberations on April 15, 2021 and the motion to approve this final adjudication and order.

FINDINGS OF FACT

1. By deed dated June 18, 2010 and recorded June 18, 2010 in Bedford County Deed Book Volume 1338 at page 184, Frances L. Ketterman, widow, conveyed two parcels of land located in the Township of Southampton, County of Bedford and Commonwealth of Pennsylvania containing 103.04 acres (Property) and 89.85 acres to Petitioners. (Amended petition at ¶ 5)

2. The Property constituted the remaining portion of real property originally conveyed to Frances L. Ketterman and her deceased husband Earl Ketterman. (Amended petitioner at ¶ 6)

3. The chain of title for the Property leading to Petitioners is as follows:

A. Rhoda May Strut and Robert S. Strut, wife and husband, conveyed 300 acres more or less excepting and reserving certain identified parcels located in the Township of Southampton, County of Bedford and Commonwealth of Pennsylvania, which included the Property and others, to McKinley Morris and Nellie P. Morris, husband and wife, by deed dated November 1, 1923 and recorded November 9, 1923 Deed Book Volume 168 at page 321.

B. McKinley Morris and Nellie P. Morris, husband and wife, conveyed 300 acres more or less excepting and reserving previously conveyed parcels located in the Township of Southampton, County of Bedford and Commonwealth of Pennsylvania, which included the Property and others, to Earl Ketterman by deed dated July 24, 1951 and recorded July 25, 1951 Deed Book Volume 248 at page 387.

C. Earl Ketterman and Frances L. Ketterman, husband and wife, conveyed 300 acres excepting and reserving previously conveyed parcels located in the Township of Southampton, County of Bedford and Commonwealth of Pennsylvania, which included the

Property and others, to Earl Ketterman and Frances L. Ketterman, husband and wife, by deed dated July 7, 1984 and recorded July 7, 1984 in Record Book Volume 196 at page 192.

(Amended petition at ¶ 7)

4. After obtaining ownership of the 300 acre parcel referred to above in paragraph A, McKinley Morris sought to obtain a patent from the Commonwealth of Pennsylvania for a smaller portion of his larger property, said portion being identified as the Jesse Dicken Warrant consisting of 118 acres and 87 perches (Dicken Warrant), a portion of which overlaps a portion of the Property. (Amended petition at ¶ 8 and attached exhibits A and B)

5. The Dicken Warrant was given by the Commonwealth of Pennsylvania to Jesse Dicken. The Warrant is dated May 11, 1863 and is filed in the Pennsylvania Department of Internal Affairs in Book D, Volume 26 at page 143. (Amended petition at ¶ 9)

6. McKinley Morris was successful in obtain a patent for the Dicken Warrant, said patent being granted on February 17, 1937 and recorded in Pennsylvania Patent Book H-79 at page 267 (Morris Patent). (Amended petition at ¶ 10)

7. Petitioners and their predecessors in title dating back to at least 1923 have been in continuous and open control of the parcel known as the Dicken Warrant, maintaining it, paying taxes on it and keeping it insured. (Amended petition at ¶ 12)

8. Petitioners are unable to reference any deeds other than those cited above. (Amended petition at ¶ 13)

9. During the time of ownership of the Property by predecessors in title, the predecessor agency to Respondent would mark white boundary lines for lands of the Commonwealth. This practice is consistent with information provided by Robert Roland, CPE,

the Clean and Green Administrator for the tax assessment office of Bedford County. Mr. Roland advised, based on his experience with the tax assessment office that Respondent paints boundary lines for its properties every 5 years. (Amended petition at ¶ 14)

10. There is no evidence of any sort that lines were marked for many years until they were marked in 2014 as a result of the dispute between Petitioners and Respondent. (Amended petition at ¶ 15)

11. On April 11, 2013, Petitioners began the process of declaring the Property a reserve for the Golden-Winged Warbler through the US Department of Agriculture known as the “Golden-Winged Warbler Initiative (West 8).” (Amended petition at ¶ 16)

12. After the conservation plan for the Golden-Winged Warbler Initiative (West 8) was approved in late 2014, Petitioners began the process of having some of the timber located on the Property logged in accordance with the conservation plan. They were approached by Respondent’s representatives from the Buchanan Forest District Office Ranger R. Shawn Lynn and District Forrester Jim Smith, who claimed that the Commonwealth was the owner of that part of the Property. (Amended petition at ¶ 17)

13. Ranger Lynn and District Forrester Smith indicated that it was their opinion that the parcel constituting the Dicken Warrant and part of the Property were one and the same parcel. As a result, logging on the Property was halted and a revision to the conservation plan was done. However, Petitioners were not able to consummate the revision because it expired on December 31, 2018 due to the pending litigation with the Commonwealth. (Amended petition ¶ 18)

14. The Commonwealth’s alleged ownership of the Property was based on a deed from Hilary H. Hartsock and Ida G. Hartsock to the Commonwealth of Pennsylvania and dated May 22, 1911 and recorded in Bedford County Deed Book Volume 116 at page 346 conveying

114 acres and 34 perches (all of the Dicken Warrant except for a small portion of the southerly corner). (Amended petition at ¶ 19)

15. The Commonwealth's assertion of ownership further relied on the following chain of title set forth in a title abstract for the Dicken Warrant by John E. Potter, examiner of titles to the Pennsylvania Forestry Commission:

A. Deed from Jesse Dicken and Rebecca, his wife, to Robert Ash dated May 4, 1864 and recorded June 27, 1864 in Bedford County Deed Book AK at page 293 conveying 130 acres more or less.

B. Deed from Abram Ash and Marian V. Ash, his wife, to Hilary H. Hartsock dated February 8, 1896 and recorded in Bedford County Deed Book Volume 88 at page 166 conveying 230 acres and 147 perches, neat measure.

C. Quitclaim deed from Robert Ash and Ann B., his wife, dated April 22, 1911 and recorded June 20, 1911 in Bedford County Deed Book Volume 116 at page 344 conveying any interest in 118 acres and 70 perches. The deed was acknowledged on April 29, 1911 before A.H. Cramer, N.P., in Adams County, Nebraska.

(Amended petition at ¶ 20)

16. The critical issue raised in the abstract was a lack of evidence showing that Robert Ash ever conveyed his interest in the Dicken Warrant to Hilary Hartsock. That issue was debated between Mr. Potter and Hilary Hartsock. (Amended petition at ¶ 21)

17. In a letter dated April 21, 1911, Hilary Hartsock requested that Mr. Potter prepare a quitclaim deed and thereafter mail it to him. Mr. Hartsock then indicated that he would mail the deed in order to get it signed by Robert Ash, who had apparently been found in Adams County, Nebraska. (Amended petition at ¶ 22)

18. A letter from Ford Ash and Lulu Ash dated May 1, 1911 was provided to Mr. Potter and it indicated that the Robert Ash (apparently found in Adams County, Nebraska) was the “only Robert Ash that was even in this country [and] undoubtedly is the individual man that purchased the land from Jesse Dicken.” (Amended petition at ¶ 23)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter under section 1207 of the Administrative Code of 1929, 71 P.S. § 337.

2. Because they cannot establish a chain of title, Petitioners cannot establish ownership of the disputed property and Respondent is entitled to judgment as a matter of law. (Findings of Fact Nos. 1-18).

DISCUSSION

Petitioners brought this action to quiet title against Respondent, a Commonwealth agency apparently asserting a claim to the real estate. The Board has jurisdiction under section 1207 of the Administrative Code of 1929,² 71 P.S. § 337, to consider matter involving a dispute of ownership of real estate involving the Commonwealth. *See, York OPA, LLC v. Commonwealth, Dept. of Transportation*, 181 A.3d 5, 13 (Pa. Cmwlth. 2018) (Board of Property has exclusive jurisdiction to determine the title to real estate or to remove a cloud on title to such real estate where private property owners and the Commonwealth claim an interest in the same real estate).

Respondent has demurred to the allegations in the complaint, arguing that Petitioners, the party with the burden of proof, cannot prevail on the legal theories they have presented. The General Rules of Administrative Practice and Procedure apply to quiet title actions before the State Board of Property, and the Board may grant a Commonwealth agency's motion to dismiss under 1 Pa. Code § 35.54 for lack of legal sufficiency appearing on the face of the complaint. *McCullough v. Commonwealth, Dept. of Transp.*, 578 A.2d 568, 571-72 (Pa. Cmwlth. 1990). In ruling on preliminary objections in the nature of a demurrer for legal insufficiency, the Board must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible from the facts, but unwarranted inference, conclusions of law, argumentative allegations or expressions of opinion need not be accepted; in order to sustain a demurrer, it must appear with certainty that the law will permit no recovery, and any doubt should be resolved in favor of the

² **Section 1207. Board of Property.**

The Board of Property shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the said board.

* * *

The Board of Property shall also have jurisdiction to hear and determine cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth.

* * *

71 P.S. § 337.

non-moving party. *Beishline v. Dept. of Environmental Protection*, 234 A.3d 878, 884 n.8 (Pa. Cmwlth. 2020).

In their amended petition Petitioners raise two theories of law to support their ownership of the Property. First, Petitioners claim that the Commonwealth's title is defective because Hilary Hartsock never obtained legal title from Robert Ash. Second, Petitioners claim that, accepting that the Commonwealth received good title to the Dicken Warrant through Robert Ash to Hilary Hartsock, the Morris patent provided Petitioners title free and clear of all liens, encumbrances and claims of the Commonwealth whatsoever. Respondent demurs to both theories.

In an action to quiet title, the petitioner bears the burden of proof to establish title by a fair preponderance of the evidence. *Long Run Timber Co. v. Dept. of Conservation and Natural Resources*, 145 A.3d 1217, 1228 (Pa. Cmwlth. 2016). Whether the matter sounds in ejectment or quiet title, the moving party must recover on the strength of its own title and not upon the weakness of the Commonwealth's. *Id.* The petitioner has the burden of establishing a prima facie title, which proof is sufficient until a better title is shown in the adverse party. *Moore v. Dept. of Environmental Resources*, 566 A.2d 905, 907 (Pa. Cmwlth. 1989). Until the petitioner has made a prima facie case by showing title sufficient upon which to base a right of recovery, the burden does not shift, and the respondent is not required to offer evidence of its title. *McGovern v. East End Gun Club of Schuylkill County*, 2014 WL 10588414, *4 (Pa. Super., filed Sept. 24, 2014, no. 1954 MDA 2013) (unpublished memorandum opinion). Where the parties claim from a common source, a petitioner makes out a prima facie case in his favor by showing a direct line of title. *Moore*, 566 A.2d at 908. Otherwise, the petitioner must show chain of title back to its source. *See, Faux v. Cooke*, 163 A. 384, 385 (Pa. Super. 1932) (quiet title plaintiff whose right to recover rested solely on paper title must show prior acquisition of legal right thereto, as it may have been acquired

from entire strangers who had no color of title; without further proof, the deed is of no value), citing, *Bonaffon v. Peters*, 19 A. 499 (Pa. 1890) (limited chain of title does not prove title in plaintiff or his grantors, as prior deeds might have been made by persons who had not even color of title and were strangers to it).

Here, Petitioners' chain of title begins with Rhoda May Strut and Robert S. Strut to McKinley Morris and Nellie P. Morris in 1923, then to Earl Ketterman in 1951, and finally by Mr. Ketterman's widow to Petitioners in 2010. Petitioners acknowledge they are unable to reference any other deeds. Petitioners cannot prove any earlier title. Petitioners cannot establish that Mr. and Mrs. Strut had valid title to the Property. Thus, Petitioner have not and cannot make out a prima facie case and as a matter of law cannot succeed on this claim. That the Commonwealth's title may be defective is of no moment.

Petitioners also assert that the McKinley Morris patent effectively transferred title to Petitioners' predecessors. Commonwealth Court has described the beginning of Pennsylvania's system for obtaining ownership of real estate:

By the Royal Charter of March 4, 1681, King Charles II of England granted "William Penn, his heirs and assigns ... make, create and constitute the true and absolute proprietaries of [Pennsylvania]" conveying to him "an immediate and absolute estate in fee to the province of Pennsylvania." ... Throughout the proprietorship, lands were conveyed by warrant and patent by the Land Office which has operated continuously since William Penn arrived in Pennsylvania in 1682 and began to administer and sell land. In 1779, the Commonwealth bought out the proprietorship and assumed title to all public land not yet conveyed.

Dutch Corner Historical Soc. v. Stahl, 78 A.3d 1201, 1202 (Pa. Cmwlth. 2013) (internal citations and footnotes omitted). Our Supreme Court previously explained:

In our system of land titles, the warrant and survey are the origin of title, and the patent is the confirmation of it. Even where the right originates in a settlement and improvement, it is only a right to pre-emption, and there must be a warrant and survey before there can be a patent. The warrant confers, indeed, but an inceptive or equitable title, but it is the title that is paid for, and the patent which passes the

legal title out of the Commonwealth is so merely a perfection and confirmation of the title by warrant, that if a wrong party receives the patent, he is always treated as holding in trust for the warrantee or the true party under him. It has often been said that the question is not who has got the patent, but who ought to have it? And that question is settled by the state of the title under the warrant and survey.

Delaware & Hudson Canal Co. v. Dimock, 47 Pa. 393, 397, 1864 WL 4693, *3 (1864). Because officers of the land office are not the proprietors of the lands granted by them and act only as agents of the state in disposing of them, the officers are limited in their action by the authority granted by them and if they grant lands belonging to the state in a manner not authorized by law, the grant must be considered void. *Id.*, 47 Pa. at 397, 1864 WL 4693, *4.

As discussed above, Petitioners' recited chain of title is not sufficient to establish that they hold title to the Property. Conversely, Respondent's deeds – as accepted by Petitioners for purposes of adjudicating this theory – do establish that that Respondent had acquired title to the Property. Clearly, Respondent ought to have the patent, and Petitioners' predecessor who received the patent merely held it in trust for Respondent. As a matter of law Petitioners cannot recover under the theory that the McKinley Morris patent perfected title in Petitioners' predecessors.

Finally, Petitioners assert that even if the Commonwealth owns the Dicken Warrant, Petitioners retain the balance of the Property. Because as discussed above Petitioners cannot establish good title to the Property as a whole, accepting that the Commonwealth owns the Dicken Warrant cannot establish that Petitioners retain the balance of the Property.

Accordingly, accepting as true the allegations of Petitioners' petition and all inferences reasonably deducible therefrom, it appears with certainty that because Petitioners cannot establish good title in their predecessors, the law will not permit Petitioners to prevail. Respondent is therefore entitled to judgment as a matter of law.

Wherefore, the Board enters the following order.


**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE STATE BOARD OF PROPERTY**

Donald L. Bussard and Barbara J. Bussard,	:	
Edward F. Lynch and Carol L. Lynch,	:	
Petitioners	:	
	:	
vs.	:	Docket No. BP 2018-0005
	:	
Commonwealth of Pennsylvania, Dept. of	:	
Conservation and Natural Resources,	:	
Respondent	:	

FINAL ORDER

AND NOW, this 15 day of April 2021, having duly convened and considered the entire record of the proceedings, and based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, the State Board of Property hereby **SUSTAINS** the preliminary objections in the nature of a demurrer of Respondent Department of Conservation and Natural Resources and **DISMISSES** this matter with prejudice.

BY ORDER:



Jason E. McMurry, Esquire
Designee of the Secretary of the Commonwealth
Chairman, Board of Property

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Date of mailing: email 4/16/2021 and USPS to be sent 4/20/2021