S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

OWEN SAYERS and NANCY SAYERS,

Plaintiffs/Counter-Defendants/
Appellants,

v

KIM W. KERR, CELIA KERR,
KIP R. KERR, RIKI KERR, FERNE M.
KERR, and ROBYN A. KERR-GRIFFIN,

Defendants/Counter-Plaintiffs/
Appellees.

UNPUBLISHED
January 8, 1999

No. 204668
Jackson Circuit Court
LC No. 96-076368 CK

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting judgment in favor of defendants in this real property action. We affirm.

At the time of his death in 1977, Rhoades D. Kerr was the owner of two hundred acres of land in Liberty Township, Jackson County. Under the terms of Kerr's will, and pursuant to an agreement of the devisees, Winthrop H. Kerr and Gladys Bentley each received an undivided one-half interest in 158 acres of the land, referred to as Parcel A. The remaining forty-two acres, referred to as Parcel B, was devised to defendants as tenants in common. Parcel B was landlocked and was only accessible over Parcel A. A road running through Parcel A to Parcel B has been in existence and used by defendants since 1977.

Winthrop H. Kerr sold his one-half interest in Parcel A to plaintiffs for $55,000 by a land contract dated February 7, 1981. The land contract called for ten percent interest, a $5,000 down payment, and monthly payments of $500 or more. It did not reserve an easement allowing access to Parcel B. In 1982, defendants obtained Winthrop Kerr's land contract vendor's interest in Parcel A.

In October 1994, plaintiffs purchased the remaining undivided one-half interest in Parcel A from Gladys and George Bentley. The deed conveying the Bentleys' interest in the property to plaintiffs stated that the conveyance was "subject to an existing right-of-way to allow access from Rhoades Road to a forty-two-acre parcel of land [i.e., Parcel B]."

On January 1, 1995, plaintiffs indicated that they wished to pay off the balance on the Kerr land contract and to receive a warranty deed for Parcel A reserving an easement differing from the established right-of-way. With this offer, they ceased making land contract payments. The parties never reached an agreement on an easement location, and there is no evidence that plaintiffs tendered the balance due on the land contract until it was placed in escrow when this suit was commenced in June, 1996. The trial court ruled that plaintiffs were entitled to a deed reciting that Parcel A is subject to the existing right-of-way to allow access to Parcel B, and that plaintiffs owed defendants interest on the land contract balance from the time of their offer to pay the balance until the date the balance was placed in escrow.

On appeal, plaintiffs first claim that the trial court erred by holding that defendants enjoyed the benefit of a contractual easement over plaintiffs' land. We disagree. Upon Rhoades Kerr's devise to defendants and plaintiffs' predecessors-in-interest, Parcel B became immediately landlocked and only accessible through Parcel A. An easement implied by necessity therefore arose at the time of the devise. See *Kahn-Reiss, Inc v Detroit & Northern Savings & Loan Ass'n*, 59 Mich App 1, 12; 228 NW2d 816 (1975); *Douglas v Jordan*, 232 Mich 283, 287; 205 NW 52 (1925). Thus, when the Bentleys later conveyed to plaintiffs their one-half interest in Parcel A, an easement over Parcel A to allow access to the adjacent Parcel B already existed. The language in the Bentleys' deed stating that the conveyance was subject to an existing right-of-way merely provided plaintiffs with actual notice of the existing right-of-way and delineated the extent of the interest plaintiffs were acquiring in Parcel A. Plaintiffs' acceptance of the warranty deed, made specifically subject to the existing easement for the benefit of defendants' estate, bound plaintiffs to respect defendants' easement rights. See *Butterfield v Brezina*, 3 Mich App 437, 443; 142 NW2d 900 (1966). The trial court did not err in ruling that plaintiffs' acceptance of the Bentleys' warranty deed bound them to the existing right-of-way through Parcel A.

Plaintiffs next claim that the trial court abused its discretion in refusing to apply principles of equity to relocate the existing right-of-way. We disagree. In *Douglas*, *supra*, p 288, our Supreme Court stated:

> [W]hen a way has once been fixed by the parties, capable of making such a determination, a court of equity may not, thereafter, upon the application of the grantor, or of his grantee of the servient estate, change the way and require the owner of the dominant estate to accept any other way in substitution thereof.

Likewise in this case, an easement by implied necessity arose over Parcel A for the benefit of Parcel B upon Rhoades D. Kerr's devises to defendants and plaintiffs' predecessors-in-interest. Ferne M. Kerr stated that the existing easement over Parcel A was used by defendants and their invitees from 1977 onward. The existing easement way, starting from Rhoades Road and traversing Parcel A, was clearly visible and should have put plaintiffs on notice of a third party's interest. See *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995). Because neither the devisees of Parcel A nor plaintiffs could have altered the existing, fixed easement, *Douglas*, *supra*, the trial court did not err in ruling that plaintiffs had not presented a basis on which to alter the location of the existing right-of-way.

Plaintiffs finally claim that the trial court erred in ruling that defendants were owed the interest accrued from the time plaintiffs offered to pay off the land contract until the contract balance was placed in escrow. We disagree. In order for plaintiffs to have stopped the running of the interest on the principal still owing under the land contract, an unconditional tender would have been necessary. See *Keller v Paulos Land Co*, 5 Mich App 246, 254-255; 146 NW2d 93 (1966). Here, such an unconditional tender was not made by plaintiffs. Accordingly, the trial court did not err in ruling that plaintiffs owed defendants the accrued interest on the principal from December 29, 1994 to June 13, 1996.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie