911 P.2d 1086
Supreme Court of Colorado,
En Banc.

Fernando SALAZAR and Richard Pretto, Petitioners,
v.
Gail TERRY, individually and as the Personal Representative of the Estate of Bill Powers, Jr., a/k/a William B. Powers, Jr., Respondent.

No. 94SC704.
|
Feb. 12, 1996.
|
Rehearing Denied March 18, 1996.

Landowner brought action to quiet title to certain property against adjoining landowner. Adjoining landowner claimed adverse possession and asserted counterclaims for acquiescence in fence as legal boundary and trespass. The District Court, Huerfano County, Claude W. Appel, J., found that fence was legal boundary separating parties' properties, dismissed quiet title action, dismissed counterclaim for trespass as barred by statute of limitations, but granted adjoining landowner $1 in damages for de minimis trespass occurring within limitations period. The Court of Appeals, Plank, J., 892 P.2d 391, reversed. Adjoining landowner petitioned for certiorari review, which was granted. The Supreme Court, Mullarkey, J., held that: (1) 15-day common ownership of tracts by prior owner eradicated significance of any prior acquiescence in fence as legal boundary separating tracts as a matter of law; (2) statutory period for establishing either acquiescence or adverse possession began running, for purposes of adjoining landowner's claims, when one tract was separated from common ownership; and (3) common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to prior landowners of tracts unless deed adopts boundary lines as previously acquiesced upon.

Court of Appeals affirmed.

Kourlis, J., dissented and filed a separate opinion in which Vollack, C.J., and Scott, J., joined.

West Headnotes (12)

[1] Boundaries
Recognition and Acquiescence

Fifteen-day common ownership of two tracts of adjoining land eradicated significance of any acquiescence in fence as legal boundary separating tracts that existed prior to period of common ownership as a matter of law, where description in deed conveying tract acquired by one party's predecessor in interest from common owner did not indicate that fence constituted boundary.

1 Cases that cite this headnote

[2] Adverse Possession
Character and Elements of Adverse Possession in General

One claiming title by adverse possession must prove that his possession of disputed parcel was actual, adverse, hostile, under claim of right, exclusive and uninterrupted for statutory period.

5 Cases that cite this headnote

[3] Adverse Possession
Beginning of Adverse Possession
Boundaries
Time of Acquiescence

Once common ownership of two tracts of adjoining land destroyed prior acquiescence in fence as legal boundary separating tracts, statutory periods for acquiescence and adverse possession began to run anew. West's C.R.S.A. §§ 38-41-101(1), 38-44-109.

2 Cases that cite this headnote

[4] Adverse Possession
Beginning of Adverse Possession
Boundaries
Time of Acquiescence

Statutory period for establishing acquiescence in fence as boundary separating adjoining tracts of land and for establishing adverse possession began to run as of date parcels were separated from common ownership. West's C.R.S.A. §§ 38-41-101(1), 38-44-109.

1 Cases that cite this headnote

[5] Boundaries
General Rules of Construction

Boundaries separate parcels of land.

Cases that cite this headnote

[6] Easements
Nature and Elements of Right

Easements, such as a right of way, burden one estate to benefit of other estate; burdened estate is servient to dominant estate that benefits from easement.

2 Cases that cite this headnote

[7] Easements
Merger

When dominant and servient estates come under common ownership, need for easement on servient estate is destroyed.

6 Cases that cite this headnote

[8] Easements
Merger

If owner of easement in gross comes into ownership of estate in servient tenement, easement terminates to extent that ownership of that estate permits uses authorized by easement.

4 Cases that cite this headnote

[9] Easements
Merger

Easement will not revive following common ownership of dominant and servient estates if estates are separated once again without same type of action required to bring easement into existence in first place. Restatement of Property § 497.

4 Cases that cite this headnote

[10] Boundaries
Artificial Monuments and Marks

As with easements, unity of ownership destroys need for boundary fences.

Cases that cite this headnote

[11] Boundaries
Recognition and Acquiescence

Intent of common owner of adjoining tracts of land with regard to merger of tracts is not relevant to determination of whether common ownership eradicated prior owners' acquiescence in legal boundary separating tracts, unless common owner's intent is manifested in deed.

Cases that cite this headnote

[12] Boundaries
Recognition and Acquiescence

Common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to prior landowners of the tracts unless deed adopts boundary lines as previously acquiesced upon.

Cases that cite this headnote

***1087** Certiorari to the Colorado Court of Appeals.

Attorneys and Law Firms

Alison Maynard, Denver, for Petitioners.

Gary E. Hanisch, Walsenburg, for Respondent.

Opinion

Justice MULLARKEY delivered the Opinion of the Court.

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We granted certiorari on the issue of whether a one hundred-year old division fence lost its identity as a boundary dividing two parcels of land because title to the land on both sides of the fence was acquired and held by one entity for a fifteen-day period in 1977. [1] The court of appeals, overturning the decision of the trial court, held that the fence lost its legal significance as a boundary when the two parcels of land were held under common ownership for a period of fifteen days. *Terry v. Salazar,* 892 P.2d 391 (Colo.App.1994). We affirm the court of appeals.

I.

In 1991, the respondent, Gail Terry (Terry), individually and as personal representative of the Estate of Bill Powers, Jr., brought an action to quiet title against the petitioners Fernando Salazar and Richard Pretto (hereinafter jointly Salazar). Salazar owns a tract of land (the Salazar Tract) adjoining Terry's 80-acre property (the Terry Tract). Both properties are located in Huerfano County, Colorado. The Salazar Tract surrounds the Terry Tract on three sides, the north, west, and east. [2] A substantial fence erected in 1888 runs roughly parallel to the government subdivision lines between the two properties. The fence, which runs in a north-south direction, is located at the western boundary of the Terry Tract and at the eastern boundary of that portion of the Salazar Tract. The deeds transferring both tracts of land consistently have referred to the government subdivision lines and not the fence as the boundary.

This action was precipitated when Terry hired a private surveyor and discovered that the fence is not located on the government subdivision lines described in her deed. According to Terry's testimony at trial, her privately commissioned survey revealed that the deviation between the government subdivision lines and the fence varies anywhere from 100 to 160 feet along her property's western boundary. By Terry's reckoning, the fence is east of the government subdivision lines and is located inside the Terry Tract. Hence, Terry claims that the fence is not the true boundary between the parties' parcels of land and that the description in their deeds, *i.e.,* the government subdivision lines, should prevail.

***1088** In response, Salazar claimed adverse possession and asserted a counterclaim that the fence line was acquiesced in and recognized by the parties or their predecessors in title for twenty years under the terms of section 38-44-109, 16A C.R.S. (1982). Salazar also counterclaimed for trespass. Salazar alleged that, in an effort to catch seepage water, Terry entered the Salazar Tract in March or April of 1989 and excavated and constructed a dam with a ditch leading to her property. The dam was located approximately 150 feet away from the fence line. Salazar further alleged that in May of 1992, Terry instructed someone to break through portions of the fence and dig a hole, 75-90 feet in diameter and 20 feet deep, on the Salazar Tract. Terry does not dispute these allegations. Rather, Terry contends that the actions took place on the disputed strip of land between the fence and the government subdivision lines which is her property under the deed.

Mills Ranches, Inc. (Mills Ranches) acquired the land presently owned by Salazar in 1971 and held it until 1979 when Mills Ranches lost the property in a bank foreclosure sale to Travelers Insurance Company. In 1989, Travelers Insurance Company sold the land to Salazar. On November 3, 1977, Mills Ranches acquired the land now owned by Terry and, on November 18, 1977, conveyed it by warranty deed to Jerry Mills. Jerry Mills conveyed the land to Terry's predecessor in title and Terry subsequently acquired the property on July 20, 1987. Therefore, between November 3, 1977, and November 18, 1977, Mills Ranches owned both the Salazar and Terry Tracts simultaneously for fifteen days. During this fifteen-day period, Jerry Mills, as sole stockholder and principal of Mills Ranches, was the common owner of both tracts. As mentioned above, all these conveyances refer to the government subdivision lines.

A bench trial was held on March 29, 1993, in the Huerfano County District Court. The trial court found that the parties' predecessors, prior to the period of common ownership, had acquiesced that the fence marked the boundary between the two properties. Pursuant to section 38-44-109, 16A C.R.S. (1982), the trial court concluded that this acquiescence established the fence as the legal boundary. Section 38-44-109 states that:

> The corners and boundaries finally established by the court in [proceedings under this section], or an appeal therefrom, shall be binding upon all the parties, their heirs and assigns, as the corners

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> and boundaries which have been lost, destroyed, or in dispute; but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for twenty years have been so recognized and acquiesced in, such boundaries and corners shall be permanently established.

The trial court based its decision, in part, on an earlier case brought in 1914 to quiet title to land immediately to the south of the land in dispute in this action. The trial court found that the land at issue in the 1914 case was bordered by the same fence as the one here. The trial court, however, explained that the portion of the fence at issue in the 1914 case was a continuation, running south, of the portion of the fence presently before the court. The 1914 case adjudicated the fence to be the legal boundary for the land south of the property now before us.

The trial court disregarded Jerry Mills's intent as to the Salazar Tract because that land was not deeded over by Mills but rather was the subject of foreclosure. The trial court, however, did consider Jerry Mills's intent in deeding over the land to Terry's predecessor in interest and found that Mills intended that the fence constitute the western boundary of the Terry Tract. Hence, the trial court concluded that "notwithstanding the brief period of common ownership of the property in 1977, the subject fence is the actual boundary line between [Terry's] and [Salazar's] properties, notwithstanding the legal descriptions in [Terry's] chain of title." The trial court dismissed Terry's action to quiet title. The trial court also dismissed Salazar's counterclaim for trespass as barred by the applicable statute of limitations but granted Salazar one dollar in damages for *de minimis* trespass that occurred within the limitations period.

The court of appeals assumed that the trial court properly determined as a question of fact "that the fence by acquiescence marked ***1089** the actual boundary of the parcels from at least 1914." *Terry,* 892 P.2d at 393. Nevertheless, the court of appeals reversed the trial court's decision and held that the period of common ownership effectively abrogated the acquiescence chargeable to the parties concerning the fence as the actual boundary. This was based on its analysis that "[o]nce ownership was joined, the fence no longer served as an external boundary, but only as an internal barrier." *Id.* The court of appeals further found that:

> When a common owner acquires title to adjoining tracts, any agreement as to division that had previously been made while the ownership was in two different persons ceases to exist or be effective.... Moreover, a division fence between two properties loses its legal significance when separate ownership of the parcels is merged in one owner.... Consequently, the common ownership acquired by Mills Ranches in 1977 nullified any significance the fence had previously been accorded as a boundary between separately held parcels. Mills Ranches as a subsequent grantor could therefore freely describe its conveyance by boundaries making no reference to the fence.

Id. (citations omitted).

The court of appeals held that the deeds were unambiguous and that the conveyances delineated the boundary in terms of the "nomenclature of the public land survey system as to the boundaries of the devised estate, without any reference to the fence." *Id.* Therefore, the court of appeals concluded that the trial court's finding, that Jerry Mills recognized the fence as the western boundary of the Terry Tract, was based upon improperly considered extrinsic evidence. Moreover, the court of appeals found that the evidence of Jerry Mills's intent, considered by the trial court, was not dispositive. [3]

II.

[1] Mills Ranches' fifteen-day period of ownership of both parcels of land controls the outcome of this case. The common ownership of the two tracts of land eradicated the significance of any acquiescence as to the legal boundary existing prior to the period of common ownership as a matter of law. An opposite conclusion would be compelled only if Jerry Mills had deeded over the

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land to Terry's predecessor in title containing a description in the deed that the fence constituted the boundary. Instead, the deed given by Mills continued to refer to the government subdivision lines.

[2] **[3]** **[4]** For Salazar to succeed on his claims, he would have to prove that Terry and her predecessor in title acquiesced to the fence as the boundary after the property was deeded by Mills or that Salazar had met the statutory and common law requirements for adverse possession. [4] In practical effect, once the common ownership destroyed the prior acquiescence of the fence as boundary, the twenty-year clock, for purposes of the acquiescence statute, started ticking anew. *See* § 38-44-109, 16A C.R.S. (1982). Similarly, the eighteen-year clock, for purposes of adverse possession, also began again. *See* § 38-41-101(1), 16A C.R.S. (1982). For both purposes, the time began to run when the parcels were separated on November 18, 1977. Terry brought this action to quiet title ***1090** in 1991. Accordingly, only fourteen years had elapsed from the time the parcels were separated and the inception of this action. Thus, Salazar has failed to meet the statutory time requirements for either acquiescence or adverse possession.

Although there is no case law directly controlling in this jurisdiction, we are guided by cases arising in other jurisdictions and by the analysis of the doctrine of merger as it relates to easements.

In *Patton v. Smith,* 171 Mo. 231, 71 S.W. 187 (1902), the Missouri Supreme Court considered a set of facts similar to those presently before this court. In *Patton,* two landowners, Samuel Kennedy (Kennedy) and Frank Remelius (Remelius), owned adjoining tracts of land and sought the assistance of a county surveyor to determine the proper boundary between their parcels of land. The county surveyor misread the survey lines and incorrectly established the boundary. Kennedy and Remelius, relying on this inaccurate survey, built a fence on the county surveyor's established boundary which, in effect, gave Kennedy more land than was described in his deed. Thereafter, Remelius acquired Kennedy's 52-acre parcel and held both parcels until his death. Subsequently, the plaintiff acquired title to the 80-acre Remelius parcel, owned by Remelius prior to his acquisition of Kennedy's 52-acre parcel, in a foreclosure sale pursuant to a deed of trust executed by Remelius some years before. The 52-acre Kennedy parcel passed to Remelius's heirs upon his demise and Remelius's heirs conveyed the Kennedy parcel to the defendant. The plaintiff, upon discovering that the fence did not lie on the survey line described in the deeds, sought to eject the defendant. The defendant countered by claiming adverse possession. The Missouri Supreme Court held that the defendant got and paid for only what was described in his deed and that "[w]hen Remelius became the owner of both tracts, he wiped out and abandoned any agreed dividing line, if there ever was one." *Patton,* 71 S.W. at 190.

Specifically, the *Patton* court was convinced by the following:

> In 1883 Remelius became the owner of both tracts, and the evidence shows that, when some question arose thereafter as to the location of the survey line, he said it made no difference, inasmuch as he owned all the land on both sides of the line, wherever it might be. So that even if the possession of Kennedy had been hostile to Remelius, and even if Kennedy had intended to claim to the line established as the survey line by [the county surveyor], without regard to whether that was the true line or not, and even if Kennedy and Remelius had agreed upon the line established by [the county surveyor], nevertheless, *when Remelius became the owner of both tracts of land, all such questions became immaterial. There was no adverse holding thereafter by Remelius as the owner of one tract against himself as the owner of the other tract, and there was no longer any question of any agreed line dividing the two tracts.*

Id., 71 S.W. at 190 (emphasis supplied).

Similarly, in *Conklin v. Newman,* 278 Ill. 30, 115 N.E. 849 (1917), the Illinois Supreme Court held that when title to both tracts of land is held in one person "any agreement and division that had theretofore been made while the ownership of the two [tracts] was in different persons ceased to exist or to be effective" because "the two

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portions of [the fence at issue] ceased to be appurtenant to any particular parts of the tract." *Id.,* 115 N.E. at 850; *see also* 5 Richard R. Powell, *Powell on Real Property* § 62.02[10] at 62-19 (1994) ("A division fence often loses its utility and always loses its legal significance when separate ownership of the parcels is merged in one owner.") (footnote omitted); Olin L. Browder, *The Practical Location of Boundaries,* 56 Mich.L.Rev. 487, 530 (1958) ("Where, after a boundary agreement, title to the parcels affected become united, it has been held that a subsequent grantee of one of the parcels takes according to the terms of his deed unaffected by the agreement.") (footnote omitted).

[5] **[6]** **[7]** **[8]** Our conclusion is reinforced by the doctrine of merger as it applies to extinguishment of easements. Easements and boundaries affect the relationship between parcels of land. Boundaries separate parcels of land. Easements, such as a "right of way," burden one estate to the benefit of the other estate. The burdened estate is servient to the dominant ***1091** estate which benefits from the easement. When the dominant and servient estates come under common ownership, the need for the easement is destroyed. Specifically, "[i]f the owner of an easement in gross comes into ownership of an estate in the servient tenement, the easement terminates to the extent that the ownership of that estate permits the uses authorized by the easement." 7 *Thompson on Real Property* § 60.08(b)(1) at 479 (David A. Thomas ed., 1994) (footnote omitted); *see also Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 858 P.2d 1258, 1261 (1993) ("When one party acquires present possessory fee simple title to both the servient and dominant tenements, the easement merges into the fee of the servient tenement and is terminated."); *Witt v. Reavis,* 284 Or. 503, 587 P.2d 1005, 1008 (1978) ("if at any time the owner in fee of the dominant parcel acquires the fee in the servient parcel *not* subject to any other outstanding estate, the easement is then extinguished by merger") (emphasis in original).

[9] Furthermore, the easement will not revive if the estates are separated once again "without the same type of action required to bring an easement into existence in the first place." 7 *Thompson on Real Property* § 60.08(b)(1) at 480 (footnote omitted); *see also* Restatement of Property § 497, Comment h (1944) ("[u]pon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise;" however, it arises only "because it was newly created at the time of the severance").

Salazar argues that merger of the Salazar and Terry Tracts did not occur and thus the legal significance of the fence as the boundary was not extinguished upon the acquisition of both properties by Mills Ranches. Salazar's position is based on the theory that merger of the properties is a matter of the common owner's intent. Salazar's position fails under the law and under the facts of the case. The doctrine of merger applies in a number of contexts. As explained above, the term merger has a separate and distinct meaning when applied to extinguishment of easements. However, the term merger is also used in the context of mortgages. It is from this context that Salazar draws support for his argument that intent governs the occurrence of merger. Salazar cites our decisions in *Goldblatt v. Cannon,* 95 Colo. 419, 37 P.2d 524 (1934); *Hart v. Monte Vista Bldg. Ass'n,* 82 Colo. 204, 257 P. 1079 (1927); *Weston v. Livezey,* 45 Colo. 142, 100 P. 404 (1909), as support for his position. These cases all apply to mortgages and indeed hold that intent is controlling.

However, the term "merger" in the mortgage context is not synonymous with its use in the easement context. In particular,

> The question whether the acquisition of the mortgaged land and of the mortgage debt by one person has in the particular case the effect of discharging the debt and extinguishing the mortgage lien is frequently one of some difficulty. When such is the result of the union of the two interests in one person, it is said that a "merger" of the mortgage occurs, or that the mortgage is "merged." The words "merge" and "merger," as used in this connection, are calculated to suggest false analogies drawn from the doctrine of merger of a less in a greater estate upon their acquisition by one person, but there appear to be no other available expressions, and they will here be used in accordance with universal practice.

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5 Herbert Thorndike Tiffany, *The Law of Real Property* § 1479 at 503-04 (3d ed. 1939) (footnote omitted). Moreover,

> The theory on which, upon the acquisition by one person of the mortgaged land and of the mortgage debt with the incidental lien on the land, the debt, and with it the lien, may ordinarily be regarded as extinguished, would seem to be that, under such circumstances, the person owning and controlling the debt can usually have no object in keeping it alive, it being in substance a claim against his own property, and he may consequently be presumed to intend that the debt shall be extinguished, a presumption to which, as tending to the simplification of titles, the courts are ready to give full effect. In accordance with this view are the numerous decisions that the intention of the holder of the two interests is the decisive consideration, and that no ***1092** merger will take place if there is proof of an intention on his part to the contrary.

Id. § 1480 at 506 (footnote omitted).

There are different considerations in merger as it relates to mortgages and easements. Intent of the common owner is relevant in the mortgage context "because circumstances can arise in which merger would produce unintended and unjust results." 12 *Thompson on Real Property* § 101.03(e) at 383 (footnote omitted) (explaining that merger leads to unfair results if there are successive mortgages and a junior mortgage may be unjustly enriched when elevated to senior status when the first mortgage is merged and extinguished).

[10] **[11]** By analogizing to the doctrine of merger in the easement context, we do not intend to equate easements with boundary fences. There are no dominant and servient estates created by boundary fences. Nevertheless, the easement analysis is relevant and applicable by analogy to boundary fences. As with easements, unity of ownership destroys the need for boundary fences. In contrast, unity of ownership should not always destroy the existence of a mortgage when other interests are dependent on it. In sum, the issue here is not whether the common owner intended that the two tracts of land merge. The common owner's intent becomes relevant only if manifested in the deed. Rather, what is relevant is the effect of the unity of ownership on the legal significance of the fence.

The acquiescence to the fence as the boundary separating the two tracts of land was wiped out when common ownership of both tracts was held for a period of fifteen days. Once the two tracts fell under common ownership, the fence no longer served any legal purpose, *i.e.,* there was no need for an internal boundary to separate land belonging to one owner. When the two tracts again came under separate ownership, the process of acquiescence and adverse possession commenced afresh.

III.

[12] For the foregoing reasons, we affirm the court of appeals and hold that the common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to the prior landowners of the tracts unless the deed adopts the boundary lines as previously acquiesced upon.

KOURLIS, J., dissents.

VOLLACK, C.J., and SCOTT, J., join in the dissent.

Justice KOURLIS dissenting:

I respectfully dissent from the majority's conclusion that fifteen days of common ownership of the two tracts of land in question here served to erase a boundary long recognized as being marked by a fence over 100 years old.

This case concerns the integrity of the boundary fence between plaintiffs' and defendants' lands. The fence has been in existence since the 1880's.[1] Following trial, the court in this case found that the fence had been recognized as the actual boundary line by all previous owners of the parcels from 1914 until 1989, when plaintiffs first asserted their claim that the fence was not on

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the government survey line. All prior conveyances of the tracts in question described the two properties by reference to the government subdivisions without mention of the fence. Plaintiffs brought this suit in order to quiet title to their property in accordance with the surveyed government subdivision lines instead of the fence line.

In 1977, for a period of fifteen days, the two tracts of land came under the common ownership of Mills Ranches, Inc. (Mills Ranches). The majority claims that due to this short period of common ownership, the long acquiesced boundary at the fence line ***1093** was extinguished and the boundary reverted back to the government subdivision lines. The effect of the majority's analysis is that the deed by which Mills Ranches obtained the Terry tract was based upon the fence line boundary, whereas the deed by which Mills Ranches conveyed the Terry tract to Jerry Mills on November 18, 1977, extinguished the fence line as the boundary, even though both of the deeds used the same general language. I must respectfully disagree with this analysis.

When parties acquiesce to the location of a particular boundary line, this boundary ripens into a reality after a prescribed period of time. *Hartley v. Ruybal,* 160 Colo. 80, 86, 414 P.2d 114, 116 (1966). Such acquiescence is binding upon the parties and their successors in interest. *Forristall v. Ansley,* 170 Colo. 391, 396, 462 P.2d 116, 119 (1969).

The statutorily prescribed time period for acquiescence in Colorado is twenty years. "[I]f it is found that the boundaries and corners alleged to have been recognized and acquiesced in for twenty years have been so recognized and acquiesced in, such boundaries and corners shall be permanently established." § 38-44-109, 16A C.R.S. (1982).[2] Thus, this fence has legally been recognized as the permanent boundary between the two properties since the early part of this century.

An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson,* 3 Cal.App.3d 607, 83 Cal.Rptr. 744, 746 (1970); *Edgeller v. Johnston,* 74 Idaho 359, 262 P.2d 1006, 1010 (1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman,* 153 Cal. 477, 95 P. 888, 890 (1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham et al., *The Law of Property* § 11.8, at 765 (1984). *See also* Olin L. Browder, *The Practical Location of Boundaries,* 56 Mich.L.Rev. 487, 530 (1958).

The policy underlying this construction of the language in the deed is the doctrine of repose, or "the notion that the law ought not to tinker with the well-settled and long-held understanding of the people involved, even if it does not comport with their documents." Cunningham et al., *supra,* at 766. *See also* 12 Am.Jur.2d *Boundaries* § 85 (1964). As the California Supreme Court has reasoned, measurements made at different times, by different persons, and with different instruments will usually vary, and that:

> If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable.

Young, 95 P. at 889. Hence, boundary lines which have been recognized for the statutory period are regarded in law as being the true and permanent boundaries described by the language in the deed.

Once the original language in the deed has been effectively changed in accordance with the acquiesced boundaries, a conveyance *by that original description* should be presumed to have been intended to refer to the boundaries as fixed by such acquiescence unless there is specific language to the contrary. *Young,* 95 P. at 891.

Mills Ranches acquired the Salazar tract by a deed in 1971.[3] The deed described the ***1094** property by government survey quarter sections. All parties agree and the trial court found that the description really referred to the fence boundary that had been legally changed by the long acquiescence. Mills Ranches acquired the Terry parcel on November 3, 1977, by a deed which made

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reference, in pertinent part, to "The Southeast quarter of Southwest quarter of Section 21, and the East half of Northwest quarter ... of Section 28." Fifteen days later on November 18, 1977, Mills Ranches conveyed the Terry parcel to Jerry E. Mills using the following description: "SE1/4SW1/4, Section 21 and NE1/4NW1/4, Section 28." For some seventy years, the government survey descriptive language in a deed to that property had been deemed to convey the property up to the fence line.

The majority holds that because the Terry tract and the Salazar tract were held under common ownership for those fifteen days, acquiescence to the fence as the boundary between the two properties was extinguished. Maj. op. at 7-8. I believe that the doctrines of acquiescence and repose call for a different outcome. As the Michigan Supreme Court stated:

> [A] boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys.... [T]he peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged.

Gregory v. Thorrez, 277 Mich. 197, 269 N.W. 142, 143 (1936) (citations omitted); *see also Finley v. Yuba County Water Dist.,* 99 Cal.App.3d 691, 160 Cal.Rptr. 423, 428 (1979); *Sachs v. Board of Trustees of Town of Cebolleta Land Grant,* 89 N.M. 712, 557 P.2d 209, 215 (1976); *Reed v. Farr,* 35 N.Y. 113, 116-17 (1866). The integrity of a boundary line agreed upon for seven decades is not to be lightly undermined. If Mills Ranches had intended to move the boundary line from that which had been established, it should have changed the descriptive language used in the deed so as to clearly overturn the effect of acquiescence.

The public policy to be served in affording certainty to boundary locations between adjoining landowners is an important one. In my view, the boundary between the Salazar and Terry tracts was established as the fence line decades before either Mills Ranches or Terry entered the chain of title. Nothing that Mills Ranches did during its brief period of common ownership changed the location of the dividing boundary from the fence line.

Accordingly, I would reverse the court of appeals with directions to reinstate the trial court judgment in favor of the defendants.

I am authorized to say that Chief Justice VOLLACK and Justice SCOTT join in this dissent.

All Citations

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Footnotes

1 We granted certiorari on the following issue:

> Whether a hundred-year old fence, historically recognized by the landowners on both sides to be the boundary, lost its identity as such "as a matter of law" because title to both sides of the fence was acquired and held by one entity for a fifteen-day period.

2 A large map of the properties was submitted as evidence during the trial but is not part of the record on appeal. Salazar's opening brief describes the Salazar Tract as surrounding the Terry Tract on three sides, the north, west, and east. This description is not challenged by Terry.

3 Although the trial court did not set forth in its written opinion the particular evidence it considered in determining that Jerry Mills recognized the fence as the western boundary, the court of appeals made the following statement:

> [W]e note that Mills himself did not testify. Another witness, a real estate broker, stated that Mills had generally motioned toward the fence when touring the parcel with the witness and while describing the extent of the tract.

Terry, 892 P.2d at 393.

4 Section 38-41-101(1), 16A C.R.S. (1982), provides that:

> No person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued or within eighteen years after he or those from, by, or under whom he claims have been seized or possessed of the premises. Eighteen years adverse possession of any land shall be conclusive evidence of absolute ownership.

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In addition, "[o]ne claiming title by adverse possession must prove that his possession of the disputed parcel was actual, adverse, hostile, under claim of right, exclusive and uninterrupted for the statutory period." *Smith v. Hayden,* 772 P.2d 47, 52 (Colo.1989).

1 In 1914, the Huerfano County court decreed that the fence represented the actual boundary line along two parcels immediately to the south of the properties at issue here. The terms of the 1914 Judgment only refer specifically to the description of the plaintiff Naranjo's property, which was located to the south of the Salazar tract in this litigation. However, the defendant in the 1914 case alleged in his answer that he owned the tract now owned by Terry as well as the tract immediately to the east of Naranjo. Thus, the 1914 judgment may have dealt with precisely the same fence at issue in this case, even though the decree would only seem to address that portion of the fence to the south of the Salazar and Terry properties.

2 The twenty year acquiescence period was first established by statute in Colorado in 1907. *See* Ch. 126, § 9, 1907 Colo.Sess. Laws 288.

3 The deed by which Mills Ranches acquired that portion of the property is not clear. Mills Ranches acquired the NW1/4 NW1/4 of Section 28 in the 1971 deed, but appears not to have acquired all of the SW1/4 SW1/4 of Section 21. The deed makes reference to a conveyance of all of Section 21 lying south of the south right of way of the County Road, and presumably included the SW1/4 SW1/4 of Section 21. There is a deletion for "that portion of the E1/2 and SW1/4 of said section 21 conveyed to Huerfano County" as to which there is no further evidence in the record. This issue was not raised on appeal.

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876 P.2d 116
Colorado Court of Appeals,
Div. II.

Gordon JACKSON, Plaintiff-Appellee,
v.
William L. WOODS and Judith K. Woods, Defendants-Appellants.

No. 93CA0827.
|
May 19, 1994.

In boundary dispute, the District Court of Teller County, Donald E. Campbell, J., quieted title in plaintiff, and defendant appealed. The Court of Appeals, Kapelke, J., held that trial court correctly applied pertinent rules of construction to irreconcilable calls.

Affirmed.

West Headnotes (6)

[1] Boundaries
General Rules of Construction

In case of repugnant or contradictory descriptive calls in a deed, court may reject or disregard the one which is false or mistaken.

Cases that cite this headnote

[2] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

Boundaries
Control of Metes and Bounds or Courses and Distances Over Other Elements

In resolving inconsistency in deed, court should look first to natural monuments, next to artificial monuments, then to courses and distances.

Cases that cite this headnote

[3] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

Monuments control courses and distances, which are considered the least reliable of all calls.

1 Cases that cite this headnote

[4] Boundaries
Artificial Monuments and Marks

"Monument," when used in describing land, is any permanent physical object on the ground which helps to establish location of line called for, and may be either natural or artificial.

Cases that cite this headnote

[5] Boundaries
Artificial Monuments and Marks

Road may serve as a monument.

Cases that cite this headnote

[6] Boundaries
Control of Water Courses, Highways, and Fences Over Other Elements

Where there was evidence that distance call from point of beginning to road was erroneous, and no evidence of intent of parties to original conveyances, trial court was justified in applying rules of construction to find that call to center of road prevailed over distance call.

1 Cases that cite this headnote

Attorneys and Law Firms

***117** Otto, Miller & Davidson, P.C., Kenneth Davidson, Security, for plaintiff-appellee.

L. Douglas Beatty, Colorado Springs, for defendants-appellants.

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Opinion

Opinion by Judge KAPELKE.

William and Judith Woods (Woods) appeal the trial court's judgment construing the legal description of certain real property in this boundary dispute. The judgment quieted title in plaintiff, Gordon Jackson, and permanently enjoined the Woods from entering upon the property or interfering with Jackson's possession. We affirm.

Both the Woods and Jackson derive their claims of title from a common predecessor. The Woods claim title to a portion of the original parcel described, insofar as pertinent here, as that land:

> which lies North and East of the old County Road, being described by metes and bounds as follows: [the point of beginning], thence S, 4° 30# East 1189 feet; thence along the road, center thereof; thence N[orth] ... to the place of beginning, containing 26.63 acres....

Jackson claims fee title through a 1949 deed to a parcel which excepts the land above by identical description. The two deeds purport to fix the northern boundary of Jackson's tract, and the Woods' adjoining southern boundary.

Jackson's immediate predecessor in title, a bankruptcy trustee, had a survey performed. The survey revealed a discrepancy between the property as described by the call to the road and that described by the distance to the road. The deed from the bankruptcy trustee to Jackson contains a legal description based on the new survey, which changed the language describing the relevant course and distance with respect to the excepted parcel to "1,069.98 feet to a point on the center line of the old County Road (now known as Trout Creek Road)."

As a result of this survey, Jackson filed this action seeking a permanent injunction prohibiting the Woods from interfering with his possession of the property as newly surveyed and described in the trustee's deed. The Woods denied that the property is correctly described in the bankruptcy trustee's deed and asserted that the correct and controlling description is the distance call of 1189 feet. They further contend that the distance call should prevail since there was evidence that the course of the road might have been altered and that Trout Creek Road might not even be the same road referred to in the earlier deeds as "the old County Road."

Following a bench trial, the court found that the road now known as Trout Creek Road is, indeed, the road referred to as "old County Road" in the previous deeds. Concluding ***118** that the call to the center of the road prevailed over the distance call, the trial court entered judgment in favor of Jackson.

The Woods now argue that the court erred by disregarding the distance call. They further contend that the location of the road was uncertain and that the reference to the road in the legal description was merely incidental. We do not agree.

[1] We initially note that, in the case of repugnant or contradictory descriptive calls in a deed, the court may reject or disregard the one which is false or mistaken. *Whiteman v. Mattson,* 167 Colo. 183, 446 P.2d 904 (1968).

[2] **[3]** In resolving an inconsistency in a deed, the court should look first to natural monuments, next to artificial monuments, then to courses and distances. *Whiteman v. Mattson, supra; Cullacott v. Cash Gold & Silver Mining Co.,* 8 Colo. 179, 6 P. 211 (1884); 1 R. Patton, *Patton on Titles* § 150 (1957). Monuments control courses and distances, which are considered the least reliable of all calls. *Wallace v. Hirsch,* 142 Colo. 264, 350 P.2d 560 (1960).

[4] **[5]** A "monument," when used in describing land, is any permanent physical object on the ground which helps to establish the location of the line called for, and a monument may be either natural or artificial. A road may serve as such a monument. 1 R. Patton, *Patton on Titles* § 150 (1950). The existence and location of a monument are questions of fact to be determined from the evidence. *Cullacott v. Cash Gold & Silver Mining Co., supra.*

[6] Here, the trial court received evidence that the distance call from the point of beginning to the road was erroneous, and there was no evidence of the intent of the parties to the original conveyances. In such a case, the court is justified in applying rules of construction. *See Wallace v. Hirsch, supra.*

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The previous deeds through which Jackson traces title demonstrate on their face that the "old County Road" was to serve as the property boundary and that the call is to the center of that road. It is undisputed that, if, in fact, the road now known as Trout Creek Road is the same monument as old County Road, then the distance of 1189 feet to the center of the road is incorrect.

The record supports the trial court's finding that Trout Creek Road is the "old County Road" referred to in the earlier deeds. The distance call on which the Woods rely is therefore incorrect.

Accordingly, the trial court correctly applied the pertinent rules of construction to the irreconcilable calls and properly quieted title to the disputed property in favor of Jackson.

The judgment is affirmed.

METZGER and JONES, JJ., concur.

All Citations

876 P.2d 116

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142 Colo. 264
Supreme Court of Colorado, In Department.

Donald WALLACE and Phyllis J. Wallace, Plaintiffs in Error,
v.
Jacob HIRSCH, Defendant in Error.

No. 18814.
|
March 28, 1960.

Action was brought to determine common boundary line between realty of plaintiff and realty of defendants. The District Court of Delta County, Charles E. Blaine, J., entered judgment in favor of the plaintiff, and the defendants brought error. The Supreme Court held that evidence sustained finding of District Court that boundary line was located as contended by plaintiff.

Judgment affirmed.

West Headnotes (2)

[1] Boundaries
Weight and Sufficiency of Evidence

In action to determine boundary line between realty of plaintiff and defendants, wherein it was agreed by both plaintiff and defendants that there was an error in description, which was contained in plaintiff's deed from their common grantor, and which was repeated in exception of land in deed of defendants, evidence sustained the trial court's finding that boundary was located as contended by plaintiff.

2 Cases that cite this headnote

[2] Boundaries
Relative Importance of Conflicting Elements

Generally in case of repugnant calls in a deed, courses and distances are the least reliable of all calls, and a call which designates a point capable of precise and exact location takes precedence over a call for a course and distance, if there is repugnancy between the two.

2 Cases that cite this headnote

Attorneys and Law Firms

***264** ****561** Victor F. Crepeau, Montrose, for plaintiffs in error.

Sparks, Conklin & Carroll, Delta, for defendant in error.

Opinion

PER CURIAM.

***265** Jacob Hirsch, the defendant in error, was plaintiff in the trial court and he will hereinafter be referred to by name or as plaintiff. Donald Wallace and Phyllis Wallace, plaintiffs in error, were defendants in the trial court and they will hereinafter be referred to by name or as defendants.

Plaintiff filed a complaint in the district court of Delta County, denominating his action as a 'Complaint in Action to Establish Corners and Boundaries under Chapter 118, Article 11, Colorado Revised Statutes of 1953.' The defendants in their answer denied, inter alia, that this was an action under Chapter 118, Article 11, of the Colorado Revised Statutes, but nonetheless did themselves generally ask for a complete adjudication of the respective rights of the parties under Rule 105 of the Rules of Civil Procedure.

Plaintiff and defendants are owners of adjoining land situate in the North half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter, Section 20, Township 13 South, Range 91 West, 6th P.M., in Delta County, Colorado, the defendants' property lying immediately to the north of that owned by the plaintiff. The basic dispute between the parties concerns the location of the common boundary line between their respective properties, i. e., the northern boundary line of the plaintiff's property which is also the southern boundary line of defendants' property.

Both parties derive their respective titles through the same grantor, namely, one S. Arthur Wade. By warranty deed

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said S. Arthur Wade, on May 17, 1947, conveyed to the plaintiff a tract of land described as follows:
'Beginning at a point on the quarter section line 1879 feet north from the quarter section corner on the section line between sections 20 and 29 in Township 13 South, Range 91 West of the 6th P.M., thence North along quarter section line 630 feet; then South 63°05# West 2910 feet, more or less, to the SW corner of the ***266** NW 1/4 SQ 1/4 of said Section 20; thence East along the subdivision line 1320 feet to the SE corner of said NW 1/4 SW 1/4; thence South along subdivision line 235 feet; thence North 61° East 1562 feet, more or less, to the place of beginning, being a portion of the North half of the Southwest Quarter (N 1/2 SW 1/4) and the Southeast Quarter of the Southwest Quarter (SE 1/4 SW 1/4) of Section Twenty (20), Township and Range aforesaid, containing 32.08 acres, more or less.'

On February 17, 1953, the said S. Arthur Wade conveyed to defendants' predecessors in title the land lying immediately to the north of the land theretofore conveyed to the plaintiff. This 1953 deed expressly excepting the land theretofore conveyed to the plaintiff, said exception using the exact description as the one set forth in the plaintiff's deed.

It is agreed by both the plaintiff and the defendants that there is an error in the description contained in the plaintiff's deed from S. Arthur Wade, the same error being repeated in the exception of this land in the deed now held by the defendants. This error occurs in the description of the northern boundary of the plaintiff's property, which as indicated supra is the southern boundary of the defendants' land. This mis-description results from the fact that there are repugnant calls in the description. The repugnant or inconsistent calls are: 'thence South 63°05# West 2910 feet, more or less, to the SW corner of the NW 1/4 SW 1/4 of said Section 20.' This repugnance or inconsistency results from ****562** the admitted fact that *if* the northern line of the plaintiff's property takes a course 'South 63°05# West 2910 feet, more or less' it will *never* intersect the 'SW corner of the NW 1/4 SW 1/4 of said Section 20,' and that for such boundary line to in fact intersect said corner it would have to follow a course approximately South 67° West 3,070 feet, more or less, instead of 'South 63°05# West 2910 feet, more or less.' In other words, the call as to course and distance is inconsistent and repugnant to the ***267** call that said line shall terminate in the 'SW corner of the NW 1/4 SW 1/4 of said Section 20.'

Upon trial the plaintiff contended that the true boundary line was one which intersects the 'SW corner of the NW 1/4 SW 1/4 of Section 20,' regardless of the angle, whereas the defendants contended that the true northern boundary line was one which 'takes a course 63°05# West' and proceeds 2,910 feet, more or less, even though such would never intersect the 'SW corner of the NW 1/4 SW 1/4 of said Section 20,' and which if followed '2910 feet, more or less' would terminate somewhere in the SW quarter of the SW quarter of said Section 20.

Regardless of the issues framed by the complaint and answer, the case proceeded to trial with all parties asking that the trial court by its judgment correct the admitted mis-description in the deeds with which we are here concerned. After the trial the court entered a written judgment upholding the plaintiff's position and decreed that the northern boundary of the plaintiff's property is a line which intersects the SW corner of the NW 1/4 SW 1/4 of said Section 20, regardless of the call concerning course and distance. Also, the court ordered that the county surveyor should physically locate this boundary line as fixed and decreed by the court and should then mark the line by constructing a fence thereon, the expense thereof to be borne equally by the plaintiff and the defendants. Thereafter the defendants in due time filed their motion for a new trial, which motion was denied. However, pursuant to a stipulation between the parties the court ordered that the actual survey and construction of the fence should be delayed until the defendants decided whether to appeal the judgment or to acquiesce therein. Obviously the defendants did not acquiesce therein and have sought review of the judgment of the trial court.

At the outset it is agreed that there is an error in the description set forth in the plaintiff's deed. It is also agreed that where, as here, there is a mis-description ***268** the court must then ascertain the true intent of the parties (S. Arthur Wade and the plaintiff) if possible from the deed itself and if not then by parol evidence which would reveal the true intent of the parties. In Derham v. Hill, 57 Colo. 345, 142 P. 181, 182, this court said:
'Where there are two repugnant descriptions in a deed, 'the court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances

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can be said to effectuate most clearly the intention of the parties.' 2 Devlin on Deeds, § 1038; Wade v. Deray, 50 Cal. 376.

'In construing a deed, the object is to discover and effectuate the intention of the parties to it. While that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. * * *

'When a particular of a description is plainly false, that particular should be rejected, and, if enough remains to locate the land, the deed is effective * * *.'

[1] This court is fully justified in affirming the judgment of the trial court on the grounds that under a long-standing rule even though there be a conflict in the evidence adduced upon trial, if there is nonetheless competent and credible evidence which supports the judgment of the trial court, then the judgment must be upheld. ****563** In other words, the trial court and not this court is the trier of the facts. In this regard, a careful review of the reporter's transcript convinces us that there is ample credible evidence to support the essential findings and the ultimate judgment of the trial court.

An illustration of some of the conflicts in the evidence which have been resolved by the trial court involves the fact that the plaintiff built a fence admittedly some distance back from the boundary line he now claims. The defendants urge that by so doing the true boundary line ***269** is where this fence is located. However, the plaintiff testified that this fence was a 'barrier fence' and not a 'boundary fence' and was never intended to designate the true boundary line between the adjoining properties. True, there was evidence to the contrary on this point. Suffice it to say, however, that this merely presents a conflict of evidence which the trial judge as the trier of the facts has resolved adversely to the defendants. The same observation might be made with reference to other contentions now advanced by the defendants. In other words, it is a case of conflicting evidence and we find that there is competent evidence to support the trial court's findings and judgment. We have repeatedly held that where a trial is to the court, the determination of controverted facts rests with the trial judge, and when supported by competent evidence will not be disturbed. See Spears Free Clinic & Hospital v. Denver Area Better Business Bureau, 135 Colo. 464, 312 P.2d 110.

[2] Additionally, analysis of the plaintiff's deed in and of itself leads to the inescapable conclusion that it was the true intention of the parties that the northern boundary line on the plaintiff's property should terminate in the 'SW corner of the NW 1/4 of the SW 1/4 of said Section 20.' A general rule of construction invoked in the case of repugnant calls in a deed is that courses and distances are the least reliable of all calls, and that a call which designates a point capable of precise and exact location takes precedence over a call for a course and distance if there is a repugnancy between the two. Hence, the 'SW corner of the NW 1/4 SW 1/4 of said Section 20' describes a point on the earth's surface which can be located with mathematical certainty. So, under the general rules of construction this call takes precedence over a call for course and distance. In this connection 11 C.J.S. Boundaries § 47. b., p. 597, reads:
'A call for an established and identified corner may, unless uncertain or mistaken, control conflicting calls, ***270** such as for quantity, course, distance, the unmarked open line of an adjoiner, or a corner or line of an adjoiner mistakenly assumed to be in the same place as the located corner.'

Also, 11 C.J.S. Boundaries § 51. e., p. 614, states:
'A call, in a description, for an artificial monument, object, or mark, including a call for a government corner or monument, will generally control over a conflicting call for course and distance, or, in other words, calls for courses and distances yield, or give way, to calls for artificial monuments or objects, in determining boundaries, especially where the words 'more or less' are used in connection with a stated distance, or the distance is obviously incorrect.

'The reason for the rule is that there is less likelihood of a mistake in a call for an artificial monument than in a call for course and distance, the former being the more reliable call. * * *'

Patton on Titles, Second Edition, Vol. 1, Page 396, Sec. 150, states:
'Although junior in importance to monuments marking a surveyed line, any fixed or natural monument which is definite and certain will control over a statement as

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to quantity and over the courses and distances used in a plat or in a metes and bounds description. * * * *Among the natural and fixed objects which are so substantial and definite as to have been considered controlling* **564 *are: * * * the corner of a lot, * * *. When the plat or conveyance describes a line as running to such a monument, but the course and distance given would not bring it to that point, the course and distance will be disregarded* * * *.' (Emphasis supplied.)

In line with this general rule is our own decision in Cullacott v. Cash Gold & Silver Mining Company, 8 Colo. 179, 6 P. 211, 213, where it is said:
'The rule of law is that monuments will control courses and distances; and while judges, in commenting *271 upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence. *All the authorities on the subject assign to courses and distances the lowest place in the scale of evidence, as being the least reliable*.' (Emphasis supplied.)

True, there may not be a monument, as such, at the 'SW corner of the NW 1/4 SW 1/4 of said Section 20,' although there was some evidence that a pile of rocks had been placed at this point. Nevertheless, the 'SW corner of the NW 1/4 SW 1/4 of said Section 20' describes a specific point which is capable of being determined with absolute certainty. Such was also the case in Matthews v. Parker, 163 Wash. 10, 299 P. 354, at page 355, wherein the Supreme Court of Washington said:
'It seems to us to be too well settled to call for citation of authorities that, in a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land be fixed by ascertainable monuments and by courses and distances, the wellsettled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls. In the description of this plat we have the north quarter corner of section 34, a monument, as the beginning point from which the first course runs south 'to the center of section 34,' another monument, erroneously stating the distance between those two monuments. *It is true that the center of the section is not a physical government monument, as is the north quarter corner, as we must presume, but it is a point capable of being mathematically ascertained, thus constituting it, in a legal sense, a monument call of the description*.' (Emphasis supplied.)

*272 For all these reasons the judgment of the trial court is hereby affirmed.

MOORE, KNAUSS and DOYLE, JJ., concurring.

All Citations

142 Colo. 264, 350 P.2d 560

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8 Colo. 179
Supreme Court of Colorado

CULLACOTT and others
v.
CASH GOLD & SILVER MIN. CO.

Filed March 6, 1885.

Appeal from district court of Boulder county.

West Headnotes (7)

[1] **Boundaries**
Relative Importance of Conflicting Elements

Course and distances, under the authorities, are assigned the lowest place in the scale of evidence, as being the least reliable.

1 Cases that cite this headnote

[2] **Boundaries**
Relative Importance of Conflicting Elements

It is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the locus in quo.

Cases that cite this headnote

[3] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

Monuments, to control course and distances in the description of real estate, need not be unquestionable.

Cases that cite this headnote

[4] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

The boundaries of land, as marked out by definite monuments, will control courses and distances called for.

1 Cases that cite this headnote

[5] **Boundaries**
Questions for Jury

Mines and Minerals
Extent and Boundaries of Claim

The existence and location of monuments may become questions of fact, to be determined like other questions of fact, according to the rules of evidence.

1 Cases that cite this headnote

[6] **Mines and Minerals**
Requisites and Validity

It is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void.

Cases that cite this headnote

[7] **Mines and Minerals**
Construction and Operation in General

In determining the location and boundaries of a patented mining claim, monuments control courses and distances; and a description of a monument as a rock in a mound of stones is not too indefinite a description of a monument, even in a country abounding in rocks and stones, if there is satisfactory proof of its location.

7 Cases that cite this headnote

Attorneys and Law Firms

***179** ****211** *G. B. Reed & J. H. Denison*, for appellants.

L. C. Rockwell, for appellee.

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Opinion

BECK, C. J.

The facts of this case are novel. Prior to the acquisition of the government title it is not an unusual circumstance for a mining claim to be entered upon and appropriated by strangers to the location. A failure on the part of the original locators to comply with any of the specific requirements of the law relating to the location of mining claims, or failure to perform annual labor within the time and of the value required after location, is often made the pretext for jumping or relocating claims. But after the miner has complied with all requirements of state and federal statutes,-has bought ***180** and paid for his claim, and received the patent investing him with title thereto in fee-simple,-it has been supposed that the jumping period has expired, and that the miner was secure in the possession of his surface ground and improvements, at least. It would seem that even this ****212** rule has its exceptions; the case before us furnishing an example. The Cash mine, at Gold Hill, Boulder county, was located by Robinson, Hock, and Sanford in November, 1882, and was surveyed for patent early in the spring of 1873. Payment was made to the government, and a duplicate receiver's receipt issued to the locators, bearing date May 15, 1873. Considerable work appears to have been done upon the property; for, in addition to the discovery shaft covered by a shaft-house, five or six other openings, or workings, upon the vein were made. The vein is a strong one, and crops out on the surface from 500 to 1,000 feet.

A government patent was issued to the locators, February 4, 1875, for 1,500 feet in length by 50 feet in width, upon the Cash lode; being mineral entry No. 343, and lot No. 62, in Gold Hill mining district. The field-notes and plat of the official survey were incorporated as part of the description. The property became, and still remains, one of the best known mining properties in the vicinity of Gold Hill. Not only was its name familiar, but the lode itself was prominent, cropping out, as stated, upon the surface, and the workings thereon being distributed along the course of the vein. Its monuments also are known, used, and referred to in the location of mining claims in the neighborhood. The government title, thus acquired, was transferred to the Cash Gold & Silver Mining Company, the appellee herein, in June, 1875, and remained unquestioned until the autumn of 1880, when the appellants took possession of the lode, surface grounds, and workings, and located what they named the Queen of May lode, with the dimensions of 1,500 by ***181** 150 feet; the Cash lode and its improvements forming the interior of the parallelogram. The only perceivable excuse for this appropriation of the property of the appellee is a misdescription of the patented premises as to courses and distances; the principal error being in the course and distance of corner No. 1 from the quarter-section corner on the east boundary of section 12, township 1 N., range 72 W. of the sixth principal meridian. The bearing of the quarter-section corner from corner No. 1, as stated in the patent, is N. 83°39# E. and the distance 1,403 feet; whereas recent surveys make the correct bearing N. 75°58# 37# E. and the actual distance 1,365.2 feet.

The surveyor who made the official survey for patent had died before the date of the trial below, and no witness was able to say whether the line described as tying corner No. 1 to the quarter-section corner had been actually run and measured or estimated only. It is probable, however, that it was merely estimated; since the testimony shows that it would be difficult to measure it on a true course, on account of the rough and broken condition of the ground. The appellants, relying upon this error to justify their appropriation of the patented premises, gravely contended that the ground called for in the patent lay wholly outside the Queen of May location. In support of this theory they caused a survey to be made of a certain parcel or ****213** plat of ground, having the same dimensions described in the patent; the lines being run from the initial point indicated in the patent as corner No. 1, computing the locality of such point from the quarter-section corner by course and distance. The tract thus laid off was duly platted, and labeled 'Cash Lode,' although it was in fact 200 feet distant from the boundaries of the patented premises at the nearest point. This plat ***182** and survey, together with a plat and survey of the so-called Queen of May lode, were exhibited, to show that no conflict existed between the two locations. But this was duly exposed on the cross-examination of the appellant's surveyor, who was forced to admit that, establishing the exterior lines of the Queen of May location, he had included within its boundaries the discovery shaft, shaft-house, and surface improvements of the Cash lode.

Other discrepancies in the patent, as tested by recent surveys, were in the length and width of its surface ground, and in the bearings of its side lines. Instead of being 1,500 feet in length by 50 feet in width, it was found to measure only 1,378 feet in length by 46.6 feet in width, and a

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variance of 1°> 49# was discovered in the bearing of its side lines. The shortage in measurements was explained by the facts that the surface is hilly and uneven, and that the measurements in the original survey were along the slopes, or surface, whereas the recent measurements were horizontal. Lines laid off by the former method would necessarily fall short when tested by the latter method. But the identity of the patented premises does not depend upon courses and distances alone. There were other calls in the patent: It calls for a '*granite rock in mound of stones*' at each of the four corners of the surface ground. The plat, incorporated as a part of the description, shows the location of the discovery shaft. And another fact of importance is that the name of the lode or mine is given. Several errors are assigned to the rulings of the court upon the trial, and to the instructions given and refused; but the controlling question in the case is, were the premises in controversy properly and sufficiently identified as the premises described in the patent?

***183** Counsel for appellants contend that monuments, to control courses and distances in the description of real estate, must be *unquestionable;* otherwise, courses and distances must prevail. They further contend that a rock in a mound of stones, in a country abounding in rocks and stones, is not an unquestionable monument. The rule of law is that monuments will control courses and distances; and while judges, in commenting upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence. All the authorities on the subject assign to courses and distances the lowest place in the scale of evidence, as being the least reliable. Mr. Washburn says this kind of evidence is ****214** regarded with great confidence in some cases, where the lines are short. He adds, however:

'But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land.' 3 Washb. Real Prop. (4th Ed.) 403.

That it is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the *locus in quo*, is shown by the adjudged cases. In *Lodge* v. *Barnett*, 46 Pa. St. 484, it is said:

> 'The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone. So, the return of a survey, even ***184** though official, must give way to the location on the ground, while the patent, the final grant of the state, may be corrected by the return of survey; and if it also differs, both may be rectified by the work on the ground.'

In *Opdyke* v. *Stephens*, 28 N. J. Law, 89, the court says:

> 'But the rule is well settled that boundaries may be proved by every kind of evidence that is admissible to establish any other fact.'

Smith v. *Prewit*, 2 A. K. Marsh, *158, is cited in support of this proposition. In Tyler, Bound. 285, it is said:

> 'Where monuments-for example, stakes, stones, or a tree-are referred to in a deed, parol proof is always admissible to show their location.'

Tested by these rules and principles, we think the original boundaries of the Cash lode were established by competent testimony on the trial, and that the jury was fully warranted in finding that the appellants had unlawfully entered upon and taken possession of said lode. Three, out of the four monuments called for, were identified by witnesses who had known its boundaries for from five to eight years; one of them being a deputy United States mineral surveyor, who had been accustomed for several years to survey mining claims in the neighborhood, and who stated that he had tied surveys of other properties to its corners probably one hundred times. There was no question of conflicting lines or surveys here, but simply a question of identifying the patented premises as a whole. The effect of the doctrine contended for by the appellants

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would be to declare the grant void for uncertainty. But it is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void. *Boardman* v. *Lessees of Reed*, 6 Pet. 345. It is plain that no such consequence could result here; for the identity of the property in controversy as the Cash lode, was known to the witnesses of both sides. ***185** This being the name under which it was granted and under which it had been for years held, worked, and generally known, the name alone would be a sufficient description to prevent a forfeiture. Sedg. & W. Tr. Title Land, § 461. We regard the proof of identity ****215** as leaving no reasonable ground of doubt that the property recovered is the same property described in the patent. The irregularties complained of are of minor importance. None of them are deemed of sufficient importance to warrant a reversal.

The judgment will therefore be affirmed.

All Citations

8 Colo. 179, 6 P. 211

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10 Colo. 66
Supreme Court of Colorado.

MURRAY
v.
HOBSON.

May 18, 1887.

Appeal from district court, Pueblo county.

West Headnotes (14)

[1] **Appeal and Error**
Reception of evidence

Where copies of a town plat were examined by court and counsel on a trial to the court, where marked as exhibits, and copies of them attached to the record, and the judge found that the papers were true copies, and that the original was lost, and could not be produced, held, that a technical objection, raised on appeal, that the copies were not introduced in evidence, would not be allowed to prevail.

Cases that cite this headnote

[2] **Boundaries**
Control of elements consistent with intention

Where the description in a deed contains a call for a certain block, such call may be properly rejected, where it appears from the whole description that a certain other block was without doubt intended; and because of such obvious error the deed is not inadmissible in evidence in an action involving the title to the land conveyed thereby.

Cases that cite this headnote

[3] **Boundaries**
Admissibility of Evidence

A deed of land included in a town site described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. Held, in an action involving the title to the land conveyed, that the description by metes and bounds, as well as that by way of reference to the plat, was properly admitted in evidence, and was not objectionable as liable to create a conflict as to the identity of the tract.

1 Cases that cite this headnote

[4] **Deeds**
Particular Description

A deed of land included in a townsite described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. In an action involving the title to the land conveyed: Held, that the whole description was properly admitted in evidence, and that oral testimony was admissible to identify the land (especially as no tract designated in the manner stated appeared on the plat), although the plat itself, or a copy, should be produced, or the non-production thereof accounted for, before admitting such oral evidence.

2 Cases that cite this headnote

[5] **Deeds**
Erroneous description

Any particular of a description may be rejected, if it is manifestly erroneous, and enough remains to identify the land intended to be conveyed.

Cases that cite this headnote

[6] **Equity**
Form and requisites of cross-bill

A defendant who becomes pro hac vice complainant, must in cross-bill, set forth the grounds relied upon for affirmative relief with the same strictness as the complainant in his original bill.

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1 Cases that cite this headnote

[7] **Evidence**

Reference to other instruments

A deed of land included in a town site described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. Held that, in an action involving the title to the land conveyed, oral testimony was admissible to identify the land; it appearing that there was no tract designated in the manner stated on the plat, and that, even if there was, the vacant land having been formed by the change of the river 12 years prior to the trial, great changes may have occurred in its boundaries since that time by subsequent changes in the bed of the river.

1 Cases that cite this headnote

[8] **Public Lands**

Town Sites

Colorado territorial act of January 10, 1868, purports to regulate the disposition of lands entered under the town site act of congress of 1844, "and any amendments that may be made thereto." The town site act of 1844 was repealed by congress previous to 1868, and a new law, that of 1867, was enacted. Held, that the territorial act merely misdescribes the act of congress to which it is intended to refer, and should be construed as referring to the act of 1867.

1 Cases that cite this headnote

[9] **Public Lands**

Town Sites

The state town site act controlled proceedings under the congressional act of 1867 considered as an amendment to the act recited in the territorial statute.

Cases that cite this headnote

[10] **Public Lands**

Execution of trust in general

Where the trustee has executed a deed of a parcel of such land to one claiming to be a beneficiary, the legal title to such parcel passes out of the trustee and vests in the grantee; no individual not then a beneficiary can thereafter in his own right question the validity of such conveyance; nor can he, by subsequent intrusion upon the possession of the holder of the legal title, acquire a right to inquire into or litigate the question whether all the preliminaries required by the local law were taken by the party holding the title from the trustee.

9 Cases that cite this headnote

[11] **Public Lands**

Adverse claims and conveyances

In ejectment to recover a lot of land, formerly constituting part of a town site, and conveyed to A., plaintiff's predecessor in title, by the county judge as trustee of the town site, defendant set up, by cross-bill, that the conveyance to A. was void by reason of his failure to perform certain preliminary steps required by law; that, by virtue of Act Colo. March 1, 1881, the legal title vested in the city; and that, by virtue of defendant's entry into possession prior to the passage of the act, and making improvements, he was entitled under the act to purchase the lot of the city. Held, that the cross-bill made no case entitling defendant to impeach the conveyance to A., and consequently afforded him no standing in equity.

8 Cases that cite this headnote

[12] **Public Lands**

Adverse claims and conveyances

Where the trustee of a town site delivers his deed, the legal title passes and no person not himself a beneficiary can impeach the title so conveyed. Cross-bill setting up the omission of certain statutory steps by the trustee: Held, to give the cross-complainant no standing in equity.

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1 Cases that cite this headnote

[13] **Statutes**
Amendment

A new act on the same subject may be treated as an amendment to the old act.

Cases that cite this headnote

[14] **Statutes**
Relation to plain, literal, or clear meaning;ambiguity

Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail.

17 Cases that cite this headnote

Attorneys and Law Firms

***67** ****922** *J. C. Elwell, Stone & Anderson*, and *Vincent D. Markham*, for appellant.

Chas. E. Gast and *John M. Waldron*, for appellee.

Opinion

BECK, C. J.

The first, second, and third errors assigned involve the merits of this controversy, and raise all the material questions affecting the proceedings and judgment.

The first alleged error complained of is the sustaining of the plaintiff's (appellee's) demurrer to the defendant's cross-complaint. The disposition of this ground of error will fix the equitable *status* of the appellant with respect to the subject-matter of this controversy, on which depend the pertinency and materiality of many of the questions presented by this voluminous record. It is a settled question that, when a defendant in ejectment files a cross-complaint, assuming to set up equities entitling him to affirmative relief, the facts relied upon therefor must be as fully stated as required to be in an original bill praying affirmative relief. The primary question, then, raised by the demurrer, is, does the cross-complaint state facts which entitle the defendant to affirmative relief?

The basis of the defendant's equitable claim to relief is substantially as follows: The lot in controversy, in 1869, ***68** comprised a portion of the town-site of the town of Pueblo, in the county of Pueblo. Mark G. Bradford was then county judge of said county, and in that capacity he entered the town-site, and received the government patent therefor, under and by virtue of the act of congress of March 2, 1867, entitled an 'Act for the relief of the inhabitants of cities and towns upon the public domain.' This act of congress vested the title of the lands so entered in patentee, and his successors in office, in trust for the several use and benefit of the occupants thereof, according to their respective interests. On December 5, 1870, a deed was executed by George W. Hepburn, the county judge of Pueblo county, to one James G. Robinson, of 12 acres, parcel of the tract patented to Bradford, and, by subsequent intermediate conveyances, the plaintiff succeeded to Robinson's title to the portion thereof now in controversy.

Defendant alleges that the deed from County Judge Hepburn to Robinson was void by reason of Robinson's failure to perform certain preliminary steps required by law, and necessary to authorize a conveyance by the trustee. It is further alleged, as a result of Robinson's omission to perform these preliminary requirements, that the title to the land attempted to be conveyed by said deed remained in the said trustee, and his successors in office, until March 1, 1881, when, by virtue of an act of the state legislature, of that date, the legal title vested in the city of Pueblo, in trust for the community at large, and that it is still in said city.

The cross-complaint sets up no title under the patent of the United States, and no claim as a beneficiary of the trust vested in the county judge and his successors in office. The equitable right claimed by the defendant is the right to purchase the lot in controversy when it shall be appraised and offered for sale by the city of Pueblo, under the provisions of the statute of March 1, 1881. The right to so purchase is based upon the defendant's ***69** entry into possession of the property prior to the passage of the said last-mentioned act, and the continuance of said possession ever since, together with the making of valuable improvements thereon. There is no allegations that the city of Pueblo has taken any steps to set aside the conveyance of the trustee to Robinson, or that it claims

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any rights in the lands described in that deed. Whether the title was rightfully conveyed to Robinson is a question for the town of **923 Pueblo, and not for the defendant. The demurrer to the cross-complaint was therefore properly sustained. *City of Denver* v. *Kent*, 1 Colo. 337, 345; *Cook* v. *Rice*, 2 Colo. 136, 137; *Smith* v. *Pipe*, 3 Colo. 187, 198; *Le Roy* v. *Cunningham*, 44 Cal. 600; *Naglee* v. *Palmer*, 50 Cal. 642; *McCreery* v. *Sawyer*, 52 Cal. 257; *Palmer* v. *Galvin*, 13 Pac. Rep. 476.

The doctrine of this court, as established by repeated decisions, is that when a trustee, in whom are vested, under the law of congress and by patent from the United States, the lands comprising a town-site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee, and vests in the grantee; also that no individual, not then a beneficiary of the trust and interested in said land, is thereafter in a position to question, in his own right, the validity of such conveyance; nor can any one, by subsequent intrusion upon the possession of the holder of the legal title, under any pretense, acquire a right to inquire into and litigate the question, either at law or in equity, whether all the preliminary steps required by the local law were taken by the party whom the trustee recognized as a beneficiary under the law, and to whom he conveyed the fee. The allegations of the cross-bill afford the defendant no standing in equity, since he states no case entitling him to impeach the conveyance from the trustee to Robinson, *70 through whom, by intermediate conveyance, the plaintiff derived his title.

The second ground of error assigned is based upon the proposition that, from the date of the issue of the government patent, August 5, 1869, up to and including that date of the county judge's deed to Robinson, December 5, 1870, the trustee named in the patent, and his successors in trust, were wholly without authority to execute the trust with which they successively became invested, in any manner or to any extent; that the act of congress of March 2, 1867, required that the local legislature should prescribe rules and regulations for carrying said act into effect; and provided that any act of the trustee not made in conformity to such regulations should be void, and that no such law had been provided.

When the plaintiff offered to introduce in evidence, on the trial below, the Robinson deed as the foundation of his title, it was objected that the instrument was void *ab initio*, and the foregoing reasons were urged in support of the objection. This assignment raises the question whether any territorial law was in force at the date of the conveyance to Robinson, prescribing rules and regulations for the execution of the trust, and authorizing the trustee to execute conveyances. The original town-site act, passed by congress on May 23, 1844, was repealed July 1, 1864. Prior to its repeal, to-wit, March 11, 1864, the territorial legislature passed an act providing the necessary rules for carrying into effect all trusts arising under it in the territory of Colorado. Laws 1864, p. 139. Subsequent to the passage of the congressional law of March 2, 1867, the territorial legislature, on January 10, 1868, repealed the legislative act of March 11, 1864, on the same day substituting therefor an act substantially similar in form and substance. See Rev. St. 1868, pp. 619, 620.

The latter act was in force at the time of the entry of *71 the Pueblo town-site, at the date of the issue of the patent therefor to County Judge Bradford, and at the date of the execution of the deed by his successor in trust, County Judge Hepburn. But it is objected that this territorial law of January 10, 1868, was of no force, for the reason that it makes provision for the execution of trusts arising under the congressional act of May 23, 1844, long since repealed, and contains no allusion to the congressional act of March 2, 1867, under which the town-site in question was entered and patented. It is true, the last-mentioned act of congress is not accurately described therein; but no one can read this law without experiencing a conviction of the legislative design to **924 make the necessary provisions for executing the trusts created under and by virtue of said congressional act. It was the only territorial law on the subject of the entry of town-sites on the public lands at the date of its passage, and, unless it can be fairly held applicable to the existing legislation on the subject, it must be treated as practically a dead letter. The latter view of a statute is never to be favored, if a more just and reasonable interpretation be admissible under well-established rules of law,—an interpretation which will not only sustain the statute, but preserve the rights which have accrued under them.

The supposed fatal objection interposed to the legislative act of January 10, 1868, consists, as we think, of a mere *misdescription*, or *false description* of the law of congress of March 2, 1867. The phraselogy employed is as follows: 'When the corporate authorities of any town, or the judge or judges of the county court for any county, in this

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territory, shall have entered at the proper land-office the land, or any part of the land, settled and occupied as the site of any such town, pursuant to and by virtue of the provisions of the act of congress, entitled 'An act for the relief of citizens of towns upon lands of the United States, under certain circumstances,' passed ***72** May 23 A. D. 1844, and any amendments that may be made thereto.'

The Colorado legislature has, in several instances, taken the view that the congressional statute of May 23, 1844, being the original town-site act, all subsequent acts on the same subject are amendments thereto. This was the view taken in the territorial act of March 11, 1864. It made provision for the execution of all town-site trusts arising under the act of congress approved May 23, 1844, 'and any amendments that may be made thereto.' The same provision, as we have seen, appears in the Revision of 1868, and the same description of the congressional law is given in the act of March 1, 1881, which repeals the law of 1868, and substitutes a new statute in its stead.

An inspection of the successive acts of congress upon the subject of townsites shows that those passed subsequent to May 23, 1844, are practically amendments of the original act. But since that act was repealed, as before stated, it is not accurate or proper to so describe them. Hence the territorial act or 1868 *misdescribes* the congressional act of March 2, 1867, under which the town-site of the town of Pueblo was entered. Does this error or inaccuracy of description nullify the law, as claimed by the defendant? The rule of law applicable to an error or inaccuracy of description is: 'The maxim, *falsa demonstratio non nocet*, applies to statutes as well as in other cases. * * * So, when a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant.' Sedg. St. & Const. Law, 354, 355.

A general rule of statutory construction, but liable to abuse without qualification, is that the intent of the legislature, if it can be ascertained, is to govern. More accurately ***73** expressed, the rule is that 'effect shall be given to the intention, whenever such intention can be indubitably ascertained by permitted legal means.' Another statement of the rule is 'so to construe statutes as to meet the mischief, to advance the remedy, and not to violate fundamental principles.' Dwar. St. 181, 184, and note. Vattel says: 'That must be the truest exposition of the law which best harmonizes with its design, its objects, and its general structure.' Among other well-established rules of construction are these: That statutes are to be construed with reference to the objects to be accomplished by them, and with reference to the circumstances existing at the time of their passage, and the necessity for their enactment. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail.

****925** Let the foregoing principles be applied to the exposition of a local statute of the character now under consideration. Congress passes a law for the relief of a certain class of citizens of the states and territories. Some of these citizens are, at the time of its passage, and others afterwards become, entitled to valuable property rights under this act. Former acts of the same character have existed, but they have been repealed, and the act in question becomes the foundation of such existing and accruing rights. But this act requires local legislation, supplementary thereto, to carry its remedial provisions into effect. Subsequent to the passage of this act, the territorial legislature has passed the requisite supplemental statute, providing the necessary mode and means of carrying into effect the act of congress. Among other things, it specifies what acts shall be performed by the local corporate or judicial officers, as the case may be, in order to obtain from the general government the title of the property to which certain of its citizens have or shall ***74** become entitled under the act of congress. This local law prescribes the acts necessary to be performed by beneficiaries of the trust, in order to obtain conveyances of their several lots and parcels of land, the titles of which are vested in the trustee. Every rule and regulation required by the act of congress is embodied therein. In respect to certain preliminary steps necessary to be taken by the beneficiaries, the precise number of days within which these acts must be performed after publication of notice by the trustee that the town-site has been entered is specified in the law. Although this is the only local law or supplementary act to the law of congress, and although its provisions are prospective, still it is strenuously contended by counsel for defendant that it is no law at all on account of the misdescription mentioned.

As against this view are the legal principles above stated. The structure and provision of the act also show it to have been the intent and purpose of the legislature to provide therein the rules and regulations required by the

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congressional act of March 2, 1867, for the executions of trusts arising under it. The same purpose is indicated by the circumstances existing at the time of its passage, the objects to be accomplished by it, the necessity for the law, and the unmistakable internal evidence furnished by the context and subject-matter of the act itself. The intention of the legislature being thus clearly ascertained, the validity of the statute is established by well-settled rules of construction, and the only duty remaining for the court to perform in this behalf is to execute the legislative will.

The objection of the quantity of land conveyed the the Robinson deed is not available in this action. *Smith* v. *Pipe*, 3 Colo. 198.

The ruling of the district court in the admission of the deed from Hepburn, county judge, to Robinson, of date December 5, 1870, was correct.

Several errors are assigned upon the admission by the ***75** court of oral testimony to identify the tract of land described in the Robinson deed. The position of appellant's counsel is that this deed contains two descriptions of the land intended to be conveyed,—one by way of reference to the recorded plat of the town, the other by metes and bounds. They contend that the only evidence necessary to ascertain definitely the boundaries of the land conveyed was the *first description* and the plat referred to in the deed; that the admission of the *second* description, by metes and bounds, was unnecessary, and liable to create a conflict as to the identity of the tract. We have carefully examined the entire evidence on this subject, and are compelled, in view of the facts and circumstances of the case, to reject this position as unsound. The land conveyed by County Judge Hepburn to Robinson is thus described in the deed: '* * * Grant, bargain, and sell unto the said James G. Robinson the following lot of land, situate, lying, and being in the town of Pueblo, county of Pueblo, and territory of Colorado, and designated on the recorded plat of said town *as the vacant land formed by the change of the bed of the Arkansas river*, and bounded as follows, to-wit: Commencing where ****926** the east line of Court street leaves the south line of the town of Pueblo, and running north along said line to the alley in block thirty-one, (31;) thence east, along said alley and the south line of M. McCarty, in block thirty-two, (32,) to Santa Fe avenue, thence south to the Arkansas river; thence up said river to where it is intersected by the south line of the town; thence along said line to the place beginning, and *not interfering* with the *plan* of *streets* and *alleys adopted in town plat in my office*.'

Appellant's counsel persistently objected on the trial to the admission of parol evidence to identify the land described in the Robinson deed; one ground of objection being that the plat referred to in the deed became by reference a part of the deed, and that parol proof of the ***76** identity of the land conveyed was incompetent until the plat should be first produced. We think this objection should have been sustained, and the plaintiff required to either produce the plat, or show that it was not in his power so to do. This would have been the proper order of proof on part of the plaintiff. The plaintiff finally introduced considerable proof going to show that the plat referred to in the deed was not in the county clerk's office, and had not been for several years, nor any record of it. A copy of the original, however, was produced by the witness Fosdick, who made the original for the use of Judge Bradford at the time of the entry of the town-site. Witness testified that it was a correct copy of the original, and had not been out of his possession since it was made, in March, 1869. There was likewise another plat of the town produced and examined by court and counsel, bearing the same date, and made by the same person.

The appellant raises the rather technical point that these plats were not introduced in evidence. But, in respect to all these objections, when it is considered that the trial was to the court without a jury, and that both court and counsel examined these plats on the trial; that they were marked as exhibits, and copies of them attached to the record; also that the trial judge found that the plat produced by the said witness Fosdick was a true copy of the original town plat referred to in said deed, and that the original was, lost, and could not be produced,—we are of opinion that no error, prejudicial to the substantial rights of the appellant, was committed.

In reference to the objection that parol testimony was not admissible to identify the land, it is wholly untenable. *Pipe* v. *Smith*, 4 Colo. 444. The copy of the original *town-site plat*, as well as the certified copy of the plat of same date, fail to satisfy the so-called *first* description of the deed, to-wit: '*And designated on the recorded plat of said town as the vacant land formed by* ***77** *the change of the bed of the Arkansas river*.' No tract of land so '*designated*' appears on either of these plats. But, even if it did, the '*vacant land*' having been formed by the change of the river 12 years prior to the trial, great changes may have occurred in its

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boundaries since that time by subsequent changes in the bed of the river.

Respecting the so-called *second* description, it was clearly admissible. The only objectionable feature about it is the misdescription of one call, which is a mistake so patent as not to raise a doubt as to the course intended. After describing a course north on the east line of Court street, to the alley in block 31, then an east course, along that alley and a certain strip of land, a distance of two blocks is described reaching to Santa Fe avenue. This course is described, thus: '*Thence east along said alley, and the south line of M. McCarty*, in block thirty-two, (32,) to Santa Fe avenue.' The error is in the number of the latter block, stating it as number '*thirty-two*,' whereas the block lying directly east of block thirty-one, and on a true line to Santa Fe avenue, is block *thirty*. The course described follows the entire length of block *thirty-one*, on the alley, and, continuing in the same direction, enters the alley in block *thirty*. This alley is not platted entirely through the latter block, and the oral evidence shows that the south line of the land of McCarty ****927** diverged from the alley to the south-east, causing the same divergence of the survey in question, but that the line closed on the avenue mentioned. Block *thirty-two*, on the contrary, lies directly north of block thirty-one, and cannot be reached on the line described. Neither did McCarty own any land in that block, while he did in block *thirty*. It is clear that the words 'thirty-two' are inconsistent with the other calls mentioned in the boundaries described; and it appearing that the remaining particulars, descriptive of the land mentioned in the ***78** deed, are sufficiently certain, the call for block *thirty-two* will be rejected.

In our judgment there is but *one description* of the premises granted inserted in the deed in question. The first portion thereof merely indicates the *situs* of this vacant tract, while the *latter* limits its extent, and defines its boundaries. There was no error in admitting the entire description in evidence, and no error in admitting oral testimony to identify the land. The very means by which it was formed show the necessity for such testimony.

We have not considered the effect of the *curative statutes* and *deeds*, considering them unnecessary to the determination of the merits of the controversy.

The judgment is affirmed.

All Citations

10 Colo. 66, 13 P. 921

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160 P.3d 373
Colorado Court of Appeals,
Div. II.

Roque R. MORALES, Plaintiff–Appellee,
v.
CAMB, a Colorado general partnership; Max Garwood; Peterson Family, LLC, a Colorado limited liability company; and G & B, a Nebraska partnership individually and as members of CAMB, Defendants–Appellants.

No. 05CA1392.
|
March 22, 2007.

Synopsis

Background: Plaintiff lot owner brought action against defendant lot owner to determine boundary between lots. The District Court, Grand County, Paul R. McLimans, J., found in favor of plaintiff lot owner. Defendant appealed.

[Holding:] The Court of Appeals, Criswell, J., held that monuments located on lots controlled the location of boundary line.

Affirmed.

West Headnotes (6)

[1] Deeds
Intention of Parties

If there appears to be a misdescription in a deed, a court must ascertain the true intent of the parties.

Cases that cite this headnote

[2] Deeds
Reference to Surveys, Maps, and Plats, and Records Thereto

When lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself.

Cases that cite this headnote

[3] Boundaries
Artificial Monuments and Marks

The monuments placed by the original surveyor are conclusive on all persons owning or claiming to hold with reference to such survey.

Cases that cite this headnote

[4] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

Monuments control courses and distances, which are considered the least reliable of all calls.

Cases that cite this headnote

[5] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone.

Cases that cite this headnote

[6] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

Monuments located on lots determined the location of boundary line between lots and superseded any inconsistent distance call or boundary line referred to in the subdivision plat, even if the monuments were misplaced.

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Cases that cite this headnote

Attorneys and Law Firms

***374** James A. Beckwith, A. R., Arvada, Colorado, for Plaintiff–Appellee.

Isaacson Rosenbaum, P.C., Blain D. Myhre, Denver, Colorado, for Defendants–Appellants.

Opinion

Opinion by Judge CRISWELL [*].

In this boundary dispute litigation, defendants, CAMB, Max Garwood, Peterson Family, LLC, and G & B, a Nebraska partnership, appeal from the summary judgment entered in favor of plaintiff, Roque R. Morales (Morales). We affirm.

I.

Because the judgment below was entered in response to a motion for summary judgment, we review that judgment on a de novo basis. *Grynberg v. Karlin,* 134 P.3d 563 (Colo.App.2006).

The Vasquez Village subdivision in the Town of Winter Park, Colorado was surveyed, platted, and approved in 1981. It contained eight lots. The subdivision plat as approved contained a "Surveyor's Certificate," which attested that the monuments required by Title 38, Article 51, C.R.S.1973, had been placed on the ground.

The pertinent statute, now § 38–51–105, C.R.S.2006, requires that the "external boundaries of platted subdivisions" are to be "monumented on the ground," that the boundaries of all blocks be monumented before any sale is made and that the boundaries of any lot be established by monuments within one year of the sale. Section 38–51–105(1), C.R.S.2006. The subdivision here, however, contains only eight lots; it has no lots within a block, as such. Moreover, it is undisputed that monuments were placed at the corners of each of the lots before the subdivision plat was approved.

Through various conveyances, defendant CAMB acquired title to lots 3, 4 and 5, and plaintiff obtained title to lot 6, which abuts lot 5 on its north. All of the pertinent conveyances referred only to the Vasquez Village subdivision plat for their legal descriptions.

In 2002, CAMB began planning to re-plat its three lots for development of a town home project. In re-surveying these lots, it was discovered that the monuments marking the boundary between lots 5 and 6 were inconsistent with at least one distance call shown on the Vasquez Village plat. While this distance was shown as 25 feet on the plat, the monument was placed some 38 feet from the pertinent prior point. Further, while the monument for the southeast corner of lot 6 was consistent with a distance call on the plat for that location, it is some 13 feet south of the ***375** location of the boundary line as depicted on the plat. Both monuments, therefore, exist some 13 feet south of the boundary between the two lots as shown on the plat.

As a consequence, if the monuments are determined to be the true points establishing the southern boundary of plaintiff's lot 6, that lot will have an additional strip of about 13 feet, containing about 1197 square feet, added to the lot as shown by the line on the recorded plat. But if the boundary line on the plat is determined to represent the proper boundary, this strip would be a part of lot 5.

To have a judicial determination of the proper location on the ground of this boundary line, plaintiff instituted this action. After the parties had filed cross-motions for summary judgment, the trial court granted plaintiff's motion, ruling that the monuments controlled the location of the boundary line and that they superseded any inconsistent distance call or boundary line referred to or depicted on the subdivision plat. We agree with this determination.

II.

Defendants contend that the district court erred in quieting title in favor of plaintiff because the intent of the grantors was to convey the lots by reference to the subdivision plat and not as located by the monuments. We are not persuaded.

[1] If there appears to be a misdescription in a deed, a court must ascertain the true intent of the parties.

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Wallace v. Hirsch, 142 Colo. 264, 268–69, 350 P.2d 560, 562 (1960); *see Lazy Dog Ranch v. Telluray Ranch Corp.,* 965 P.2d 1229, 1235 (Colo.1998)(in construing a deed, it is paramount to ascertain intent of parties).

However, certain rules of construction are used to disclose that intent.

[2] First, "[i]t is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself." *Spar Consol. Mining & Dev. Co. v. Miller,* 193 Colo. 549, 552, 568 P.2d 1159, 1161–62 (1977), citing *Cragin v. Powell,* 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566 (1888).

Here, then, the deeds conveying lots 5 and 6 to the parties incorporated all of the items of information on the plat, including the surveyor's certificate attesting that appropriate monuments had been placed on the ground, as required. *See Spar Consol. Mining & Dev. Co. v. Miller, supra.*

[3] **[4]** **[5]** Further, it is a general rule that the monuments placed by the original surveyor are conclusive on all persons owning or claiming to hold with reference to such survey. *Everett v. Lantz,* 126 Colo. 504, 514, 252 P.2d 103, 108 (1952). "Monuments control courses and distances, which are considered the least reliable of all calls." *Jackson v. Woods,* 876 P.2d 116, 118 (Colo.App.1994). "The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone." *Cullacott v. Cash Gold & Silver Mining Co.,* 8 Colo. 179, 183, 6 P. 211, 214 (1885)(citing *Lodge v. Barnett,* 46 Pa. St. 477 (1864)); 12 Am.Jur.2d Boundaries § 74 ("Where land is disposed of by reference to an official plat, the boundary lines [as] shown on the plat control. In locating land upon the ground from the calls and descriptions in the map, plat, or field notes referred to, the same primary rules apply as exist in the locating of calls and descriptions in a deed containing no such reference, that is, the various calls are given the same order of preference. In case of conflict, monuments control plats or maps, and an actual survey controls over a plat or a map.")

In the trial court, CAMB presented an affidavit from a registered professional land surveyor who averred that, using the field notes for the Vasquez Village subdivision, the descriptions contained in those notes were consistent and allowed the exterior boundary lines of that subdivision to "close." However, CAMB's surveyor averred that, if the locations of the monuments were used as the ***376** boundary indicators, the resulting description of the subdivision's exterior boundary would not close. Hence, this expert concluded that the discrepancy between the monuments and at least one distance call on the plat resulted from the misplacement of the monuments, or a "field blunder," and that the distance calls and boundary line as reflected on the plat, rather than the monuments, should control the location of the pertinent boundary.

The trial court rejected this ultimate conclusion, and so do we.

[6] Even if we assume that both monuments were mis-placed, the rule that monuments control over distance and course calls on the plat is nevertheless applicable and the monuments still control the boundary location. *See Everett v. Lantz, supra, citing Ben Realty Co. v. Gothberg,* 56 Wyo. 294, 109 P.2d 455 (1941) (monument mis-placing 8th standard parallel still controls description of land in grant).

Duane v. Saltaformaggio, 455 So.2d 753 (Miss.1984), does not support a contrary conclusion. The exception to the general rule relied upon by the court in that case is limited to those rare instances in which the locations of monuments are themselves inconsistent, thereby creating a conflict between monuments.

Here, the parties do not dispute that the pertinent monuments are located consistently with each other. Hence, we need not decide whether the rule of the precedence of monuments has any exception under Colorado law, because the only conflict here is between the location of the monuments on the ground and the distance call and boundary line depiction on the plat.

We conclude, therefore, that the district court correctly determined the location of the disputed boundary line.

The judgment is affirmed.

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Judge ROTHENBERG and Judge TERRY concur.

All Citations

160 P.3d 373

Footnotes

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S.2006.

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513 P.2d 1075
Colorado Court of Appeals, Div. II.

The BOARD OF COMMISSIONERS OF GRAND COUNTY, Colorado, Plaintiff-Appellee,
v.
Earl C. BAUMBERGER, a/k/a Earl Baumberger, et al., Defendants-Appellants.

No. 72-330.
|
Aug. 21, 1973. Not Selected for Official Publication.

A board of county commissioners brought an action against grantors of a deed transferring a right-of-way to the county for a road, praying that the deed be reformed and that defendants be enjoined from interfering with the county's or the public's use and possession of the property described in the reformed deed. The District Court, Grand County, Don Lorenz, J., entered judgment for the county commissioners, and the grantors appealed. The Court of Appeals, Enoch, J., held that the route for the road in question which was contended for by the county commissioners not only conformed to the courses and distances recited in the deed but also allowed harmonization in a reasonable manner of the monument or boundary calls that, on a finding of mutual mistake, reformation was a proper remedy, that parol evidence was admissible for the purpose of construing the deed, and that evidence of nonpayment of consideration for the deed was not admissible to avoid the deed or vary its effect.

Affirmed.

West Headnotes (5)

[1] Boundaries
Control of Natural Objects and Monuments Over Other Elements in General

Although natural and artificial monuments as well as adjacent boundaries control over course and distance calls where there are repugnant calls in deed, calls may not be disregarded if they can be applied and harmonized in reasonable manner.

1 Cases that cite this headnote

[2] Boundaries
Control of Metes and Bounds or Courses and Distances Over Other Elements

In suit by county commissioners for reformation of deed granting county right-of-way for road, route for road contended for by commissioners would be adopted where it not only conformed to courses and distances recited in deed but also rendered monument or boundary calls effective.

1 Cases that cite this headnote

[3] Reformation of Instruments
Deeds

Where evidence supported finding that mutual mistake had occurred between grantors of deed for right-of-way for road and grantee board of county commissioners, reformation of deed was proper remedy.

Cases that cite this headnote

[4] Evidence
Grounds for Admission of Extrinsic Evidence

Where deed to county commissioners of right-of-way for road was ambiguous, parol evidence was admissible for purposes of construing deed.

Cases that cite this headnote

[5] Evidence
Want or Failure of Consideration

While action might be maintained to recover consideration not paid for deed to county commissioners of right-of-way for road, evidence of nonpayment of consideration could not be allowed for purposes of avoiding deed or varying its effect.

Cases that cite this headnote

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Attorneys and Law Firms

***1075** Richard P. Doucette, Granby, for plaintiff-appellee.

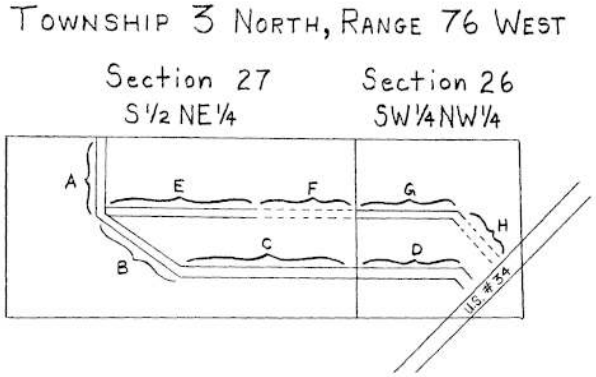
Donald L. Brundage, P. C., Westminister, for defendants-appellants.

Opinion

ENOCH, Judge.

This is an appeal from a judgment entered in favor of the Board of County Commissioners of Grand County (County), plaintiff, and against Earl C. Baumberger, Mary K. Baumberger, Paul E. Coffey, Audra Coffey, and Stephen J. Digor, defendants. The court ordered that a deed transferring a right-of-way for a road from Digor to the county be reformed and that the ***1076** defendants among others be permanently restrained and enjoined from interfering with the county's or the public's use and possession of the property described in the reformed deed. We affirm.

On December 1, 1953, defendant Digor filed a plat signed by him in which a proposed road across his land, represented by the segments A, B, C, and D in the diagram below, was designated 'Digor Drive.'



On May 10, 1961, Digor signed a letter in which he agreed to deed to the county a right-of-way in exchange for the county's agreement to open up and maintain Digor Drive. A deed was executed on June 8, 1961, conveying to the county '(a) continuation of Digor Drive through SW 1/4 NW 1/4 of Sec. 26, Twp. 3 N.R. 76 W of the 6th PM.' The deed also contained a description by courses and distances of three segments of the land; (1) segment A, (2) segment C Or E, and (3) segment D Or G.

It is by construction of this deed that the land intended to be conveyed will be determined. A literal reading of the description of the property granted by the deed is consistent with a single grant of two separated segments of land, one consisting of segments A and E and the other consisting of segment G. This construction, however, would leave significant voids, totaling in excess of 600 feet, represented by segments F and H, in any right-of-way leading from the N 1/2 NE 1/4 of Section 27 to U.S. highway 34. On the other hand the county claims and the trial court found that the land intended to be conveyed is the route A B C D as designated Digor Drive in the 1953 plat. Although the course and distance descriptions are consistent with segments A, C, and D of this route, the deed contains no description of segment B.

I.

[1] In support of the A E F G H route as being the route for the right-of-way intended in the deed, defendants rely upon the general rule enunciated in Whiteman v. Mattson, 167 Colo. 183, 446 P.2d 904, to the effect that where there are repugnant calls in a deed, natural and artificial monuments as well as adjacent boundaries control over course and distance calls. Application of this rule without qualification would result in segment E being extended ***1077** beyond the distance designated in the deed such that it would encompass segment F. And likewise, segment G would be extended to include segment H. Thus, the right-of-way would be rendered continuous on the route contended by defendants.

[2] The general rule urged by defendants, however, has a limitation. '(I)t is not permissible to disregard any of the calls if they can be applied and harmonized in any reasonable manner.' Whiteman v. Mattson, Supra. By including a call representing segment B, the calls for segments C and D not only conform to the courses and distances recited in the deed, but they also apply and are harmonized in a reasonable manner rendering the 'monument' or boundary calls effective.

II.

[3] Defendants also contend that reformation is not the proper remedy because, at most, a unilateral mistake in the description was made by the county. On findings

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supported by the evidence, the trial court found, as required by Segelke v. Kilmer, 145 Colo. 538, 360 P.2d 423, that a mutual mistake had occurred and that therefore reformation was proper. Without detailing the evidence supportive of this finding, suffice it to say that in order to accomplish the result sought by either party, the written instrument would have to be changed either by (1) adding segments F and H to segments E and G, or by (2) adding segment B as an additional call.

III.

[4] Defendants also object to the admission of parol evidence for construction of the deed which they allege is clear on its face. A review of the record, however, demonstrates that the court's finding that the deed was ambiguous is supported by the evidence and will not be disturbed on review. American National Bank v. Etter, 28 Colo.App. 511, 476 P.2d 287.

IV.

[5] Finally, defendants base certain of their contentions of error upon the fact that the evidence does not conclusively show that the consideration recited in the deed actually passed from the county to Digor. While an action may be maintained to recover consideration not paid, evidence of non-payment cannot be allowed in order to avoid the deed or to vary its effect. Brown v. State, 5 Colo. 496.

We find the remaining arguments of defendants to be without merit.

Judgment affirmed.

COYTE and SMITH, JJ., concur.

All Citations

513 P.2d 1075

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Upper Harmony Ditch Co. v. Carwin, Colo., July 28, 1975

167 Colo. 183
Supreme Court of Colorado, In Department.

H. C. WHITEMAN, Plaintiff in Error,
v.
Genevieve MATTSON, Defendant in Error.

No. 21856.
|
Nov. 4, 1968.

Property owner brought action against adjoining owner for damages resulting from alleged encroachment by construction of apartment building. The District Court, Pueblo County, Edward M. Yaklich, J., entered judgment for plaintiff owner, and adjoining owner brought error. The Supreme Court, McWilliams, J., held that where survey accepted by trial court as accurate clearly established that there was no strip of land 20 feet wide and 120 feet long adjoining lots of plaintiff and defendant, legal description in property owner's deed was inaccurate and property owner, whose deed contained monument call which set western boundary of adjacent lot as eastern boundary of the lot, was not record owner of any part of adjacent lot and construction of apartment building on adjoining property did not encroach on her property.

Reversed and remanded with direction.

West Headnotes (5)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

Where deed contained inconsistent distance call, which set eastern boundary of lot 20 feet east of western boundary of adjoining lot, and monument call, which set western boundary of the adjacent lot as eastern boundary of the lot, monument call took precedence over distance call and boundary of lot was western boundary of adjoining lot.

2 Cases that cite this headnote

[2] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

Where survey accepted by trial court as accurate clearly established that there was no strip of land 20 feet wide and 120 feet long adjoining lots of plaintiff and defendant, legal description in property owner's deed was inaccurate and property owner, whose deed contained monument call which set western boundary of adjacent lot as eastern boundary of the lot, was not record owner of any part of adjacent lot and construction of apartment building on adjoining property did not encroach on her property.

2 Cases that cite this headnote

[3] **Taxation**
Estate or Interest Created

Issuance of valid treasurer's deed creates virgin title erasing all former interests in land.

6 Cases that cite this headnote

[4] **Adverse Possession**
By Public

Any adverse possession by property owner of adjacent property occurring prior to 1947 became ineffective with issuance in that year of valid treasurer's deed.

Cases that cite this headnote

[5] **Adverse Possession**
By Former Owner, Payment of Taxes

Adverse Possession
By Public

Property owner did not acquire interest by adverse possession in adjoining property which was acquired by valid treasurer's deed in 1947 and on which apartment house was constructed in 1962 by adjoining owner. C.R.S. '63, 118-7-1.

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Cases that cite this headnote

Attorneys and Law Firms

***184** ****905** Adams & Abbot, Harper L. Abbot, Alan N. Jensen, Pueblo, for plaintiff in error.

Jack Jenkins, Pueblo, for defendant in error.

Opinion

McWILLIAMS, Justice.

This is a dispute between adjoining property owners and relates to the location of their common boundary line. Genevieve Mattson brought an action against H. C. Whiteman, alleging that Whiteman had constructed an apartment building which encroached upon her property ***185** and as a result of the alleged encroachment she made claim for damages in the sum of $10,000. By answer Whiteman denied that he had in any manner encroached upon the Mattson property and alleged that any improvements or structures built by him were constructed upon premises owned by him.

Trial of the matter was to a jury. However, after all of the evidence was in, the trial court, upon motion, directed a verdict in favor of Mattson on the issue of so-called 'liability.' In other words, the trial court held as a matter of law that Whiteman had in fact encroached upon the Mattson property, and accordingly submitted to the jury only the issue of damages. By its verdict the jury determined Mattson's damages to be in the sum of $5,500 and judgment in this amount was entered in favor of Mattson and against Whiteman. By this writ of error Whiteman seeks reversal of the judgment thus entered against him.

The facts must be summarized in some detail if this opinion is to have any substance and meaning. We approach this task with at least a modicum of trepidation, as the record before us is unclear in certain particulars, and is generally quite hard to follow. And this is not meant to be any reflection on counsel, as it probably results from the very nature of the case. The following then is our re sume of the facts as we understand them.

Blake's addition and Craig's addition are adjacent subdivisions in Pueblo, Colorado, with Craig's addition situated immediately to the east of Blake's addition. The Mattson and Whiteman properties abut, with the former being in Blake's addition and the latter in Craig's addition. In her complaint Mattson alleges, and the evidence supports her allegation that Whiteman is the record owner of Lots one, two, and three in Block fifteen of Craig's addition. ****906** It is Mattson's further allegation that she is the record owner of certain property lying immediately to the West of the Whiteman property, which property is described as Lot seven, and the east five ***186** feet of Lot eight, in Block fifteen in Blake's addition, 'and also that certain strip of land twenty (20) feet in width and one hundred twenty (120) feet in length adjoining said Lot seven (7) and Lot three (3), Block fifteen (15), of Craig's addition * * *.'

Upon trial it was established, and we believe this fact to be very significant and the key to the whole controversy, that there simply was no 'strip of land twenty (20) feet in width and one hundred twenty (120) feet in length adjoining said Lot seven (7) and Lot three (3), Block fifteen (15) of Craig's addition.' Surveys clearly indicated that though Lot seven and Lot three may not actually abut, there is at the most only a very narrow strip of land between the two lots above mentioned, perhaps 4-6 feet in width, but nowhere near the 20 feet described in the Mattson deed.

In this general connection the witness Elliot, a professional engineer and land surveyor, testified that he surveyed the Whiteman property in 1962. This witness testified that as a result of his survey he determined that Lots one and two in Block fifteen in Craig's addition were so-called 'normal' lots in that each was 44 feet in width. The witness explained, however, that the width of Lot three in that same block, depended entirely on the location of the so-called sixteenth line, which line constituted the western boundary of Craig's addition as well as the western boundary of Lot three. After locating this sixteenth line, it was then determined by this witness that Lot three was only 40.84 feet in width at the front of the lot and 38.47 feet in width at the rear of the lot. And as we understand it, Mattson does not challenge the accuracy of this survey and, as will be referred to in a moment the trial court in its rulings declared the survey to be an 'accurate' one.

Another very significant fact is that the aforementioned survey definitely established that the apartment house

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about which Mattson complains was so constructed as to be completely situate upon Lots one, two, ***187** and three. In other words, the evidence is that the apartment house in question was constructed on the three lots owned by Whiteman.

So much then for our recitation of background material and any further reference thereto will only be made as such is deemed essential to an understanding of the several contentions of the disputants. At the conclusion of the plaintiff's evidence Whiteman moved for a directed verdict in his favor. The motion was denied. After putting on his evidence, Whiteman renewed this motion, which motion was again denied.

Mattson then moved for a directed verdict in her favor on the issue of so-called 'liability' and this the trial court granted. In thus holding the trial judge declared that the western boundary line of Lot three as established by survey 'was accurate insofar as lot description is concerned.' However, the trial judge then went on to hold that regardless of that fact Mattson still had a 'right' to a strip of land 20 120 lying immediately to the east of the aforesaid Lot seven and that this right was 'derived both by grant and by adverse possession.' As an alternative finding, the trial judge also held that this right resulted from the fact that Mattson occupied this particular land under color of title with payment of taxes thereon for about 20 years. The trial court then found as a matter of law that Whiteman did 'enter into and upon the land' belonging to Mattson, although there was no determination as to the extent of the encroachment. It was on this general basis, then, that the trial court directed the jury to return a verdict in favor of Mattson and submitted to the jury for its determination the issue of damages. And, as above noted, the jury fixed Mattson's damages to be in the amount of $5,500.

****907** In our view of the matter it was proper under the circumstances for the trial court to treat the issue of so-called 'liability' as a matter of law and in connection therewith to direct a verdict. The trial court ***188** committed error, however, in directing a verdict for Mattson and on the contrary should have granted Whiteman's motion for a directed verdict and directed a verdict in his favor. Before setting forth our views on the matter, we would note that even assuming that there was an encroachment, there is insufficient evidence to support the jury's determination that Mattson's damages were in the sum of $5,500. But, as indicated, our analysis of the matter leads us to conclude that there was no encroachment and that the jury should have been directed to return a verdict for Whiteman.

By a warranty deed executed and delivered in 1947 the following described land was conveyed to Mattson: Lot seven, and the east five feet of Lot eight in Block fifteen in Blake's addition, and 'that certain strip of land twenty (20) feet in width and one hundred twenty (120) feet in length adjoining said Lot seven (7) and Lot three (3), Block fifteen (15) of Craig's addition * * *.' As indicated, Mattson makes no claim of any record ownership of Lot three. Indeed, it is quite clear that by the aforementioned deed Mattson acquired no interest whatsoever in the aforesaid Lot three and that, on the contrary, the Eastern boundary of the property which was conveyed to Mattson, whatever the extent be of the property thus conveyed, was the Western boundary of Lot three. Also, as above indicated, the survey, which was accepted by the trial court as being 'accurate,' clearly established that there was no strip of land 20 in width and 120 in length 'adjoining' the aforesaid Lots seven and three. It thus becomes evident that the legal description in the Mattson deed is inaccurate and that the calls contained therein are inconsistent.

Concerning the general order of precedence as between different calls, the following appears in 12 Am.Jur.2nd 603:
'Where the calls for location of boundaries to land are inconsistent, other things being equal, resort is to be had ***189** first to natural object or land marks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances.'

'In determining boundaries on a tract of land, it is not permissible to disregard any of the calls if they can be applied and harmonized in any reasonable manner, but if there is an actual contradiction between calls in the description of the land, so that they are irreconcilable, the court may reject or disregard the one which is false or mistaken.'

Colorado would appear to be in accord with the general rule set forth immediately above. See, for example, Cullacott v. Cash Gold and Silver Mining Co., 8 Colo., 179, 6 P. 211 where it was held that courses and distances

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are assigned the lowest place in the scale of evidence, as being the least reliable, and Davies v. Craig, 70 Colo. 296, 201 P. 56, where it was held that courses, distances and quantities yield to monuments.

[1] **[2]** Insofar as the distance call is concerned, the Mattson deed purported to set the eastern boundary of the Mattson property 20 feet east of the eastern boundary of Lot seven. At the same time the deed clearly recognized that the eastern boundary of the Mattson property was the western boundary of Lot three. In this circumstance the so-called monument call, i.e., the boundary of the adjacent lot, takes precedence over the distance call. Hence we conclude that Mattson is not, and never was, the record owner of any part of Lot three. Furthermore, Mattson never did hold any portion of Lot three under any color of title; nor did she ever pay any taxes on Lot three.

****908** It would appear to us that Mattson instituted the action on the premise that there really was a strip of land 20 feet in width and 120 feet in length situate between Lots seven and three and that Whiteman had encroached upon that particular strip of land to which she had ***190** record title with his apartment house. When it became clear that there was no such strip of land and that the apartment house complained of was constructed on Lots one, two, and three, Mattson shifted her theory of the case to one of adverse possession, claiming that regardless of the record title she somehow acquired an interest in Lot three through her adverse possession thereof. This matter was not pleaded, nor is there anything to indicate that the parties consented to the injection of that issue into the case. In this regard, however, it should be noted that the trial court in one of its alternative findings ruled for Mattson on the basis of adverse possession. Resolution of this phase of the case requires that we inquire into the manner in which Whiteman obtained title to Lots one, two, and three.

Lots one, two, and three were sold for unpaid taxes and a treasurer's tax deed to the property was issued in 1947. Thereafter title to Lots one, two, and three was quieted and the tract was subsequently conveyed to Whiteman. And after having his property surveyed, Whiteman in 1962 commenced construction of his apartment house. It was when the bulldozer uprooted some trees and bushes, as well as a fence, all of which Mattson believed to be on her property (but which were a few feet over her property line and on Lot three) that this dispute arose. The present action was thereafter brought in 1963.

[3] **[4]** **[5]** Mattson asserts here that from 1925 to 1962 she and her predecessors in title were in continuous adverse possession of an undetermined portion of Lot three. We have heretofore held, however, that the issuance of a valid treasurer's deed creates a virgin title erasing all former interests in the land. Harrison v. Everett, 135 Colo. 55, 308 P.2d 216. See also Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008. Hence, in the instant case any adverse possession of Lot three or any part thereof, occurring Prior to 1947 became ineffective with the issuance in that year of a valid treasurer's deed. Furthermore, it is ***191** quite evident that the eighteen year period prescribed by C.R.S.1963, 118-7-1 could not have run Subsequent to 1947, for it was in 1962 when Whiteman constructed his apartment house on the aforesaid Lots one, two, and three. Therefore the determination by the trial court that Mattson somehow acquired an interest in Lot three by virtue of adverse possession is error.

Finally, under the circumstances of the instant case, Mattson is in no position to launch at this late date an attack on the tax title given Whiteman's predecessors in interest. See Harrison v. Everett, supra.

Accordingly, we conclude that the trial court erred in holding that Mattson had an interest in Lot three. To the contrary Mattson had No interest in Lot three, be it on the theory of record ownership, color of title or adverse possession. Hence, the trial court should have granted Whiteman's motion-and not the Mattson motion-for a directed verdict, for the very good reason that Whiteman did not encroach on the Mattson property. We are not unsympathetic to Mrs. Mattson's plight, because no doubt in good faith she actually believed that she owned a strip of land 20 feet in width lying to the east of Lot seven. But the fact of the matter is that she did not. And Whiteman should not now be called upon to pay for a mistake which was not his.

The judgment is therefor reversed and the cause remanded with direction that the trial court enter judgment in favor of Whiteman.

MOORE, C.J., and DAY and KELLEY, JJ., concur.

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446 P.2d 904

All Citations

167 Colo. 183, 446 P.2d 904

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78 Colo. 141
Supreme Court of Colorado.

LUGON et al.
v.
CROSIER et al.

No. 11047.
|
Sept. 14, 1925.
|
Rehearing Denied Nov. 2, 1925.

En Banc.

Error to District Court, Routt County; Charles E. Herrick, Judge.

Action by Emile Gay Crosier and others against Fidel Lugon and others. Decree adopting report of commissioner was entered, and defendants bring error.

Affirmed.

West Headnotes (7)

[1] **Appeal and Error**
Costs

Supreme Court cannot say orders made relative to costs in boundary line proceeding were erroneous, where abstract does not show what orders were.

Cases that cite this headnote

[2] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

True monument controls course in later reestablishing of corner.

Cases that cite this headnote

[3] **Boundaries**
Location of Corners

Gen.L.O.Reg. 47, relating to reestablishing lost or obliterated closing corner, does not apply to closing corner from which no standard parallel has been initiated nor directed.

Cases that cite this headnote

[4] **Boundaries**
Location of Corners

Where northeast corner of section could not be established by monument, proper way to establish corner was by running line due north from undisputed southeast corner to correction line, bounding section on north, which was where original surveyor should have put corner.

Cases that cite this headnote

[5] **Boundaries**
Location of Corners

Where monument representing northwest corner of section was found north and east of southwest corner of adjoining section, true corner will be established by running line between true southwest corner of section and monument to intersection with correction line between sections, correction line having been established before monument, and surveyor had no right to cross it when monument was established.

Cases that cite this headnote

[6] **Boundaries**
Location of Corners

The true corner is on the correction line, where the surveyor ought to have stopped, and where his notes say he stopped.

Cases that cite this headnote

[7] **Courts**
Other Particular Matters, Rulings Relating To

Where in proceeding under Code 1921, §§ 298-309, for establishment of boundary line,

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court at one time had directed commissioner to establish corner under Gen.L.O.Reg. 47, that is not necessarily law of case, since court may correct its own error until final judgment and motion for new trial denied.

Cases that cite this headnote

Attorneys and Law Firms

****462 *142** Joseph K. Bozard, of Steamboat Springs, for plaintiffs in error.

C. W. Darrow, of Glenwood Springs, for defendants in error.

Opinion

DENISON, J.

This was a proceeding under Code 1921, c. 24, for the establishment of disputed boundaries of section 9, township 4 north, range 84 west of sixth p. m. in Routt county. The plaintiffs in error were defendants below. There were several reports by Richardson, the first commissioner, and one by Harkness, his successor. The latter was adopted, in toto, by the court, and a decree was entered accordingly. The case comes here on error. The dispute is fundamentally on the position of the northwest and northeast corners of the section, and, incidentally, upon the north, east, and west quarter corners thereof.

The township closes on the first correction line north, a standard parallel, and is somewhat more than one mile short, so that the north tier of sections, and say 150 feet of the next tier, is missing, and the survey of section 9 is otherwise irregular. These conditions do not all affect the questions before us, but they explain some things which otherwise would be confusing.

The correction line above mentioned was surveyed in 1873, and, according to the practice in government surveys, is marked by standard corner monuments upon the southeast and southwest corners of the southern tier of sections of township 5 north of said range 84.

Ordinarily, the north tier of sections being omitted, the northeast corner of section 9 would coincide with the southeast corner of 33, and the northwest corner of 9 with the southwest corner of 33, but, since these corners are on a correction line, and said corners of 33 were fixed first as standard corners, the east and west boundary lines of 9 ***143** were or should have been simply run to that line, the intersections forming the corners of section 9 and tied in the field notes to the standard corners.

1. The Harkness report in question fixes the northeast corner of section 9 by starting from the southeast corner of that section, which is undisputed, and running a line due north to its intersection with the correction line. Whether this method was right is one of the cardinal questions before us. The interior of said township 4 was surveyed for the government in 1881 by one Smith. The commissioner started where Smith, in his notes, said he started, followed the course which he said he took to the line on which he said he stopped, and called that the corner. We cannot say that that was wrong. Plaintiffs in error say that there was here a monument which was ignored, but the commissioner expressly finds that Smith never located or found the standard parallel (correction line), but calculated or guessed the ties from the field notes of the survey of 1873, and that this monument 'is not the original government closing corner for the northeast corner of section 9.' If so, it was properly ignored, ****463** and there was evidence to support the finding. The commissioner, an engineer and surveyor, who not only heard the witnesses, but went on the ground and reran the lines with the field notes of Smith's survey, and saw the topography therein mentioned and the alleged monuments themselves, is in a better position than we to determine whether the monument is genuine.

[1] The plaintiffs in error say, however, that if the monument is rejected, the rule of the General Land Office as to restoring lost monuments must be followed. The rule invoked is Gen. L. O. Reg. 47:
'A lost or obliterated closing corner from which a standard parallel has been initiated or to which it has been directed will be reestablished in its original place by proportionate measurement from the corner used in the original survey to determine its position.'

[2] ***144** The corner in question is a closing corner, but not one from which a standard parallel has been initiated nor one to which a standard parallel has been directed; we do not see, therefore, that the rule relates to this case, but if it did we doubt that the corner can be regarded

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as lost or obliterated. It never existed, and so cannot, strictly speaking, be said to be lost or obliterated. If the monument were lost or obliterated there would be some reason to attempt to relocate it, and perhaps the method prescribed in rule 47 is as good a way as any other, but when it is a myth, never on the ground, the natural, straightforward, and sensible way is to establish the corner at the place where the original surveyor ought to have put it, and that is where the north course of the east line of the section meets the correction line at right angles, and that is where the report puts it. Everybody knows that that is where the section line ought to have closed, and where the original surveyor, honest or dishonest, meant to close it; that his duty required him to close it there, so that the inclosure of his lines might be a rectangle or nearly so. Why should courts be less reasonable than reasonable men?

2. The next question is the location of the northwest corner of section 9. The commissioner professed himself unable to find whether a certain stone located 655 feet east and 122 feet north of the standard southwest corner of said section 33 was the original government corner set as the closing corner of the west line of section 9, but leaves that to the court upon the evidence. The court, in effect, finds that it is such corner, and, in accordance with the commissioner's recommendation if such should be the finding, places the true northwest corner of 6 at the place where a true line from the southwest corner thereof to the said stone intersects the said correction line.

[3] [4] This was right. Being a true monument, it controlled the course (indeed it was very near it), but the correction line was also a monument, and, in view of the fact that the surveyor, Smith, had no right to cross it, it must be regarded as controlling the stone monument. Therefore the true corner is on the ***145** correction line, where the surveyor ought to have stopped, and where his notes say he stopped.

[5] 3. The plaintiffs in error complain of the costs, but the abstract does not show what the orders in that regard were; we cannot, therefore, say they were erroneous.

[6] 4. The court at one time directed Commissioner Richardson to fix the corners by said rule 47, and plaintiffs in error now claim that to be consequently the law of the case. We do not think so. The court may correct its own errors until final judgment and motion for new trial denied.

It is not necessary to notice the remaining objections to the decree.

Judgment affirmed.

All Citations

78 Colo. 141, 240 P. 462

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70 Colo. 296
Supreme Court of Colorado.

DAVIES
v.
CRAIG et al.

No. 9801.
|
July 3, 1921.
|
Rehearing Denied Oct. 3, 1921.

En Banc.

Error to District Court, Grand County; Harry S. Class, Judge.

Action by William Bayard Craig and another against J. W. Davies and others. Judgment for plaintiffs, and defendant named brings error.

Reversed and remanded with directions.

See, also, Wescott v. Craig, 60 Colo. 42, 151 Pac. 934.

West Headnotes (3)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

Courses, distances, and quantities yield to monuments set in the original survey, which, when they are found, establish the boundaries of survey, being better evidence of what the surveyor did than plats or field notes.

1 Cases that cite this headnote

[2] **Boundaries**
Location of Corners, Lines, and Monuments

Evidence founded on plats and field notes, which contained errors, and which were contradicted by monuments and eyewitnesses of the survey, held not sufficient to sustain the findings of the trial court as to location of a corner of a survey.

1 Cases that cite this headnote

[3] **Appeal and Error**
Evidence Sufficient to Establish Cause of Action or Defense

When findings of trial court are not supported by evidence, appellate court may disregard them and direct a judgment in accordance with the undisputed evidence in the case.

Cases that cite this headnote

Attorneys and Law Firms

****57** ***296** Howard & McCrillis, of Denver, for plaintiff in error.

H. A. Hicks, E. W. Hurlbut, and A. T. Monson, all of Denver, for defendants in error.

Opinion

TELLER, J.

This case, which is here for the second time, involves the location of the corner common to sections 5, 6, 7, and 8, township 3 north, range 75 west, Grand county. The parties will be designated as in the trial court.

The plaintiffs below, who are defendants in error here, brought an action against the plaintiff in error and others, to remove a cloud on the plaintiff's title. Later it appears that, by consent of the parties, the case was treated as arising under the statute concerning lost or disputed boundaries. The trial court appointed two surveyors as commissioners to locate the south line of section 6 and ***297** establish the southeast corner thereof. The commissioners took testimony and reported that the south line terminated on the edge of the lake at a point where there was a stone marked 'CC' on the north side, with five grooves on the east and five on the south. They reported that this stone was practically in line between the southwest corner of section 6, the monument of which was not disputed, and the recognized corner common to sections 3, 4, 9, and 10 to the east, and that said CC stone

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was 2,470 feet easterly, on said line, from the south quarter corner of section 6. They also reported that, starting from the east quarter corner of 7, and running a true line between said quarter corner and the northeast corner of section 6, also undisputed, at a distance of 2,548.62 feet from said east quarter corner of 7, their line intersected the south shore of Grand Lake at a point 42 feet east of another stone set on the shore of the lake, marked 'CC' on the west face, with five grooves on the south face and five on the east face. This they determined to be the intersection of the line between sections 7 and 8 with the meander line of the lake. This placed the corner in question in the lake at the intersection of these two lines projected from the respective CC stones.

The court sustained objections to the report, and appointed another commissioner, who reported that, according to the field notes as recorded in the Surveyor General's office, said corner was 6.54 chains west of meander corner 8, set on the south shore of the lake. He accordingly set a stone 6.54 chains west of said meander corner as the southeast corner of section 6. The court approved the report and entered judgment accordingly. That judgment was reversed in this court in an opinion found in Wescott v. Craig, 60 Colo. 42, 151 Pac. 934.

Another commissioner was thereupon appointed, and reported the corner substantially as placed by the judgment which was reversed. Thereafter further evidence was taken before the court, largely by deposition, and the court made new findings, establishing the corner within a few ***298** feet of where it was located by the last-named commissioner. The cause is now here on error to that judgment.

[1] It is evident that this litigation was begun, has been carried on by the plaintiffs, and decided by the court, upon a wrong conception of the relative value, as evidence, of the records of the Surveyor General's office and the evidence of the survey which may be found on the ground. 'It is elementary that courses, distances, and quantities yield to monuments set in the original survey, and that, when such monuments are found, they establish the boundaries of the survey; this for the reason that they are better evidence of what the surveyor did than are plats or field notes.' Morse v. Breen, 66 Colo. 398, 182 Pac. 887.

[2] The report of the last commissioner, which was substantially followed by the court, accepts and is clearly based upon the records of the Surveyor General's office. Despite the fact that it is admitted that those records, and the plat made in connection with them, place Grand Lake about 460 feet nearer to the north boundary of the township, which is evidenced by undisputed monuments, than it actually is when located by those monuments, the commissioner locates the corner on the land, and explains that he did so because that was the location least inconsistent with the field notes. It is not located according to the field notes generally, but apparently with relation to the supposed meander corner 8.

On the second trial it was found that what was supposed to be meander corner 8 was meander corner 53; meander corner 8 being upon the north shore of the lake. ****58** There is, therefore, nothing in the record which justified the action of Commissioner Brown in proportioning the corner in between the south quarter corner of 6 and a supposed meander corner 8. It being admitted that the lake is 460 feet farther north, according to the plat, than it actually is, it would appear that, that mistake having been made, the notes were written up to conform to the supposed location of the lake.

Huntington, a witness for plaintiff, while assistant ***299** county surveyor, established a corner on the land in accordance with the plaintiff's contention. He testified that from the south quarter corner of 6, east to the CC stone, the line is nearly on the course as given in the notes.

The supervisor of Arapahoe Forest testified that in 1917, at the southwest corner of section 6, he found bearing trees with blazes, and that upon cutting into the trees he found 36 rings of annual growth since the blazes were made, from which he determined that the cuttings had been made 36 years prior to his investigation; that is, in 1881, the date of the original survey. He found trees likewise blazed at the south quarter corner, and some near the CC stone on the west side of the lake, all showing 36 years of growth since the blazing. He testified further that there was a plainly marked line from the south quarter corner eastward to said CC stone; that he found near that stone a dead tree blazed, showing 32 rings, and in a live tree blazes showing 36 rings. He further testified that he had had experience in relocating survey lines in the forest.

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Treas, who made the meander survey immediately following the original survey by Ouelette, and under the same contract, testified that the instructions from the Surveyor General's office were to set closing corner stones where subdivisional lines intersected the high-water line of the lake.

Alden testified that he was shown the CC stone on the west side of the lake, and saw the blazed line to the westward of it, forming the south line of section 6, within a few days of the survey.

Wescott, who was a squatter on section 7, and who entered land in that section and in the southeast of 6, testified by deposition that he saw the CC stone set at the east end of the south line of 6, and that Ouelette, the surveyor, told him that he had placed a stone, also on the south shore of the lake, marking the end of the line between section 7 and section 8, and that the corner was in the lake where the lines, if projected, would intersect.

***300** Ashley, who financed Ouelette on this survey, testified that he saw the south line of 6 run from a short distance west of the south quarter corner to the lake; that trees were blazed along the line, and the brush cut out to the lake, where the CC stone was set. He further testified that Wescott was there at the time, thus corroborating the latter's testimony. He says, further, that he was directed by the Surveyor General to have closing corner stones set where the survey lines intersected the line of the lake. He called attention to the fact that the field notes show that the line between sections 5 and 6 was run from the north; whereas, if the corner had been on the land as located by the judgment of the court, this line should have been run north from that corner, instead of south to it.

Byers testified that in the fall of 1881 he assisted his father, a deputy United States surveyor, in laying out the town site of Grand Lake; that when the line was run to the lake a CC stone was found at the southwest corner of the lake; that the section corner was supposed to be in the lake; that the town site was tied to this CC corner.

It is worthy of note that all the other monuments set in the survey of said section 6, except the east quarter corner, are in place and undisputed. This quarter corner is admittedly in the lake. This is at least suggestive that the southeast corner of 6 was never set on the land.

The trial court did not adopt the findings of Commissioner Brown in toto, but made new findings, from which he located the corner in question within a few feet of its location by the commissioner. The court said:

'While in the former trial of this cause it seems to have been taken for granted that meander corner 8 was a corner set in the meander survey of the lake, it now appears, and the court so finds, that M. C. 8 was a corner set in the subdivisional survey, and not in the subsequent meander survey of the lake. It therefore becames a monument of importance, being an incidental call to the corner in the subdivisional survey.'

We find nothing in the record to support this finding of ***301** the court, except the field notes, which are contradicted by the accepted monuments on the ground. There is no evidence that the corner marked M. C. 53 was set in the subdivisional survey and treated as M. C. 8. The court further finds:

'That the so-called CC stones around Grand Lake are not a part of the original government survey, nor was the well marked and blazed line near the south line of section 6, which defendants contend was the south line of section 6.'

The only ground for this finding is that the CC stones are not mentioned in the surveyor's notes as recorded. On the other hand, there is the testimony of two witnesses who saw the CC stones set as closing corners upon the lake, and two others who saw them within a few days, and when the line eastward fro the sourth quarter of 6 ****59** was freshly cut and blazed. The testimony of these witnesses is uncontradicted. The testimony of the Forest Supervisor as to the age of the blazing strongly corroborates the witnesses who testified that the line was so blazed.

The further finding of the court that the lines as originally run can be fully retraced, and that they show that the missing corner should be where located by the commissioner, has no evidence whatever to sustain it. The line from the south quarter corner of 6 to the corner established by the commissioner is far away from the course reported in the notes, and runs through timber in which there is no evidence of a line ever having been run at the time of the original survey.

[3] Upon the undisputed evidence the CC stones mark the intersection of subdivisional lines with the high-water

line of the lake. The evidence clearly establishes that a line was blazed, and the brush cut out, nearly due east from the south quarter corner of 6 to the CC stone on the west shore of the lake. The findings of the trial court being without support in the evidence, that court is at liberty to disregard them, and direct a judgment in accordance with the undisputed evidence in the case.

The judgment is therefore reversed, and the trial court ***302** is directed to enter a decree fixing the southeast corner of section 6 at a point in Grand Lake where a line from the south quarter corner of 6, passing through the CC stone on the west side of the lake, projected on that course, intersects a line between the east quarter corner of section 7 and the accepted monument at the northeast corner of said section 6. The other lines in difference will then be easily located from the lines thus determined.

SCOTT, C. J., and BAILEY, J., not participating.

All Citations

70 Colo. 296, 201 P. 56

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66 Colo. 398
Supreme Court of Colorado.

MORSE et al.
v.
BREEN.

No. 9278.
|
July 7, 1919.

Department 1.

Error to District Court, Rio Grande County; A. Watson McHendrie, Judge.

Suit by Thomas Breen against William W. Morse and another. Judgment for plaintiff, and defendants bring error. Affirmed.

West Headnotes (5)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

In view of Rev.St.U.S. § 2396, subd. 2 (43 U.S.C.A. § 752), courses, distances, and quantities yield to monuments set in the original survey, and when such monuments are found they establish the boundaries of the survey, being better evidence of what the surveyor did than plats or field notes.

1 Cases that cite this headnote

[2] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

The rule that courses, distances, and quantities yield to monuments set in the original survey applies only in the location of lines run and marked, and affords no aid in determining what section is included in such boundaries.

1 Cases that cite this headnote

[3] **Boundaries**
Control of Maps, Plats, and Field Notes Over Other Elements

In ascertaining number of section in which land is situated, markings on corner stones are of no greater probative value than notes and plats; both being in nature of records and equally likely to mistake in the making.

Cases that cite this headnote

[4] **Boundaries**
Control of Water Courses, Highways, and Fences Over Other Elements

Stones, being liable to removal, are not as good evidence of the lines run as are physical objects used as monuments or located on plats, such as streams, etc., which are permanent in their nature.

1 Cases that cite this headnote

[5] **Boundaries**
Weight and Sufficiency of Evidence

In action involving question of whether section in which land was situated was section 3 or 4 of certain township, where topographical features of land and surrounding country agreed in all respects with plats and notes showing the section to be No. 4, and one corner of land was marked by monuments on township line where plat showed it, court was justified in finding land to be in section 4, though corner stones on south boundary of the section were marked section 3.

Cases that cite this headnote

Attorneys and Law Firms

***399** ****887** Jesse Stephenson, of Monte Vista, for plaintiffs in error.

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Albert L. Moses, of Alamosa, for defendant in error.

Opinion

TELLER, J.

This cause involves the location of a tract of land in Rio Grande county to which both parties make claim. The controversy arose out of the following circumstances:

In 1885 one Church obtained a government patent, under the pre-emption law, for the southeast quarter of the southeast quarter of section 33, township 40 north, range 3 east, and the north half and the southwest quarter of the northeast quarter of section 4, in township 39 north, in said range 3. In 1899 he obtained patent, under the homestead law, for lots 1 and 2 and the southwest quarter of the northeast quarter of section 3, in said township 39.

Later the title to both of these tracts passed to the defendant in error, who conveyed to one Clark the second described tract. Clark conveyed to plaintiff in error Morse, who soon afterwards learned that the location of the tract he had purchased was uncertain. Morse having later made claim to tract 1, the defendant in error brought suit to quiet his title to it.

The court found that the Forestry Service had recently made a survey of township 39 and a plat thereof, which showed that said township does not conform to the other ***400** townships as it should, but that section 1 of township 39, instead of being under section 36 of township 40, lies under section 35 of township 40, so that between said township 39 and the township immediately east of it there is a vacant strip 1 mile in width and 6 miles in length, and each of the sections in township 39 is located 1 mile west of where it should be in order to conform to the corresponding sections in township 40 lying immediately north of it.

Tract 1, which lies immediately south of section 33 in township 40, contains 60 acres of cultivated land, and has been for years occupied as a farm. Plaintiffs in error claim that this tract is in section 3, and is the land conveyed to them by Clark, basing this claim upon the alleged fact that the monuments on the ground set by the government surveyors sustain the survey and plat made by the Forestry Service to which the court refers in its findings.

It is undisputed that there is a stone at the southwest corner of the section in which the cultivated land is situated which is so marked as to show that it was intended for the southwest corner of section 3, and that there is a stone at the southeast corner of the section with two distinct marks on its east side and five marks on the south side that can be traced. It appears, further, that there are several other corner stones in the township which are so marked as to indicate that the entire township is located 1 mile to the west of where it should be, unless mistakes were made in such markings.

The government plats, however, do not show any such situation, but place section 3 in township 39 under section 34 in township 40, as it should be according to the established system of surveys. The field notes agree ****888** with the plats, and the topographical notes show physical features according to their location on the plats and contrary to their location according to the said monuments.

***401** The plaintiffs in error contend that the monuments on the ground control, while defendant in error insists that the land was patented according to the recorded plats and that they must control. The case presents a question upon which counsel produce no authority directly in point, and it must therefore be decided by the application of the general rules governing in cases of disputed boundaries.

[1] It is elementary that courses, distances, and quantities yield to monuments set in the original survey, and that when such monuments are found they establish the boundaries of the survey; this, for the reason that they are better evidence of what the surveyor did than are plats or field notes. 9 C. J. 164; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; U. S. Rev. St. § 2396, sub. 2 (U. S. Comp. St. § 4804).

[2] This rule applies, however, only in the location of lines run and marked, and affords no aid in determining the question of what section is included in such boundaries. To hold that section 3, owned by plaintiffs in error, lies immediately south of section 33 in township 40 because two corner stones on the south line of said section are marked to indicate that they are corners thereof, is to make the markings on the stones controlling as to the proper number of the section.

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It is true that it appears from the map (Exhibit 3) made by the Forestry Service that there are other stones in the township so marked as to support the contention that the entire township is 1 mile west of where it should be, but that affects the quantity of evidence, not its value.

It is to be observed that there is here no dispute as to the boundaries of the land claimed by each of the parties, but as to the number of the section in which it lies.

[3] There is no apparent reason why markings on the corner stones should be regarded as of greater probative value than the notes and plats. Both are of the nature of records and equally likely to mistake in the making.

From the map above mentioned it appears that at the ***402** northeast corner of this section there is a monument with three marks on the east and three on the west side, and at the northwest corner there is a monument with four marks on the east and two on the west. These corners on the township line would be, then, the common corners respectively of sections 3 and 4 of township 39, and sections 33 and 34 of township 40, and sections 4 and 5 of township 39, and sections 32 and 33 of township 40. The first described corner is the northeast corner of the land in controversy.

The plat and field notes show section 4 immediately south of section 33 in township 40, and locate the south fork of the Rio Grande river on said sections 4 and 33. The record shows that the land in controversy is bottom land on said stream.

Counsel for plaintiffs in error urge that a prospective buyer of the land would locate it by the monuments which show it to be in section 3. But such showing is true only of the stones on the southern boundary of the section. The monuments on the north line, one of which is an actual corner of the land in dispute, show the land to be in section 4, and these corner stones on the township line are regarded in government surveys as primary, while subdivision corners are secondary.

The reason that monuments are regarded as better evidence than field notes, or plats made from them, is that their existence may be determined by an inspection of the ground, while the notes are records of what was done.

[4] Still, stones are liable to removal, and hence they are not as good evidence of the lines run as are physical objects used as monuments, or located on plats, such as streams, etc., which are permanent in their location. Here we find one corner of the land in controversy marked by a monument on a township line which is where the plat shows it, and the topographical features of said land and of the surrounding country agree in all respects with the official plats and notes.

[5] ***403** Under these circumstances, the trial court was, we think, justified in finding for the plaintiff in the action.

The judgment is accordingly affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

All Citations

66 Colo. 398, 182 P. 887

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48 Colo. 569
Supreme Court of Colorado.

DUNCAN
v.
EAGLE ROCK GOLD MINING & REDUCTION CO.

April 4, 1910.
|
Rehearing Denied Nov. 14, 1910.

Appeal from District Court, Boulder County; James E. Garrigues, Judge.

Action by the Eagle Rock Gold Mining & Reduction Company against John T. Duncan. From a judgment for plaintiff, defendant appeals. Reversed.

West Headnotes (18)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

The rule that monuments control courses and distances is recognized only where the monuments are clearly ascertained, and where there is a doubt as to the monuments, as well as to the course and distance there is no reason for declaring that the monuments shall prevail.

Cases that cite this headnote

[2] **Mines and Minerals**
Citizenship and Residence

The mineral lands of the United States are open for exploration and purchase only to citizens of the United States, or those who have declared their intention to become such, and one not a citizen can never make a valid location, though one so made is apparently valid.

Cases that cite this headnote

[3] **Mines and Minerals**
Requisites and Sufficiency

Mills' Ann.St. § 3154, making an open cut, cross-cut, tunnel, or adit each the equivalent of a shaft, does not change the definition of the respective words used, and in locating a claim that for which the certificate of location calls must alone be used.

Cases that cite this headnote

[4] **Mines and Minerals**
Nature and Locus of Work and Improvements

Where contiguous mining claims constitute a group, and expenditures are made on an improvement which is intended to aid the development of all the claims, the improvement is a distinct entity not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it, and the work performed attaches to the claims collectively.

Cases that cite this headnote

[5] **Mines and Minerals**
Nature and Locus of Work and Improvements

Where the plaintiff asserts that work done in a tunnel, at a distance from his claim, was intended to develop such claim, and as the annual labor thereon, the defendant is entitled to a full and fair cross-examination upon the question of plaintiff's intention, and to show, if he can, that the work done in the tunnel was really intended for the development of a group, including many other lodes than that in controversy, and was not sufficient in amount to meet the requirements of the statute.

Cases that cite this headnote

[6] **Mines and Minerals**
Nature and Locus of Work and Improvements

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One claiming an unpatented mining claim, must, where the annual labor required by statute was not performed upon such claim, show that work done elsewhere was, at the time thereof, intended as the annual labor upon the particular claim, and was of the character and amount satisfying the statute.

Cases that cite this headnote

[7] **Mines and Minerals**
Rights of Action and Defenses

Proceedings to obtain title to mining property of the United States are in the nature of inquest of office, and the government is a party in fact, and the objection of alienage, no matter by whom suggested, is based solely on the right of the government to interpose the fact of alienage as a bar to procure a title, though, where the grant of title or the equivalent is made to an alien, it cannot be attacked by a third person.

Cases that cite this headnote

[8] **Mines and Minerals**
Issues, Proof, and Variance

Each of the parties to a suit in support of an adverse against a patent to lode mining claims must prove every material fact necessary to sustain the validity of his claim, and, under a general denial or its equivalent, each party claims the title on which the right to possession is based, and the court must determine which of the two holds it, so that both parties are actors, and hence forfeiture by plaintiff of its claims for failure to do the annual assessment work may be shown under the general denial.

1 Cases that cite this headnote

[9] **Mines and Minerals**
Issues, Proof, and Variance

In a suit to support an adverse claim the defendant, under a general denial or its equivalent, may show non-performance by the plaintiff of the annual labor required by statute, upon his claim, and the consequent forfeiture.

Cases that cite this headnote

[10] **Mines and Minerals**
Presumptions and Burden of Proof

A corporation suing to support an adverse against an application for a patent to lode mining claims need not prove the citizenship of its stockholders, where it proves its existence and its own citizenship by a certified copy of its articles of incorporation showing that it is a duly organized and existing domestic corporation.

Cases that cite this headnote

[11] **Mines and Minerals**
Presumptions and Burden of Proof

A corporation suing to support an adverse against an application for a patent to lode mining claims, and relying on a purchase of claims located by third persons, must prove that the third persons were citizens, or had declared their intention of becoming citizens, so that they were competent original locators.

Cases that cite this headnote

[12] **Mines and Minerals**
Presumptions and Burden of Proof

One suing to support an adverse against an application for a patent to lode mining claims must clearly show the segregation from the public domain and the appropriation by him of the particular territory claimed in his adverse, and must produce in evidence certificates of location or amendments thereof in conformity with law covering the particular territory in dispute.

Cases that cite this headnote

[13] **Mines and Minerals**
Presumptions and Burden of Proof

In an action brought to support an adverse claim, to an application in the United States

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land office, for patent to a mining claim, the plaintiff must affirmatively prove that the original locator was, at the date of the location, a citizen of the United States, or, if alien born, had declared his intention to become such citizen. Thomas v. Chisholm, 21 P. 1019, 13 Colo. 105, followed; McKinley Creek Mining Co. v. Alaska United Mining Co., 22 S.Ct. 84, 183 U.S. 563, 46 L.Ed. 331 and Manuel v. Wulff, 14 S.Ct. 651, 152 U.S. 505, 38 L.Ed. 532, distinguished.

Cases that cite this headnote

[14] Mines and Minerals
Presumptions and Burden of Proof

In a suit to sustain an adverse claim, the plaintiff must prove a location conforming to the statute, and including the territory described in his adverse claim as filed in the land office.

Cases that cite this headnote

[15] Mines and Minerals
Ownership or Possession

Where one suing to support an adverse against an application for patent to lode mining claims disregarded the rule that in surveys the deputy mineral surveyor must be controlled by the record of the certificate of location and the markings on the ground, the latter controlling where there is a variation between the description in the record and the monuments, and the surveyor constructed his plat, not from the monuments and calls given in the certificate of location, but from the stakes on the ground as pointed out, the plat was inadmissible in evidence to show plaintiff's title.

Cases that cite this headnote

[16] Mines and Minerals
Marks and Monuments

Where the location certificate of a mining claim in the vicinity of territory which a prospector desires to locate calls for a particular monument such as a shaft, adit, cut, or a post set in the ground, the prospector may look for and demand the particular monument specified, and his rights are not jeopardized by proof of some other monument not designated.

Cases that cite this headnote

[17] Mines and Minerals
Marks and Monuments

A plat of what is alleged to be the plaintiff's location, but which was made upon assumption merely, without any reference to the location certificate, or the workings or monuments upon the ground, but in disregard of them, should not be received.

Cases that cite this headnote

[18] Mines and Minerals
Development and Assessment

Where one suing to support an adverse against an application for patent to lode mining claims admitted that the annual assessment work had not been done within the surface boundaries of the adverse claims, he must show that such work as had been done elsewhere was in fact intended at the time as the annual assessment work on the particular claims, and was sufficient in character and amount to satisfy the requirement of the law for the entire group, and defendant was entitled to a full cross-examination of plaintiff's witnesses to bring before the jury the intent of plaintiff at the time he did the work.

Cases that cite this headnote

Attorneys and Law Firms

***570** ****589** Charles B. Ward and Guy D. Duncan, for appellant.

John R. Wolff, John R. Smith, and Horace N. Hawkins, for appellee.

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Opinion

WHITE, J.

John T. Duncan made application through the proper United States Land Office for patent to certain lode mining claims designated as survey lot No. 17,375, situate in Sugar Loaf Mining district, Boulder county. The Eagle Rock Gold Mining & Reduction Company filed an adverse, and thereafter within the time limited by law this suit in support thereof, claiming of Duncan's lodes substantially all of the Black Prince, Black Prince No. 1, and Black Prince No. 2, located in 1904, as portions of its Ellmettie and Grace lodes, located in 1898, Oro and Anna G., located in 1899, Everett, Washington, and Monarch, located in 1900, and demanding damages, reasonable attorney's fees, and expenditures in support of the adverse. By the complaint the legal right to occupy and possess said premises and to the possession thereof was claimed 'by virtue of full compliance with the local laws and rules of miners of said mining district, the laws of the United States and of the state of Colorado, by pre-emption and purchase, and by actual possession as lode mining claims located on the public domain of the United States.' ***571** Duncan, defendant below, denied specifically the allegations of the complaint, and alleged title in himself to the territory in question. The replication traversed the allegations of the answer. Upon the issues so joined, trial was had, resulting in a verdict for plaintiff, the appellee here, for possession of the territory in dispute, $225 expenses and counsel fees, in support of the adverse, and $700 damages. Motion for new trial interposed and overruled, judgment in accordance with verdict entered, and writ of restitution ordered. From the judgment Duncan prosecutes this appeal, and assigns numerous errors, only a few of which we deem it necessary to consider.

Appellee, to prove its corporate existence and its citizenship, introduced in evidence a certified copy of its articles of incorporation showing that it was duly organized and existing as a corporation under and by virtue of the laws of the state of Colorado. No other proof of the citizenship of its stockholders was made, and it is contended that citizenship in that respect was not established. It appears from Jackson v. White Cloud Gold Mining & Milling Co., 36 Colo. 122, 85 Pac. 639, that the proof upon the matter in question was sufficient. Appellee acquired some of its claims by purchase and the others by location. Of the former were the Ellmettie and the Grace. The Ellmettie location certificate was filed by F. J. Rogers and William Capp, and an amended certificate thereof by William and M. L. Capp. The Grace location certificate was filed by William Capp. There was no evidence that Rogers or either of the Capps at the time of making the respective locations, or the conveyance of the claims to appellee, were citizens, or had declared their intention of becoming citizens, of the United States. Appellant contends ***590** that the ***572** appellee could not sustain its adverse as to these two claims because it failed to prove the citizenship of the original locators, and in support of his contention cites several authorities.

In Lee v. Justice Mining Co., 2 Colo. App. 112, 29 Pac. 1020, after announcing the statutory rule that none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to public mineral lands, it is held that an alien cannot acquire such an interest in a mining claim upon the public domain by location as can be sold, and upon which a subsequent title can be predicated. That case was carried to this court, however, and in 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216, was overruled; it there being held that the Court of Appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim, as that question could not, under the facts there presented, be raised. In Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019, the title to a mining claim, based upon a prior location made by one Joseph Hudson and the Kansas City Mining & Smelting Company, a corporation, and by them assigned or conveyed to Chisholm, the defendant, was under consideration in an adverse suit, and it was expressly held necessary to allege and prove the citizenship of the original locator or locators, as well as the citizenship of the successful party to the action.

Appellee contends, notwithstanding these decisions, that the citizenship of the original locator is material only where he continues to be the claimant to the time of the institution and determination, of an adverse suit. It must be conceded that many authorities so hold. Such is the doctrine announced in Morrison's Mining Rights (12th Ed.) p. 286; Lindley ***573** on Mines, § 233, and other authorities. We are constrained, however, to adhere to the doctrine, heretofore announced by this court, until there is a specific holding to the contrary by the United States Supreme Court. Appellee insists that such pronouncement has already been made by that tribunal,

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and that the doctrine of Thomas v. Chisholm, supra, has been overturned in McKinley Creek M. Co. v. Alaska M. Co., 183 U. S. 563, 571, 22 Sup. Ct. 84, 46 L. Ed. 331, and Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532. We are of the opinion that neither of the cases go to the extent claimed by appellee. Manuel v. Wulff holds that a deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only, and if such alien becomes a citizen, or declares his intention to become such at any time before judgment in a contest concerning such mining claim, the alien's disability to take title is thereby removed. In that case, on page 511 of 152 U. S., on page 653 of 14 Sup. Ct. (38 L. Ed. 532), it is said: 'We are of opinion on this record that as Alfred Manuel (the original locator) was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was under the circumstances open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered. * * * And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a nonsuit.' ***574** McKinley Creek Mining Co. v. Alaska Mining Co., supra, does not appear to be an adverse, but rather a controversy in which the federal government was neither directly nor indirectly interested. After reciting that in Manuel v. Wulff, supra, the court had sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the Supreme Court of Montana to the contrary, the opinion states that the 'decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase and can only be divested of it by office found'; and then quotes from the case of Governeur v. Robertson, 11 Wheat. 332, 6 L. Ed. 488, as follows: 'That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural born subject that is a resident in the kingdom and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.' ***575** It is then said: 'The meanine of Manuel v. Wulff is that the location by an alien and all the rights following from such location are voidable, not void, and are free from attack by any one, except the government.'

****591** It appears by these decisions that the court went no further than to hold that whoever is occupying the public domain under an apparent valid claim has a right to so continue until ousted by the government itself; that is, the citizenship of the holder and the original locator of the mining claim is subject to question only by the sovereign. In support of the proposition that a location made by an alien can be conveyed to a citizen, and when vested in the latter is as complete as if originally acquired by him by location, and that the government itself cannot assail his title, Mr. Lindley in his work on Mines, § 233, argues that, if the government can, by direct conveyance to an alien, vest in him a title to the absolute fee, it follows that an alien can acquire a limited estate by location, subject to an inquiry as to his qualifications, when he seeks acquirement of the ultimate fee. Unquestionably the sovereign is a competent grantor in all cases in which an individual may grant, but in the case of mining claims it will not, and does not knowingly, grant to an alien. Inasmuch, however, as every person is supposed a natural born subject that is resident in the kingdom, the sovereign in effect says to all, a certificate of location of a mining lode, complete in itself, gives an apparent right which must be recognized until the sovereign inquires into its validity. When the inquiry is made, the apparent right becomes-what it really is-no right at all.

The mineral lands of the United States are open to exploration and purchase only by citizens of the ***576** United States, or by those who have declared their intention to become such. As citizenship goes to the very

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inception and initiative of the title or right to hold as against the government, a noncitizen can never make a valid location, though one so made is apparently valid. Proceedings to obtain title to mining property are in the nature of 'inquest of office.' 'In such cases the sovereign is a party in fact to the proceeding, which is a direct one, for the procurement of title, and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. If, however, the grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party.' Billings et al. v. Aspen M. & S. Co. et al., 52 Fed. 250, 3 C. C. A. 69. The Ellmettie certificate of location called for 384 feet on said lode running southwest from the center of the discovery shaft, and 1,116 feet running northeast therefrom, and particularly described the lode as beginning at the northeast cornerstone of the Fair Count lode. The Fair Count lode was a patented claim. An additional or amended location certificate of the Ellmettie, filed in June, 1899, called for 360 feet running N. 76°35# W. from center of discovery shaft, and 1,140 feet running S. 76°35# E. from center of discovery shaft, and fixed the southwest corner thereof as corner No. 1, which was also therein stated to be corner No. 3, survey No. 6,980A, Fair Count lode, thence N. 5°15# E., 151.54 feet, to corner No. 2, whence corner No. 3 of said survey No. 6,980 bears S. 5°15# W. 1.5 feet. Corner No. 3 of the Ellmettie was identical with corner No. 2 of the Grace ***577** lode, and corner No. 4 was identical with corner No. 1 of the Grace lode. The claim, as described and fixed by its monuments and ties, was practically a rectangle lying due east of the Fair Count. The location certificate of the Grace lode called for 100 feet running N. 78°.05# W. from center of discovery shaft, and 1,400 feet running S. 78°.05# E. from center of discovery shaft, and the west end corner stakes thereof were made identical with the east end corner stakes of the Ellmettie lode. The Grace was also a right angle parallelogram. It is apparent from these descriptions, and the testimony likewise shows, that the Ellmettie was intended as an extension of the Fair Count, and the Grace was intended as an extension of the Ellmettie. The location certificate of the Grace, and the amended location certificate of the Ellmettie, and likewise the other location certificates of plaintiff's lodes, were all prepared by a deputy United States surveyor upon surveys made by him for that purpose. The descriptions in the certificates of the Grace and the Ellmettie lodes, and likewise the amendment of the latter, placed both those claims far south of any of the territory in controversy.

It was incumbent upon the plaintiff to clearly establish the segregation from the public domain, and the appropriation by it, of the particular territory claimed in its adverse. In order to do this, it was essential, among other requirements, that it produce in evidence certificates of location, or amendments thereof, in conformity with law, covering or including the particular territory in dispute. In this essential requirement it failed, and the court erred in not so advising the jury at the request of the defendant. ***578** Whether the plaintiff is in any better position as to its other claims the record does not disclose. Instead of locating and surveying its claims, in preparation for this suit, by the monuments given in the location, or amended location certificates, and the calls therein specified, the plaintiff wholly disregarded them, but produced upon a map, or plat, the alleged location and relative position of the several claims without any real or substantial facts for a basis. After application for patent, the plaintiff took a deputy United States surveyor, and pointed out to him its alleged discovery workings and location stakes of its several claims constituting the adverse. The surveyor thereupon assumed that these fixed the location of such claims, and reproduced them upon a plat in their relative position to each other, and to ****592** defendant's claims, as so pointed out. Some excerpts from the testimony of the surveyor will illustrate the worthlessness of this plat: 'Q. If, Mr. Armstrong, you took the east corners of the Fair Count as the west corners of the Ellmettie lode, and projected the side lines of the Ellmettie lode in accordance with the location certificate, then the Ellmettie lode would not touch any ground for which defendant has made his application for patent, would it? A. What relation does the corner you refer to bear to this shaft? The Court: Can you answer that question? A. No, sir. No one can answer it. Q. Why did you not go to the Fair Count lode, survey No. 6,980A, for your place of beginning? A. When I made this adverse survey? Q. Yes, sir. A. I never heard of it being done. I didn't go because it is not the custom. No one does it. We tie to the discovery shaft. Q. You paid no attention to this certificate ***579** (location certificate), did you? A. I never do. * * * I paid no attention to certificates.' And further: 'Q. How far is that discovery adit from the end line from the west end line of the Grace lode? A. 104 feet. Q. 104 feet? Is that the correct distance between that adit and the actual end line of that claim? A. As I found them on the ground. Q. Now, I don't know just what you mean by your answer. Do you mean to

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say that that is the actual measurement as you took it upon the ground? A. If you will let me explain, when I go upon the ground, I pay no attention to the location certificates at all. I simply take the man out and say, 'Show me your stakes.' I run a traverse around to make a closed traverse. * * * Q. When you started out to locate the claim, why did you take a discovery adit when the location certificate calls for a discovery shaft? A. Because the man who owns the claim went with me and showed me the point he had taken as the point of discovery.' The territory comprising the claims in dispute had been prospected for many years prior to the locations of plaintiff. Claims identical in name with some of plaintiff's had been located and abandoned. The country was covered with old abandoned shafts, adits, and discovery cuts. Under these circumstances, it is clearly apparent that this map or plat upon which plaintiff's case was predicated has nothing to support it, and should not have been received in evidence over defendant's objection. There is not the slightest evidence in the entire record to identify the claims described in plaintiff's several certificates of location, and amendments thereof, with its claims as designated upon the plat. In making the plat plaintiff disregarded the rule that in surveys the deputy mineral surveyor is controlled by the record ***580** of the certificate of location, and the markings on the ground, the latter controlling where there is a variation between the descriptive calls of the record and the monuments. 1 Lindley on Mines, § 396.

As said in Thallman et al. v. Thomas (C. C.) 102 Fed. 935, 936: 'The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to the monuments, as well as to the course and distance, there can be no reason for saying that monuments shall prevail, rather than the course given in the patent; and that is this case.' In the Ellmettie location certificates the west end corner stakes are practically the east end corner stakes of the Fair Count, yet the surveyor failed to take that into consideration, and failed to locate or show the Fair Count claim. The certificate of the Ellmettie calls for a discovery shaft, yet the surveyor took an adit, and constructed the claim around it, notwithstanding a discovery shaft was upon the ground at the identical spot designated in the certificate of location. The location certificate of the Grace also calls for a discovery shaft, but again an adit was taken for the initiative point of the survey. The discovery shaft, adit, or cut, as the case might be, as called for in the certificate, constituted one of the principal monuments for the purpose of finding the claim. When the location certificate of a claim in the vicinity of territory which a prospector desires to locate calls for a particular monument, to wit, a shaft, an adit, a cut, or 'a post four inches square, set two feet in the ground,' the prospector has a right to look for, and to demand, the particular monument specified, and his rights cannot be jeopardized by proof of some other monument not designated.

***581** In Resurrection Co. v. Fortune Co., 129 Fed. 668, 672, 64 C. C. A. 180, 184, it is said: 'Parol evidence, however, is incompetent to substitute a different monument for one clearly called by a deed or patent, or by the survey upon which it is founded, because that course of proceeding would violate the settled rule that written contracts may not be contradicted or modified by oral evidence.' In that case the patent did not call for a monument at corner No. 3. The field notes were introduced in evidence, and at said corner called for a post four inches square, four feet long, two feet in ground, marked '3-2309,' cut into the post. Evidence was then introduced that a round stake four inches in diameter, with two blazes, the later on the side of the earlier, with the figures '3-2309' written in pencil, but not cut into the post, was really intended. The trial court instructed the jury that this stake satisfied the description of the corner post. In reversing that holding it is said: 'Its effect is to strike out of the patent and field notes the description of the square post marked by the figures '3-2309' cut into it, and to write into them the description of the round, blazed ****593** stake inscribed with the figures '3-2309' by means of lead pencil, and in this way to violate the settled rule that written conveyances may not be modified or contradicted by parol.'

This court in Pollard v. Shively, 5 Colo. 309, 315, 318, said: 'In this case the call is for a post at the southwest corner, and it is insisted that parol evidence is admissible to show that, while a post is called for, a stump was in fact established as a corner. Courts have gone far in the admission of parol evidence in the matter of uncertain and disputed boundaries, but I am unable to see how this demand of the defendant can be sustained on principle. The ***582** certificate, like a deed, must be construed ex visceribus suis. When the intent is clearly expressed, no evidence of extraneous facts of circumstances can be received to alter it. 3 Wash. R. P. 400, 404; Bagley v. Morrill, 46 Vt. 99. The general rule stated more fully is that parol evidence cannot be admitted to control or contradict the language of a deed, but latent ambiguities

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can be explained by such evidence. Facts existing at the time of the conveyance, and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties when by the terms of the deed such line is left uncertain. 3 Wash. R. P. 401; Drew v. Swift, 46 N. Y. 209; Claremont v. Carlton, 2 N. H. 369 [9 Am. Dec. 88]; Peaslee v. Gee, 19 N. H. 277. There is neither latent ambiguity nor uncertainty in the terms of the certificate to bring it within the meaning of the rule. The call of the certificate is for a post. A stump does not answer the call. If parol evidence is admissible to show that a stump, and not a post, is the actual corner, it would be equally competent to show a pile of stones, or any other monument uncalled for. This would not be construing the calls of a survey, but making them. It would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that, in the absence of latent ambiguity, a deed cannot be varied or contradicted by parol evidence. It would not be controlling courses and distances by monuments, but controlling both by parol evidence. Claremont v. Carlton, 2 N. H. 369 [9 Am. Dec. 88]. The rule is that, where monuments are relied upon to control courses and distances, they must be found as called for. Bruckner v. Lawrence, 1 Doug. (Mich.) 19; McCoy v. Galloway, 3 Ohio, 282 [17 Am. Dec. 591]; ***583** Seaman v. Hogeboom, 21 Barb. [N. Y.] 399; Finley v. Williams, 9 Cranch, 164 [3 L. Ed. 691]. In the case of McCoy v. Galloway, supra, it was held that, where the patent called for a tree of one kind, it was not competent to show a tree of another kind. * * * Where there is a variation to any considerable extent between the courses and distances as the location certificate and monuments established on the ground, the record with its misdescription, in point of fact, gives no notice of the ground actually appropriated. If the monuments are swept away, no search, no exercise of prudence, diligence, or intelligence would advise the subsequent locator of the prior appropriation. In such case the rule demanded by the defendant would work the greatest injustice and hardship, and would be an interpretation of the law in the interest of erroneous records and indolent claimants.'

Appellee argues that as section 3154, Mills' Ann. St., makes an open cut, cross-cut, tunnel, or adit each the equivalent of a shaft, therefore, though the certificate of location calls for a shaft, and the proof shows an open cut, or an adit, there is no variance between the proof and the certificate. This contention is unquestionably sound when applied to the discovery work required; but when used in a certificate, for the purpose of ascertaining the situs of the claim, it has not that force and effect. The Legislature in making a cut, a tunnel, or an adit equivalent to a discovery shaft did not change the definition or meaning of those respective words. Notwithstanding the statute, an open cut or an adit is not a shaft, and in locating the claim that for which the certificate calls must alone be used. Moreover, the evidence is undisputed that, as located, the Grace was a straight claim with six posts, one at each corner, and one at the center of each side line; ***584** yet upon the plat the claim is shown as extending from corner No. 2, being also corner No. 3 of the Ellmettie, N. 67°36# E. 115.70 feet, thence S. 82°41# E. 1369.97 feet, to corner No. 3. The surveyor, having testified that he constructed this plat, not from the monuments and calls given in the certificates, but from the stakes upon the ground as pointed out, admitted that there were no stakes at either of the angle corners as shown on the plat, yet, in order to make the adit pointed out the discovery point, it was necessary to construct the claim with this angle. A plat or diagram so constructed, based upon assumptions only, in utter disregard of, and contrary to, the facts, should have no place in a court of justice.

Plaintiff conceded that the annual labor required by statute was not performed upon, nor within, its adversing claims, but contended that it had performed such labor through the Eagle Rock No. 1, Post Boy, and Georgie Marie tunnels on adjacent claims, comprising, with the claims in controversy, a group.

Plaintiff produced evidence as to the amount and value of work done in its tunnels in each year from 1901 to, and including, 1904, the year in which defendant's claims were located. Upon cross-examination defendant attempted to show that during those years plaintiff claimed a great number of lodes by possessory title in addition to the claims forming the basis of the adverse, and that the work done in the tunnels during ****594** each of those years was intended by the plaintiff as the annual labor upon the entire group, and did not aggregate in value one hundred dollars for each claim; that plaintiff had notices posted upon each of the claims constituting the entire group to the effect that the work on such claims, respectively, was then being done through said tunnels. ***585** By instructions given, and by the rulings upon the admissibility of this evidence, the court denied defendant's right to make such inquiry, and held substantially that plaintiff need prove the annual labor only for the group of claims described in its complaint, instead of upon its entire group. As the

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annual assessment work had not been done within the surface boundaries of the adverse claims, it was incumbent upon plaintiff to show that such work as had been done elsewhere was, in fact, intended at the time as the annual assessment work upon these particular claims, and was of such a character and sufficient in amount to satisfy the requirements of the law for the entire group.

In Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. 428, 430, 28 L. Ed. 452, it is said: 'The expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent.' And in Mining Company v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886, the rule stated is: 'A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff. And we think that all work done was a part of that general system, and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. * * * The natural and reasonable presumption is that all the work is done as part of the system, and as such applicable to all the claims.'

The question of the intention of the plaintiff as to the annual work done by it was therefore a material issue in the case. To make work done on a tunnel an improvement upon another mining claim under the law requiring annual labor, the work must have been done for the express purpose of benefiting such claim, and for its development. Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413. If plaintiff did an insufficient ***586** amount of work to hold its entire group, yet posted notices that the work on each claim was being done through specific tunnels, it could not thereafter, when certain of such territory became valuable, through discovery and development by others, apply the work to such particular territory only in order to hold it. Defendant was entitled to a fair and full cross-examination of plaintiff's witnesses in order to bring before the jury the intent of the plaintiff at the time of doing the work. Resurrection Co. v. Fortune Co., supra. Where several contiguous mining claims constitute a group, and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity, not subject to physical subdivision, or apportionment, in its application to the claims intended to be benefited by it. The work performed attaches to the claims collectively, and not severally. This is the rule clearly and forcibly announced by the Secretary of the Interior in Re James Carretto and Other Lode Claims, 35 Land Dec. Dep. Int. 361, 364. It is there said: 'To undertake to set apart or apportion a physical segment or section or an arbitrary fractional part of a common improvement, and to credit the value thereof to a particular claim, is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is on its face unreasonable and leads to a result but little short of absurd. The department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law. * * * In this or in any similar patent proceeding, where a part of the group is applied for and reliance is had upon a common improvement, the Land Department should be fully advised as to the total number ***587** of claims embraced in the group as to their ownership and as to their relative situations properly delineated upon an authenticated plat or diagram.'

Appellee, however, contends that, under the pleadings in this case, the question of whether the plaintiff had forfeited its lode claims for failure to do the annual assessment work was not an issue; that forfeiture is an affirmative defense which must be specially plead; and, if not, is waived. Under a general denial or its equivalent each party to an adverse suit claims the title upon which the right of possession is based, and the court determines which of the two holds it. Each are actors, and both may fail. As said in Bryan v. McCaig, supra: 'The Act of Congress of March 3, 1881, authorizing the jury to find that title to the ground in controversy has not been established by either party makes it absolutely necessary that a party claiming the right to the possession of any portion of the public domain in an adverse suit by virtue of a mining location must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. Becker v. Pugh, 9 Colo. 589, 13 Pac. 906. The pleadings required proof to be made of a compliance with the requirements of the statute. The policy of the law, without regard to the pleadings, requires such proof to be made.' Being an adverse suit, it devolved upon each of the parties to bring forward proof of every material fact necessary to sustain the validity of their respective claims, and it was necessary for the appellee to prove the annual work, at least, for the year immediately preceding the location, ****595** or attempted location, of appellant's claims. This was evidently the view which the court and counsel entertained of the law at the trial. The plaintiff treated this as one of the ***588** issues to be tried, and submitted evidence upon

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that theory. The defendant sought by cross-examination to show that the work done was insufficient by reason of the great number of claims in plaintiff's group, and it was error to deny him that right.

We will not prolong this opinion by discussion of other errors assigned, as it is clearly evident the judgment must be reversed, and it is so ordered.

Judgment reversed.

STEELE, C. J., and BAILEY, J., concur.

All Citations

48 Colo. 569, 111 P. 588, 139 Am.St.Rep. 288

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15 Colo.App. 281
Court of Appeals of Colorado

LINK, County Treasurer of Park County,

v.

JONES, County Treasurer of Jefferson County. [1]

June 11, 1900

Error to district court, Park county.

Action by William L. Link, as county treasurer of Park county, against Robert E. Jones, as county treasurer of Jefferson county. From a judgment for defendant, plaintiff brings error. Affirmed.

West Headnotes (4)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

In the location of boundary lines, calls for natural objects and artificial monuments will always control courses and distances.

1 Cases that cite this headnote

[2] **Counties**
Territorial Extent and Boundaries

Where the legislature, in an act describing the boundaries of P. county fixed the eastern boundary as south along the boundary of J. county, set forth in a prior section, to the P. river, and thence up the river to the place of beginning, such place of beginning being a well-defined point, and in order to make the boundary close it was necessary to run down the river instead of up from the western boundary of J. county, the words "up the river" will be rejected from the closing course, since fixed objects control courses, and, the western boundary of J. county and the point of beginning being fixed objects, the closing course must run between them.

Cases that cite this headnote

[3] **Counties**
Territorial Extent and Boundaries

Where the legislature, in setting out the boundary line between two counties, describes it as running due south to a given point, and thence south to the P. river, each course will be interpreted as meaning due south according to the magnetic meridian.

Cases that cite this headnote

[4] **Counties**
Territorial Extent and Boundaries

Where the legislature divided territory into counties by one act, giving a section to each county, and bounded P. county on the east by the western boundary of J. county, described in a previous section, the court, in determining a dispute as to the location of the dividing line between J. and P. counties, will first determine the territory called for by the description of J. county standing by itself, since the sections of the act are not to be construed like different acts on the same subject, but like grants, where the older in time segregates the land included in its description, and is necessarily conclusive on a younger conflicting grant.

2 Cases that cite this headnote

Attorneys and Law Firms

***282** ****339** Augustus Pease and C.A. Wilkin, for plaintiff in error.

Wm. A. Dier, for defendant in error.

Opinion

BISSELL, P.J.

Why the possible dispute over these boundaries has lain dormant for nearly 40 years, and only thrust itself on judicial attention at the threshold of the twentieth century, is past comprehension. We assume without examination,

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since it is conceded by the contending governmental bodies, the suits were properly brought, and under the law can be maintained. The important thing in them is the end and a decision of the matter. To sustain the trial judge, or to seek for legal reasons by which his and our conclusions can be undeniably supported, is relatively of slight consequence. No great injury could be done either county by an erroneous decision. The suit is peculiarly one wherein the old maxim, "Interest reipublicae ut sit finis litium," applies with unusual force. A simple affirmance would be as valuable and useful as an affirmance supported by a discussion of the facts and upheld by irrefragable legal arguments. We could as justly and as well insist the learned trial judge proceeded wisely along the lines indicated by the authorities as to attempt to so demonstrate. But the statute commands us to write. We shall therefore, as briefly as we can, whether as to the facts or as to the law, state our conclusions.

***283** In February, 1861, the territory of Colorado was organized. At the first session of the territorial legislature in the fall of that year it was subdivided into 17 counties. The sections of the act which established the boundaries of Jefferson and Park counties are before us for construction. They are:

"Sec. 24. Jefferson County-Commencing at a point where the township line between townships one (1) and two (2) south, intersects the range line between ranges sixty-eight (68) and sixty-nine (69); thence due west twenty miles; thence due south to the junction of North and South Clear creeks; thence south to the Platte river; thence down the center of said Platte river to the point where said river intersects the first correction line; thence east to the point where said first correction line intersects the range line between ranges sixty-eight (68) and sixty-nine (69); thence north to the place of beginning."

"Sec. 30. Park County-Commencing at a point where the second correction line south intersects the Platte river; thence south to the third correction line south; thence west to the summit of the Snowy range, east of the Arkansas river; thence in a northerly direction along the divide between the Arkansas and Platte rivers, and around the headwaters of the Platte river and its branches; thence easterly along the Snowy range dividing the waters of the Platte from the waters of the Blue, to the point of intersection with the first correction line south; thence east on said correction line to the western boundary of Jefferson county; thence south on said boundary to the Platte river; thence up the center of said river to the place of beginning."

Boogel and Vermillion at some time became the owners of land part or all of which ****340** was situate in either Jefferson or Park county as the boundaries of those counties were established. Each county claimed from them portions of the taxes assessed, and they brought suit to obtain a judicial determination of their obligation. The two counties, in some way which we have not examined, were interpleaded, the ***284** owners dropped out on the payment of the taxes into court, and Park and Jefferson counties remained as the respective litigants, contending over the location of the boundary lines. The nub of the dispute is the location of the western boundary of Jefferson county. It is quite impossible, without an unwarranted prolixity of statement, to exhibit it as clearly as it appears to us from an inspection of the whole act and an examination of the maps which counsel have presented. Using a very apt and pointed illustration furnished by counsel for the defendant, for which we desire to give him full credit, we start out with the suggestion that at the time the act was passed the land within the limits of the territory was unorganized, undivided, and largely unsurveyed. Most of it was an unknown, untraversed wilderness. It devolved on the sovereignty to divide this terra incognita into governmental subdivisions. They started, practically, as we start for the purposes of construction, with a map of the state clean and clear, and on that white surface proceeded to lay out the 17 counties. They began with Costilla. With that starting point, and with its lines and the boundaries of the territory as a base, they proceeded to construct and define the remaining 16. The twelfth county in the order of formation was Jefferson. There can be no dispute as to the starting point of the boundary of that county, none as to its north line, none as to its east or south lines, and none as to its west to the junction of North and South Clear creeks. These are all conceded, and, indeed, could not, on any theory of construction, location, or survey, be disputed. They are plainly determinable by fixed points and natural objects easily ascertained and practically irremovable. We then assume that the statute defining the county boundaries of the territory of Colorado, so far as regards its different sections, is in no sense to be looked at and construed in pari materia like different statutes on the same subject, or like a statute with many sections treating on one subject. The principle suggested is wholly inapplicable. Each section establishes

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the lines of a county. The map is to be constructed by the process ***285** of elimination or exclusion. As fast as one county is laid out, the land included in its limits is to be treated as segregated from the whole or the balance, and none thereby included can be taken to be included, or to be intended to be included, in the subsequent creations, unless no construction is possible save one which shall in some degree disturb what has been laid out. Under some circumstances, we might be compelled to vary an apparently established line to work out the inclosure of the whole territory within specified lines. This is speculative purely, for there is no such necessity. Eleven counties were created. Jefferson was laid out. It was followed by Clear Creek and Gilpin, and then Park was defined. In stating its boundaries and termini the dispute will come in sight, and we can, after the narration, better proceed with the case.

The starting point of Park is without the possibility of mistake. It begins where the second correction line intersects the Platte river. It runs south to the third correction line; west to the summit of the Snowy range, now known as the Mosquito, which is east of the Arkansas; along this divide to its intersection with the first correction line; thence east on this line to the western boundary of Jefferson. Thus far we have no trouble. Points and lines are definite, certain, unmistakable. We are furnished monuments which control all other descriptions, courses, or distances. If this western boundary of Jefferson be ascertainable, we still have no difficulty. But Park's eastern boundary to the length of this line is by statute made coincident with it. The statute says: "Thence south on said boundary [of Jefferson] to the Platte; thence up the river to the place of beginning." But if we have run the western boundary of Jefferson from the forks of North and South Clear creeks south to the Platte, according to the terms of section 24, which created it, then when we run the eastern boundary of Park to the Platte, according to the call along the western boundary of Jefferson, we can run "thence to the place of beginning," but we cannot, according to the call of the statute, go "thence up the center of the river to the place of beginning"; for from the point at which, run south, the western boundary of Jefferson strikes the Platte, it is some dozen or more miles down the river to the fixed point at which the legislature started Park's boundary lines. "Thence up the ***286** center of the stream." On this call Park county bottoms this appeal. If there be any legal principles which control the construction of this language, or if the call can be rightly construed to mean "thence to the point of beginning," rejecting the language "up the center of the river," then the case is relieved of all difficulty, and the judgment of the court below was right, and should be affirmed.

The first inquiry is, what is the proper construction of the language of the section establishing Jefferson county,-"thence south to the Platte river"? Does this mean due south, according to the magnetic needle, or is the line thereby left so indefinite that we may swing it far enough east of south to strike the river above the starting point of Park's boundary, and thereby so conclude the description of this last county that we can from the end of its eastern line run thence "up the river" to the place of beginning?

The legal propositions suggested by this ****341** statement and argument are, on the authorities to which our attention has been called, amply supported, and they fully accord with our views of the law. Stating these propositions in a measure sequentially for the purposes of the opinion, the cases are agreed to the point that the description in the location of Jefferson county, "thence south to the Platte river," starts and runs a line from the junction of North and South Clear creeks due south to the Platte river. We see no force in the suggestion that because the line from the northwest corner of Jefferson to the junction of North and South Clear creeks is run due south, and the continuing line is expressed "thence south," furnishes a presumption that the line is to run otherwise than due south or south on a magnetic line from that junction to the Platte river. The cases lay it down as a general proposition that wherever a line is run southerly, or south, or due south, the result is precisely the same, and the line thus ***287** stated in a description is to be taken as run due south, unless there is some other thing in the description which compels or permits another course, in order to work out the description which the grantor has put in a deed, or whereby a legislature has fixed the boundaries of a county. It was held in the New Hampshire case, and we think very properly, that wherever a line in a grant is stated as running due south, or due north or south, or north, it is to be taken as south or north according to the magnetic variation. If this principle be adopted in this state, then whenever a line is run south it is to be taken as run south according to the magnetic variation of the needle in the locality to which the description is applicable. In any event, it would be run due south by the siderial or astronomical meridian, if not by the magnetic. The New Hampshire case held that the

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courses of a deed are to be run according to the magnetic meridian, unless something appeared in the terms of the grant or otherwise to indicate that the astronomical, and not the magnetic, meridian was to be observed. We think this rule is properly applicable in Colorado, and ought to be adopted by the courts. It is well known that in all surveys made by the government in subdividing the state, and running meridians and correction lines, section lines, or subdivisions of sections, the magnetic meridian is adopted. This is true in the location of all mining claims, and all such lines are thus run, and this is usually so stated. It ought, therefore, to follow that, where a line is run without the statement of the magnetic variation, it should be assumed to be run with an observance of it, unless there be some statement to the contrary. We therefore hold, in accordance with the authority which we cite, that when the legislature stated the western boundary of Jefferson county, and ran the line south from the junction of North and South Clear creeks, it ran a line due south, making allowance for the magnetic variation, and it must strike the Platte river at the point where that line thus projected would strike the stream. Wells v. Jackson Iron Mfg. Co., 44 N.H. 61; Brandt v. Ogden, 1 Johns. 156; Jackson v. Reeves, 3 Caines, 293; ***288** Currier v. Nelson, 96 Cal. 505, 31 Pac 531, 746. Either determination of the direction of this line would probably answer for the purposes of the decision, and we shall assume the court's findings with reference to the location of the land or the running of the line as entirely correct under the testimony, accepting those conclusions without any further examination of them.

There are two or three other considerations which are equally determinative of the correctness of the judgment. We have already suggested that the sections of the statute were not to be construed like different acts passed on the same subject, to which the rule of construction in pari materia would be applicable, and we conclude that the two sections are to be construed like patents or grants or segregations of a different date, where the older in time necessarily concludes. It was held in the case cited from Caines that the older patent must be first satisfied whenever the older and the junior come in conflict. This principle would, if this rule be correct, require, first, the determination of Jefferson county's boundaries, and the inclusion therein of all territory which its lines would embrace, and the exclusion therefrom of all territory which would otherwise be embraced within the lines of Park county. There is another rule applied in the determination of boundaries which is, to our mind, equally conclusive of the claims and contentions of Park county. We are bound, in determining where those lines are to be run, to look first to the natural objects and artificial monuments, which will always control courses and distances. Monuments and natural objects, being ascertainable and irremovable, must be observed, and they overcome the force and effect of any course or distance named in the description. Nearly all the authorities to which we shall subsequently refer, as well as those already cited, adopt this doctrine. This being true, we must ascertain, first, whether there are any natural objects or permanent monuments stated in the descriptions of either of the counties which will control the courses and distances. This is self-evident from the reading of the statute. So far as concerns Jefferson county, we have the forks of North and South Clear ***289** creeks, and we have the Platte river, both natural objects, both permanent monuments. We have under the authorities run a line due south, according to the magnetic variation, from the junction of North and South Clear creeks to the Platte river. The ends of the two lines being given, the direction being established, we have a line connected by two natural objects run in a fixed direction under the law. We have been thus particular in stating this line because the line itself, being thus established, becomes thereunder a fixed boundary ****342** with reference to the description of Park county. The lines of a location known as "Hart's Location" and a grant have been held to be a natural object for the purpose of a boundary. Land Co. v. Saunders, 103 U.S. 316, 26 L.Ed. 546; Owings v. Freeman, 48 Minn. 483, 51 N.W. 476; White v. Luning, 93 U.S. 514, 23 L.Ed. 938; Johnson v. Bowlware, 149 Mo. 451, 51 S.W. 109; Shepherd v. Nave, 125 Ind. 226, 25 N.E. 220; Yanish v. Tarbox, 49 Minn. 268, 51 N.W. 1051; Cragin v. Powell, 128 U.S. 691, 9 Sup.Ct. 203, 32 L.Ed. 566.

Accepting these decisions as declarative of the law, the results which we have already foreshadowed, and the positions which we have already stated, are amply supported, and control the controversy. The lines of Jefferson county were first established, and this portion of the public domain of the territory must be included within its boundaries. The legislation resulted in fixing a line due south from the forks of North and South Clear creeks to the Platte river, which, being thus run, became a permanent object or a natural monument, by which the subsequent description of Park county must of necessity be controlled and measured. It will be remembered that

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the starting point of Park county is a natural corner on the Platte river from the northwest corner of a previously established county. It was run due south to a correction line which is a public survey of which we are bound to take judicial notice, and by which all descriptions are governed and controlled. It was run west to the top of a range; "thence north to a line established by a public survey"; thence east to a fixed object, to wit, the western boundary of Jefferson county; and thence south along that line to the Platte river. When once we accept that line as an established ***290** proposition and a natural object by which the Park county boundaries are to be determined, there is no question whatever but what it must control all courses and distances, and be regarded as the eastern boundary of Park county. It was likewise a controlling part of the description of Park county because that line is what is known in the law as an adjoiner, and wherever there is a discrepancy in the description the adjoiner always governs. Airey v. Kunkle, 190 Pa.St. 196, 42 Atl. 533.

We thus have under all these authorities, and under all the different principles which they declare, and the rules which they have laid down in the determination of boundaries of property, several controlling rules, any one or all of which fix and determine the eastern boundary of Park county. It is quite manifest from the statute and from what has already been stated, if the section describing Park county had said, at the conclusion of the description of Park's eastern boundary, "thence to the place of beginning," there would have been absolutely no trouble or possibility of dispute. The sole difficulty comes from the use of the words, "thence up the river to the place of beginning." Subsequent knowledge, and subsequent surveys and information, probably not possessed by the legislature when the counties were created or the state was subdivided, show the cause of the mistake. There was little knowledge as to the exact location or description or course of the Platte river, and this want of information led it to believe that continuing the boundary line of Park county from the termination of the western boundary of Jefferson would compel a course up the river, instead of down the river, to the place of beginning. However this may be, the principles already declared by the courts, and referred to and followed, compel us to reject the words "up the river," and read the call, "thence to the place of beginning," instead of, "thence up the river to the place of beginning." The right to do this, and the rule of construction which permits it, seem to be as well established as those to which we have already adverted. ***291** Simpkins' Adm'r v. Wells (Ky.) 42 S.W. 348; Warden v. Harris (Tex.Civ.App.) 47 S.W. 834. These authorities are direct to the proposition, and in seeming accord with the principles laid down in the other cases. Assuming this to be the law,-and it is certainly well-established in matters of description contained in grants and patents and surveys,-we hold that it is our right and our duty to reject, and the court below did not err when it rejected, the words "up the river," but proceeded to draw the line from the junction of the western boundary of Jefferson county with the Platte river to the point of beginning, which is a fixed object. Thus and thereby the apparent intention and purpose of the legislature will be accomplished, the boundary lines of the two counties be firmly and fully established, and the county authorities of the contending governmental subdivisions of the state will be advised as to their duty, and be able to act intelligently in the assessment of taxes, the imposition of other burdens, or the performance of the duties which the various statutes have laid on them. We believe the learned judge who tried the case did not err, and that his conclusion accords with the law, is a correct interpretation of the statute, and the dispute between the counties has been correctly adjudged. Finding no other error in the record which is urged and of sufficient consequence to disturb the judgment, it will therefore and necessarily be affirmed. Affirmed.

All Citations

15 Colo.App. 281, 62 P. 339

Footnotes

1 Rehearing denied October 8, 1900.

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5 Colo. 309
Supreme Court of Colorado

POLLARD
v.
SHIVELY ET AL.

Dec. T., 1880

West Headnotes (13)

[1] **Boundaries**
Control of Natural Objects and Monuments Over Other Elements in General

In determining boundaries, natural and permanent objects control courses and distances.

1 Cases that cite this headnote

[2] **Boundaries**
Artificial Monuments and Marks
Mines and Minerals
Marking Boundaries on the Ground

While a stump hewed and marked might be adopted as a location post, the descriptive survey should give both its real and assigned character.

Cases that cite this headnote

[3] **Evidence**
Latent Ambiguity

The general rule that parol evidence cannot be admitted to contradict or control the language of a deed, but that latent ambiguities may be explained by such evidence: Held, applicable to a location certificate.

1 Cases that cite this headnote

[4] **Evidence**
Location and Identification of Monuments or Calls

When the call in a location certificate is for a post, parol testimony is inadmissible to show that, while a post is called for, a stump was in fact established as a corner.

1 Cases that cite this headnote

[5] **Mines and Minerals**
Marking Boundaries on the Ground

The marking of the surface boundaries with posts is so far imperative under Rev.St.U.S. § 2324 (30 U.S.C.A. § 28), and 2 Mills' Ann.St. § 3153, as to require that the boundaries may be readily traced by them. The notice which the statute contemplates and seeks by and through them may not be substantially impaired by any omission.

2 Cases that cite this headnote

[6] **Mines and Minerals**
Marking Boundaries on the Ground

2 Mills' Ann.St. § 3153, was passed in 1874 to supplement the acts of congress, which were silent as to how a mining claim should be marked or designated on the ground.

Cases that cite this headnote

[7] **Mines and Minerals**
Marking Boundaries on the Ground

The requirements of 2 Mills' Ann.St. § 3153, that the side posts marking the boundaries of a surface claim be placed in the center of the side lines, is satisfied if they be placed substantially in the center; but, when there is a discrepancy of 150 feet, they cannot be said to be in the center.

Cases that cite this headnote

[8] **Mines and Minerals**
Marking Boundaries on the Ground
Mines and Minerals
Variation of Description from Ground Marks

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Where a variation exists between the monuments and the courses and distances of the location certificate, it is necessary, prior to the patent, for the locator, as against subsequent locators, to keep up his monuments to an extent that gives fair and reasonable notice.

2 Cases that cite this headnote

[9] **Mines and Minerals**
Marking Boundaries on the Ground

While a stump, hewed and marked, might be adopted as a location post, the descriptive survey should give both its real and assigned character. When the call in a location certificate is for a "post," parol testimony is inadmissible to show that while a "post" is called for, a "stump" was in fact established as a corner.

1 Cases that cite this headnote

[10] **Mines and Minerals**
Marking Boundaries on the Ground

Marking the boundaries of a surface claim as required by the statute, serves a double purpose; it operates to determine the rights of the claimant as between himself and the government, and to notify third persons of his rights.

2 Cases that cite this headnote

[11] **Mines and Minerals**
Marking Boundaries on the Ground

The rule is, that where monuments are relied upon to control courses and distances, they must be found as called for.

Cases that cite this headnote

[12] **Mines and Minerals**
Alteration or Obliteration of Boundaries

A claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous, when the right of an intervening locator without notice will be prejudiced.

1 Cases that cite this headnote

[13] **Mines and Minerals**
Requisites and Sufficiency

A recorded certificate of location is a statutory writing affecting realty being in part the basis of the miner's rights of exclusive possession and enjoyment" of his mining location, granted by the act of congress of May 10, 1872. The purpose of description is to identify the claim with reasonable certainty.

Cases that cite this headnote

Attorneys and Law Firms

***309** Appeal from District Court of Clear Creek County.

THE facts are stated in the opinion.
Mr. L. H. SHEPHARD and Messrs. ROCKWELL and BISSELL, for appellant.

***310** Mr. R. S. MORRISON and Mr. JACOB FILLIUS, for appellees.

Opinion

***311** ELBERT, C. J.

This was an action brought by the appellees, Peter and David Shively, against the appellant, Pollard, in the District Court of Clear Creek County, to recover possession of a certain portion of the Glendower Lode, claimed by the appellant as a part of the Hardin Lode, and embraced by him in his application for a patent therefor.

The Hardin Lode was discovered in June, 1875, and in the November following was surveyed and staked, and a certificate of location filed in the office of the register of deeds for Clear Creek county by the discovers, Packard and Krise, remote grantors of appellant.

The Glendower Lode was discovered the 6th December, 1878, was surveyed and staked the 20th February, 1879, and a certificate of location filed the 21st February, 1879.

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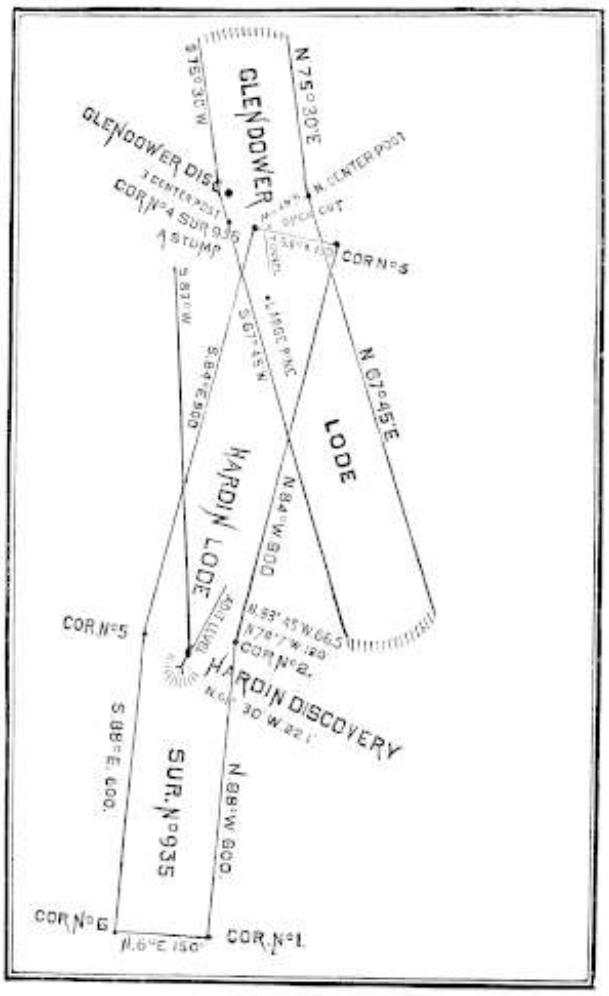
On the 26th of August, 1879, Pollard, who had become the owner by purchase of the Hardin Lode, filed a certificate of relocation thereof, for the purpose, in the words of the certificate, 'of more definitely defining the boundaries as originally staked out and filed, without waiver of any right acquired by virtue of said original location.'

The discovery shaft of the Hardin was situated six hundred feet from the east end, and nine hundred feet from the west end of the survey. Both the original location and the relocation varied from a regular parallelogram, from the discovery shaft west, each diverging at a slight angle to the north. By the courses and distances of the original location certificate, the Hardin location did not interfere with or embrace any portion of the Glendower. By the courses and distances of the relocation, the west end of the Hardin was swung further to the north and overlapped a portion of the Glendower. The portion so overlapped constitutes the ground in controversy.

At the trial below the defendant based his case upon the assumption that there was a misdescription in the original certificate of location; that the courses and distances therein were erroneous; that they did not describe the ground actually ***312** surveyed and staked, and sought to control the courses and distances by monuments, which he claimed were established at the time of the survey, and which brought the ground in controversy within the Hardin location.



The verdict was for the plaintiff, and the defendant appeals.

The controversy here concerns chiefly two instructions given by the court, as follows:--

'No. 1. The court instructs the jury that the defendant under his location certificate and the other evidence in this case, cannot claim any ground except that which is described in the original Hardin location certificate, and that none of the ground covered by the original location certificate is sued for in this case.'

'No. 2. The court instructs the jury that unless they find that the locatons of the Hardin lode marked the surface boundaries of their claim by six substantial posts, hewed or marked on the sides in towards the claim, and sunk in the ground, to wit:-one at each corner and one at the center of each side line, the location was void as against any bona fide locator of the same ground, or any part thereof, who has complied with the law as to discovery and location of a mining claim, and that placing stakes upon the side lines of

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the claim opposite the discovery shaft, where the discovery shaft is 600 feet west of the east end line, and 900 feet east of the west end line, is not a substantial compliance with the law.'

The first instruction, it is insisted, infringes the rule that monuments control courses and distances.

A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's 'right of exclusive possession and enjoyment' of his mining location granted by the act of Congress of May 10, 1872.

The purpose of the description in a certificate of location, as stated by the statute, is to 'identify the claim with reasonable certainty.' Identification of the subject-matter is likewise the purpose of all description in patents, grants, and other conveyances of real estate. The description in each being for like purpose, should be governed by like rules.

***313** That the courses and distances of a survey must yield to its monuments, whether natural or artificial, is a familiar doctrine. 3 Wash. R. P. *621, and cases there cited.

Negligence in making surveys; imperfect instruments; variations of the needle; roughness and unevenness of the ground-are some of the elements of uncertainty affecting courses and distances, and make obvious the propriety of the rule. Ibid.

It is only saying that, that which is more obvious and certain shall control that which is less so. Clark v. Wethey, 19 Wend. 320. Hence, generally, in descriptions of boundaries in degree of certainty, natural objects rank artificial marks, as artificial marks in turn rank the courses and distances given in a deed. 3 Wash. R. P., *631.

The difficulty in the case at bar is not about the rule, but its application.

It will be borne in mind that the conflict between the two lodes is at the west end of the Hardin, and that the monuments there are those chiefly contested.

The evidence touching the original survey and its boundaries is conflicting. The testimony of the plaintiff's witnesses, among whom was the surveyor who made the survey, tends to show that the courses and distances given in the original location certificate were correct; and although the corner posts at the west end had disappeared, that they were actually placed at or near the points where the courses and distances would locate them. The east end corner posts, and what were intended as the center posts, although not properly placed, were all found and identified by the surveyor, and corresponded with the courses and distances given for the east end.

No original monument was found at the northwest corner. Evidence was introduced by the defendant to show that a stake was originally placed at this corner, but the evidences also shew that it was not in existence at the time of the Glendower discovery or location, and consequently could not avail to control the courses and distances of the record, for reasons fully stated hereafter.

***314** The monuments upon which the defendant relied to control the courses and distances of the original survey, was a stump standing at the southwest corner of the relocation, and claimed by him to be the southwest corner of the original location.

The certificate called for a post at this corner, but the defendant was allowed to introduce evidence to show that in point of fact a post was never placed at this corner, but that this stump, standing in the right place, was adopted as a substitute for a post, and marked accordingly.

The act of Congress of July 26, 1866 (14 Statutes at large, 251), is silent as to how a mining claim shall be marked or designated on the ground.

The act of May 10, 1872, Revised Statute, Sec. 2,324, provides that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of locators, date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'

The legislature in 1874 passed a law supplementing the act of Congress, and prescribing more specifically how a mining claim shall be marked (Gen'l Laws, 629).

Section six is as follows:

'Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in towards the claim, and sunk in the ground, to wit, one at each corner, and one at the center of each side line.

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'Where it is practicably impossible, on account of bed-rock, to sink such posts, they may be placed in a pile of stones; and where, in making the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such posts at the nearest practicable point strictly marked to designate the proper place.'

***315** Such statutory monuments substantially complying with the requirements of the law, would control courses and distances, so that where there was a variation between the courses and distances given in the certificate of location and the monuments on the ground, the latter would prevail.

If in the survey of a mining location, a stump of sufficient size and stability stands at a point where a statutory post should be located, I see no good reason why it should not be hewed, marked and adopted as a location post. In such case however, the descriptive survey should give both its real and assigned character; otherwise it would not satisfy the call of the location certificate.

Where there was no variation between the monuments and the courses and distances, the failure to so designate it would perhaps be unimportant; but in case of variation it would be of prime importance.

In this case the call is for a post at the southwest corner, and it is insisted that parol evidence is admissible to show that while a post is called for, a stump was in fact established as a corner.

Courts have gone far in the admission of parol evidence in the matter of uncertain and disputed boundaries, but I am unable to see how this demand of the defendant can be sustained on principle. The certificate, like a deed, must be construed ex visceribus suis. When the intent is clearly expressed, no evidence of extraneous facts or circumstances can be received to alter it. 3 Wash. R. P. 400, 404; Bagley v. Mornill, 46 Vt. 99.

The general rule stated more fully is, that parol evidence cannot be admitted to control or contradict the language of a deed, but latent ambiguities can be explained by such evidence. Facts existing at the time of the conveyance, and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties when, by the terms of the deed such line is left uncertain. 3 Wash. R. P. 401; Drew v. Swift, 46 N. Y. 209; Claremont v. Carlton, 2 N. H. 369; Peaslee v. Gee, 19 N. H. 277.

***316** There is neither latent ambiguity nor uncertainty in the terms of the certificate, to bring it within the meaning of the rule.

The call of the certificate is for a post. A stump does not answer the call. If parol evidence is admissible to show that a stump, and not a post, is the actual corner, it would be equally competent to show a pile of stones, or any other monument uncalled for. This would not be construing the calls of a survey, but making them; it would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that in the absence of latent ambiguity, a deed cannot be varied or contradicted by parol evidence. It would not be controlling courses and distances by monuments, but controlling both by parol evidence. Claremont v. Carlton, 2 N. H. 369.

The rule is that where monuments are relied upon the control courses and distances, they must be found as called for. Buckner v. Lawrence, 1 Dong. Mich. 19; McCoy v. Galloway, 3 Ohio, 383; Seaman v. Hogeboon, 21 Barb. 399; Finley v. Williams, 9 Cranch, 315.

In the case of McCoy v. Galloway, supra, it was held that where the patent called for a tree of one kind, it was not competent to show a tree of another kind.

In Buckner v. Lawrence, supra, it was held that a marked tree did not satisfy the call for a post. The court say: 'The proposition was not then to prove to the jury that there was a disagreement between the courses and distances and the monument and boundaries as given in the patent, and as they are found on the land, but to show that there was an actual line on the ground not described or called for in the patent, but in fact intended by the surveyor, Greely, as one of the boundaries of the plaintiff's grant. To admit parol proof of a marked line nowhere mentioned in the deed, but entirely variant from its calls, would serve to render title to real estate dependent, not on deeds of conveyance and the language of the grantor, and courses, distances and monuments, but on the mere memory of witnesses.'

***317** In the view the evidence introduced by the defendant, showing a monument other than the one called for, was not competent, and in the absence of any other

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monument or monuments to control the courses and distances of the original survey, there was no error in the first instruction.

The defendants' case was the same as if no monuments had been given or called for. In such case parol evidence is not admissible to control the courses and distances. 3 Wash. R. P. 403; Drew v. Swift, 46 N. Y. 209; Bagley v. Morrill, 46 Vt. 94.

The last line of the instruction, viz.: 'That none of the ground covered by the original location certificate is sued for in this case,' would be objectionable, had not the fact which is stated been admitted.

The instruction was equally justified in another view of the case.

Marking the boundaries of the surface claim as required by statute, is one of the first steps towards a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another seeking the benefits of the law, going upon the ground, is distinctly notified of the appropriation, and can ascertain its boundaries. He may thus make his own location with certainty, knowing that the boundaries of the other cannot be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating, is one of the purposes served.

The record also serves a double purpose. As between the claimant and the government, it preserves a memorial of the lands appropriated after monuments, in their nature perishable, are swept away. It also supplements the surface marking, in giving notice to third persons. Golden Fleece v. Cable Consolidated, etc. Co. 12 Nev. 312; Gleason v. Martin, White M. Co. 13 Nev. 471.

Counsel for the appellant submitted to the court below in ***318** their first instruction, and urge here the following proposition: 'That when a lode is marked as required by law, it is to be presumed such marking is sufficient to notify all persons of the appropriation of the ground within the surface limits of such boundaries, and a person is not bound in law to keep the corners of his claim marked and in the position they were originally placed; that when a claim has been lawfully and properly located, the law presumes it will remain so, and that all subsequent owners have at least constructive notice of the prior appropriation of the ground thus located, even though as a matter of fact they had no such notices.'

We are dealing with claims, not patents or grants, where the fee has passed.

Whether a claimant with a true record must keep good his surface monuments we need not say,-the record in this case on the theory of the defendant, was not a true record.

Where there is a variation to any considerable extent between the courses and distances of the location certificate and the monuments established on the ground, the record with its misdescription, in point of fact, gives no notice of the ground actually appropriated. If the monuments are swept away, no search, no exercise of prudence, diligence or intelligence, would advise the subsequent locator of the prior appropriation. In such case the rule demanded by the defendant would work the greatest injustice and hardship, and would be an interpretation of the law in the interest of erroneous records and indolent claimants. The record failing in its constructive notice, I think it just to insist that the statutory monuments shall be found performing their statutory and essential duty of actual notice, and to say that where a variation exists between the monuments and the courses and distances of the location certificate, it is necessary prior to patent for the locator, as against subsequent locators, to keep up his monuments to an extent that gives fair and reasonable notice. In other words a claimant who has not kept up his boundary posts, will not be permitted to show the courses and distances of his recorded location ***319** to be erroneous, when the right of an intervening locator without notice, will be prejudiced.

Tried by this rule, the defendant had no case, and the first instruction was justified.

At the date of the Glendower location there were no monuments in existence at the west end to warn the plaintiffs that the ground had already been appropriated; neither were there any center stakes at the center of the side lines. The only monuments claimed as in existence at that time at the west end, where the conflict arises, was a stump partially blazed and imperfectly marked in pencil.

The certificate instructed the subsequent locator to look for a post at this corner; it does not advise him that a stump had been utilized as a post.

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If the pretensions of the defendant are to be allowed, there would be no protection for a subsequent locator against swinging locations-an evil against which the strict requirements of the statute were intended to protect.

It was, therefore, competent for the court, the facts being undisputed, to say to the jury that the defendant, not having maintained his location monuments so as to give notice of the ground appropriated, that he could not claim ground other than that which was described in his record as against a subsequent locator.

The second instruction given by the court was objectionable. The requirements that the side posts be placed in the center of the side lines is satisfied if they be substantially at the center. Where there is a discrepancy of one hundred and fifty feet, as in this case, they cannot be said to be in the center.

I think it is too much to say, however, the claims being otherwise marked as required by statute, that the failure to place the side posts in the center of the side lines, will invalidate the location. Such an omission might exist with all the corner posts properly placed and the lode exposed and worked the entire length of the lode.

It would be an unnecessarily harsh and unreasonable construction of a beneficent statute.

***320** It is reasonable to say, however, that the statutory requirements respecting the marking of the surface boundaries with posts, are so far imperative as to require that the boundaries may be, in the language of the statute, 'readily traced' by them, and that the notice which the statute contemplates and seeks, by and through them, may not be substantially impaired by any omission.

As independent of this instruction, the defendant had no case, the giving of it was error without prejudice.

It is not necessary to examine any of the other assignments.

The judgment of the court below is affirmed with costs.

Judgment affirmed.

All Citations

5 Colo. 309, 1880 WL 167

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4 Colo.App. 234
Court of Appeals of Colorado

COCHRANE
v.
JUSTICE MIN. CO.

Jan. 22, 1894

Error to district court, Lake county.

West Headnotes (7)

[1] **Appeal and Error**
Rendition and Entry of Judgment or Order as Directed

A new judgment not as broad as directed is erroneous.

Cases that cite this headnote

[2] **Appeal and Error**
Sufficiency of Judgment Entered in Lower Court

A decree of the supreme court, directing specific performance of a contract to lease defendants' mining properties, which described them by the names of the lodes, and as "consisting of 26.8 acres," is not satisfied by a subsequent decree, on remand to the lower court, ordering the making of a lease of defendants' properties "as owned by them" at the date of the contract to lease, without stating the quantity of land.

1 Cases that cite this headnote

[3] **Boundaries**
Control of Metes and Bounds or Courses and Distances Over Other Elements

When a discrepancy exists between a statement of the quantity of a tract of land and its monuments, courses and distances, the latter control.

Cases that cite this headnote

[4] **Specific Performance**
Recovery of Damages in Addition to Specific Performance

Where a decree for specific performance of a contract to lease property is rendered after the expiration of the term for which the lease was to run, the lessee cannot enter the property under a lease made under the decree for a term of the same length, and also demand an accounting for the term it was illegally withheld.

Cases that cite this headnote

[5] **Specific Performance**
Recovery of Damages in Addition to Specific Performance

The general rule in cases of specific performance is that the parties are to be placed, so far as possible, in the situation they would have been if the contract had been performed; and, to that end, the vendor is to be regarded as trustee for the benefit of the purchaser and liable to account for rents and profits.

Cases that cite this headnote

[6] **Specific Performance**
Judgment or Decree

In an action for specific performance of a contract of lease, a decree of performance cannot be entered after expiration of the designated term. Nevertheless, the rights of the parties may be established, and the plaintiff may be allowed by proper proceedings to recover damages.

Cases that cite this headnote

[7] **Specific Performance**
Judgment or Decree

A distinction exist between a decree in an action of specific performance for the conveyance of an estate in fee, and one for

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a lease for a limited time. In the former the vendor is required to convey the title and to account for the use of the property while wrongfully detained; in the latter, if the term expired while the lessor retained possession, the lessee can recover damages only.

Cases that cite this headnote

****753** Action by Frank T. Cochrane against the Justice Mining Company to compel specific performance of a contract to lease. There was judgment for defendant, and plaintiff appealed. The supreme court reversed the judgment, and directed the trial court to enter a decree of specific performance. A decree was entered, and plaintiff brings error.

For former report, see 26 Pac. 780.

The other facts fully appear in the following statement by REED, J.:

***235** Suit was brought by the plaintiff in error against the defendant company to compel the performance of a contract for a lease of the mining property of the defendant to the plaintiff. Upon the hearing in the district court a decree was entered dismissing the bill. Appeal was prosecuted to the supreme court, where the decree of the district court was reversed, and a decree of specific performance ordered. See 16 Colo. 415, 26 Pac. 780. After the district court again acquired jurisdiction, on June 12, 1891, a final decree of specific performance was made. That portion of the decree ordering the lease is as follows: "All of the Justice Mining Company's properties, as owned by it on the 18th day of March, A.D.1889, consisting of the Justice, Marlin, Monte Cristo, and Western Union lode mining claims, together with all improvements and buildings thereupon, belonging on said premises, and all machinery and tools which were thereon on the 18th day of March, A.D.1889; all of said premises being located in the Roaring Fork mining district, county of Pitkin, and state of Colorado,"-followed by a form of lease the defendant was required to execute. Exceptions were taken to the decree for causes hereafter discussed, and an appeal taken from the decree. The decree contains the following paragraph: "It is further ordered and decreed that plaintiff has leave to make application to the court for an accounting in this case any time within the first ten days of the next term of court." Prior to the making and entering the decree no supplemental bill or petition had been filed asking for an accounting by the plaintiff. On the 21st day of August a petition was filed asking an accounting ***236** from April 15, 1890, to date, alleging, upon information and belief, that "the Justice Mining Company has ever since said time, and now is, engaged in mining said property, and extracting valuable silver and lead bearing ore therefrom; *** that it is impossible for the plaintiff to state the amount and value of the said ore so extracted and mined from said property. *** Plaintiff alleges that the same was of the value of many thousands of dollars." On the 24th day of August, 1891, the petition was denied by the court, and an exception taken, as shown by the journal entry of the clerk of the court. The errors assigned are: (1) That the court failed to follow the supreme court; (2) that the decree, instead of ordering a lease for the property contracted to be leased, decreed that the company should execute a lease of all the mining property owned by it on the 18th day of March, 1889; (3) that the court erred in not requiring a covenant in the lease, deducting from the term of the lease all time during which the lessee might be prevented from work by reason of injunction or stoppage of work by legal proceedings against the lessor; (4) that the court erred in decreeing that the lease should be executed and work commenced by the lessee before an accounting was had.

Attorneys and Law Firms

Decker & O'Donnell, for plaintiff in error.

A.W. Rucker, for defendant in error.

Opinion

REED, J., (after stating the facts.)

The first question to be determined is whether the decree of the district court is sufficiently broad to cover the contract of the parties as construed in and required by the supreme ***237** court. The subject-matter of the contract of lease and the extent and area of the property cannot be misunderstood. The public published offer to lease, made by the company, was as follows: "Bids will be received at the office of the Justice Mining Company, up to noon on March 18th, 1889, for lease or leases on the properties of the Justice Mining Company, consisting of the Justice, Marlin, Monte Cristo, and Western Union,

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situated in Tourtelotte park, and consisting of 26.8 acres." The language of the supreme court (16 Colo. 423, 26 Pac. 780 et seq.) is as follows: "The question is comparatively free from embarrassment. The offer of defendants to lease by its terms contained the entire mining property. The respective claims were named, and their aggregate is given as twenty-six and eight-tenths acres. The offer of plaintiff was for the entire property. No lease of the entire mining property was ever tendered. The 'Crowe shaft,' with surface ground, was excepted and reserved for a part of the term. It is conceded that it had at the time of the contract been leased to other parties. It is claimed by defendants that the fact was known to plaintiff at the time of making the contract. This fact cannot prevail as a defense. The knowledge on the part of plaintiff, if it existed, would not relieve defendants from the necessity of complying with their contract. It is also contended that the suit could not be maintained because of the inability of defendants to perform by reason of having leased the Crowe shaft previous to the contract with plaintiff. It appears that between the date of the advertisement for bids and the awarding of lease to plaintiff, defendants had leased part of the property to other parties, and had also leased the boarding house used with the property. It would be sufficient answer to this contention to say that, having already leased to other parties, the exception and reservation ****754** of those portions should have been made at the time of making the contract with the plaintiff. Another sufficient reason why it cannot prevail lies in the fact that plaintiff offered to adjust the matter by receiving the rent which was to be paid ***238** to the defendants, which offer was refused. The law is well settled that a lessor who cannot fully comply with his contract will not be allowed to set up his own inability to perform as a defense when the lessee is willing to take what can be demised, and compensation for the balance. See Pom.Spec.Perf. § 388, and cases cited." It will be observed that one great obstacle to the execution and acceptance of the lease at the time of the contract was that the company, between the time of advertising and making the contract with plaintiff, had disposed of some of the property by lease, and was unable to comply. The supreme court held that plaintiff was entitled to the entire property, or to have it adjusted, and receive the proceeds, or compensation. In other words, the company was held to specific performance of its contract as made. The decree made fails to conform to the decision of the supreme court. It attempts to compel the plaintiff to accept a lease of "all the Justice Mining Company's properties as owned by it on the 18th day of March, 1889," enumerating the lodes, and giving their names. The quantity and parts remaining at that time are not shown or known. Plaintiff was entitled to a decree for a lease of the "Justice, Marlin, Monte Cristo, and Western Union, *** consisting of 26.8 acres."

It is ably contended by the defendant in error that the statement of 26.8 acres must be disregarded; that monuments, courses, and distances must control as to quantity. Such is undoubtedly the law when a discrepancy exists, and one must give way; but where there is no discrepancy the authorities and arguments of counsel can have no place. No discrepancy or error is shown to exist. In all grants of mineral lands made by the government two fees are granted,-one of the lode as principal, and one of the surface ground as ancillary. Both, taken together, constitute the "claim," which is required by law to be established by courses, distances, and monuments. The superficial area is definitely established, and is sold by the acre and fractions of an acre to the purchaser, and, unless some error is shown to ***239** exist, is the "claim." The plaintiff was, by the terms of this contract, entitled to a lease of the entire four lodes to their full extent as located, and surface ground to the extent of 26.8 acres, or to an adjustment and compensation for such parts as could not be delivered. Hence the decree is defective in not being as broad as the decision of the supreme court. No definite quantity of ground or lodes is decreed to be leased. The quantity is not that contained in the advertisement nor embraced in the contract. By the decree, any remnant remaining on the 18th, regardless of the extent, would fulfill its requirements.

It is urged that the court erred in entering a decree for specific performance without an accounting having been had. Plaintiff was entitled to the possession of the property after the 18th day of March, 1889. From the time of the commencement of the suit by the plaintiff until the 15th day of April, 1890, when the decree of the district court dismissing the bill was entered, the defendant company was restrained from working and mining the property and selling ore. After such decree, it is alleged, the defendant entered into the mine, worked it, and disposed of the ore, from such date until the 12th day of June, 1891, when the final decree was entered,-a period of some 16 months. The general rule in equity is that on a decree for specific performance, where there has been delay or change in the quantity, there should be an accounting, prior to the decree of specific performance. See 1 Story, Eq.Jur. § 512,

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where it is said: "If there is a trust estate, and the cestui que trust comes upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits." See Worrall v. Munn, 38 N.Y. 137, where it is said: "The general rule on this subject, as laid down by the elementary writers and in the adjudged cases, is that the court of equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and to that end the ***240** vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits." By the terms of the contract and the decree of specific performance the lease should have borne date the 18th of March, 1889, for the term of 18 months. At the time of the decree over two years had elapsed. The term having long expired, neither party could comply with the contract. The lessor could not be required to execute a lease of the date of the decree for the term of 18 months, nor the lessee to accept it, without a new contract. It is apparent a lessee could not enter the property under a lease made at the date of the decree for the term of 18 months, and also have an accounting for the term it was illegally withheld. By such a course the lessee would have the benefit of two terms instead of one. It follows that the decree of specific performance was barren, except that it judicially established the rights of the plaintiff, and allowed him, by proper proceedings, to require and recover damages for the lapsed term. Before the entry of the final decree, had plaintiff filed a supplemental bill or petition praying an accounting, it would have been the duty of the court to entertain it, and proceed to adjust and dispose of ****755** the entire matter. The power was inherent in the court, and should have been exercised to end the controversy, and prevent a multiplicity of suits. No supplemental bill or petition was filed before the final decree, which was entered on June 11th. On August 21st a petition was filed, and denied by the court, and very properly. The decree provided for a lease running 18 months from the 22d of June, 1891. If executed and accepted, the lessee could not have the term and damages for the former term. A very marked and obvious distinction exists between a decree of specific performance for the conveyance of an estate in fee and the decree for a lease for a limited time. In the former the vendor is required to convey the title, and is liable to account for the use of the property while wrongfully ***241** detained; in the latter, if the term expires while the lessor retained the possession, the only remedy of the lessee is for the damages. In this case both court and counsel seem to have been led into a mistake by following the law in regard to the sale of real property. The court having refused an accounting, the plaintiff was relegated to his action at law for the mesne profits for the expired term. On the 24th of August, when the court denied an accounting, an exception was taken, as shown by the court journal, and error is assigned upon such denial; but such exception is not embraced in the bill of exceptions, consequently could not be a basis upon which error could be predicated, under the rules. This, had we seen fit to avail ourselves of it, would have been sufficient to dispose of the question of accounting; but, court and counsel having evidently fallen into an error in regard to the nature and effect of the decree of specific performance, it was thought necessary to discuss the questions involved, to aid in their solution, and, as far as possible, hasten the final conclusion of the controversy. In our view of the case, it will be unnecessary to remand it to the district court. This court will amend the decree by striking out the following: "This agreement of lease, made and entered into this 22d day of June, A.D.1891," and inserting: "This agreement of lease, made and entered into this 18th day of March, A.D.1889;" also by striking out, "All the Justice Mining Company's properties as owned by it on the 18th day of March, A.D.1889, consisting of the Justice, Marlin, Monte Cristo, and Western Union lode mining claims," and inserting in its stead: "The properties of the Justice Mining Company, consisting of the Justice, Marlin, Monte Cristo, and Western Union, situated in Tourtelotte park, and consisting of 26.8 acres,"-all the balance of the decree to stand as entered. All costs since the case was remanded from the supreme to the district court to the present time will be equally divided between the parties. Decree modified.

All Citations

4 Colo.App. 234, 35 P. 752

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76 Colo. 131
Supreme Court of Colorado.

BEAVER BROOK RESORT CO. et al.
v.
STEVENS.

No. 10789.
|
July 7, 1924.
|
Rehearing Denied Nov. 10, 1924.

Department 3.

Error to District Court, Clear Creek County; S. W. Johnson, Judge.

Action by Clara Stevens against the Beaver Brook Resort Company and others. Judgment for plaintiff, and defendants bring error.

Reversed.

West Headnotes (6)

[1] **Boundaries**
Method of Making Surveys

To establish lost corner, surveyor should locate, if possible, government corners in every direction from it, and apportion distance between such points.

Cases that cite this headnote

[2] **Boundaries**
Control of Maps, Plats, and Field Notes Over Other Elements

Quarter corner, marked by stone, not shown to have been in place, held not controlling as against reference in field notes to certain brook.

Cases that cite this headnote

[3] **Boundaries**
Location of Corners, Lines, and Monuments

Court held not justified in accepting line run by surveyor from corner fixed by two marked trees, in view of other competent evidence as to stone in place marked as corner and blazed trees on lines running therefrom on courses given in field notes.

Cases that cite this headnote

[4] **Boundaries**
Testimony of Surveyors and Their Assistants

That one making survey for his father, who was owner of property, had no license under C.L. § 4696, to practice surveying, did not render his testimony as to location of corner incompetent; "to practice a profession" being to hold one's self out as following it, as calling or one's usual business.

2 Cases that cite this headnote

[5] **Trespass**
Questions for Jury

There being fair question as to location of boundary line, and no evidence that parties sued for damages for cutting timber acted willfully, wantonly, or recklessly, submission of question of exemplary damages to jury was not authorized.

Cases that cite this headnote

[6] **Boundaries**
Natural and Permanent Objects

Corner stones being liable to removal are not as good evidence of lines as physical objects which are permanent in their location.

Cases that cite this headnote

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Attorneys and Law Firms

****121** ***132** Guy D. Duncan, of Denver, for plaintiffs in error.

Charles R. Bosworth and S. S. Abbott, both of Denver, for defendant in error.

Opinion

TELLER, C. J.

The parties to this litigation were owners of adjoining tracts of timber land in Clear Creek county. The defendant in error owned the north half of the northwest quarter of section 21, and the northeast quarter of the northeast quarter of section 20, all in township 4 south, range 72 west.

Plaintiff in error, the Beaver Brook Company, owned lands immediately south of this row of 40's. Defendant in error had judgment in an action against the plaintiffs in error for damages alleged to have resulted from the cutting of timber on her property. The verdict was for $650, which included $150 exemplary damages. Judgment was entered on the verdict.

The question on which the right to damages ****122** turned was as to the south line of plaintiff's property, which was, of course, the north line of defendants' property. One of the errors assigned is the giving of instruction No. 2, by which the jury was informed that the line between the lands of the plaintiff and defendants, as established by the survey of one Barbour, is the true boundary line of the lands, and it was to be so considered.

It does not appear from the record that any undisputed monuments of the original government survey were found. It is conceded that the northwest corner of section 21 was ***133** a point material to be established, from which the south line of plaintiff's property could be located. Barbour, who made the survey adopted by the court, testified that at the point which he established, and which the court accepted as that corner, he found no monument; but two trees, one standing and one down, one marked '16' and the other '17,' were accepted by him as witness trees. He testified further that he found on the ground, something less than a mile east of this corner, a stone which he took to indicate the northeast corner of the section. He further testified that he found the west quarter corner of 21, the southeast corner, and the east quarter corner. None of these stones taken by Barbour as monuments appears by his testimony to have been in place. He testified that he did not go west of the point selected as the northwest corner of 21, or north of it, nor did he go south of it beyond the quarter corner.

[1] The method of restoring lost corners is indicated in Westcott v. Craig, 60 Colo. 42, 151 P. 934. The rule is one of apportionment; under it, to establish a lost corner, the surveyor should locate, if possible, government corners east of it, west of it, north of it, and south of it, and then by apportioning the distance as found to be between these points, the true corner will be established.

[2] We regard the evidence of Barbour as wholly insufficient to justify the court in holding that the south line of the plaintiff's property as located by him was correct, even if there were no evidence to the contrary. The line as located by Barbour and accepted by the court was admittedly several hundred feet farther to the south than it would be under the field notes which were in evidence. The notes give Beaver Brook's location, with reference to the southwest corner of the section, at the point where it crosses the west line, and if that point be as stated in the notes, the south line of plaintiff's property has been carried by Barbour much too far to the south. Barbour testified that he did not regard physical features mentioned in the notes as material, where government corners contradicted the ***134** notes. In this he was probably correct, but as applied to this case he is wrong. The west quarter corner, while properly marked, was not in place and so located as to make it controlling as against the reference to the brook.

In Morse v. Breen, 66 Colo. 398, 182 P. 887, we said: 'Stones are liable to removal, and hence they are not as good evidence of the lines run as are physical objects used as monuments, or located on plats, such as streams, etc., which are permanent in their location.'

Barbour seems to have been satisfied with finding what he called the two bearing trees as fixing the location of the northwest corner of 21.

[3] Moreover, the court was not justified in accepting the Barbour line, in view of the fact that there was other competent evidence, which the jury might well have

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considered, showing that the northwest corner of 21 was a considerable distance to the west, and to the north, of the place where Barbour placed it. The testimony is that at that point there was a stone in place bearing the markings to show that it was the northwest corner of 21. The testimony as to this location of the corner was supported by testimony that there were blazed trees on lines running from it on the courses given in the field notes.

[4] The court withdrew from the jury the testimony of one Furlong, who testified to a survey by him which carried the north line of 21 north, and the west line west, of where Barbour placed them. He found the corner above mentioned. The court held that inasmuch as Furlong was not a licensed surveyor he could not testify. The statute, which doubtless the court had in mind, is 4696 C. L. 1921, which makes it unlawful for any person--

'to practice or offer to practice engineering or land surveying in this state, unless such person has been duly licensed under the provisions of this act.'

That statute has no application to this case.

The testimony of Furlong was that he had engaged in land surveying in Minnesota, that he, at the time of this survey, was a clerk in the post office, and that he made the survey for his father, who was one of the owners of ***135** the property. Such a survey is not practicing surveying. To practice a profession is to hold one's self out as following that profession as a calling, as one's usual business. People v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575. In the latter case it is held that one who acts as a broker in the selling of a single piece of property, not being engaged regularly in the business, does not require a broker's license. The court excluded the plat made by Furlong because he was not a licensed surveyor.

[5] There are other instructions of the court to which objection is made which we ****123** need not consider. There is an objection to the allowance of exemplary damages, which, on the record before us, must be sustained. There was a fair question as to the location of this boundary line, and there is no evidence whatever that the defendants acted willfully and wantonly or recklessly. The testimony is undisputed that they accepted the line pointed out to them by the former owner of the property.

There was nothing to justify a submission to the jury of the question of exemplary damages. For the reasons above stated, the judgment is reversed.

CAMPBELL and SHEAFOR, JJ., concur.

All Citations

76 Colo. 131, 230 P. 121

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147 Colo. 328
Supreme Court of Colorado, In Department.

Arthur V. BRACKETT and Eileen A. Brackett, Plaintiffs, in Error,
v.
John M. CLEVELAND, Margaret Woods Cleveland, Donald G. Harrison, Broma Lou Harrison, Leonard Wittemyer, W. Glen Thau, Fern B. Thau, and Autrie V. Lehr, Defendants in Error.

No. 19238.
|
July 24, 1961.
|
Rehearing Denied Aug. 21, 1961.

Action for the establishment of lost, destroyed and disputed corners and boundaries to a placer claim. The District Court, Boulder County, Dale E. Shannon, J., rendered a judgment favoring the plaintiffs and the defendants brought error. The Supreme Court, Sutton, J., held, inter alia, that conventional 'compass rule' method of balancing used by the commissioner in the establishment of placer corners was neither erroneous nor illegal.

Affirmed.

West Headnotes (7)

[1] **Boundaries**
Location of Corners

Conventional "compass rule" method of balancing used by commissioner in the establishment of placer corners the monuments of which had disappeared was neither erroneous nor illegal. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[2] **Boundaries**
Pleading

Issue in proceeding for establishment of lost, destroyed and disputed corners and boundaries of placer claim, the patent survey of which was admittedly erroneous, was not what original patent description provided but where it did in fact exist on ground. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[3] **Boundaries**
Location of Corners, Lines, and Monuments

There was no evidence that commissioner re-establishing situs on ground of original monuments, which had disappeared, marking boundaries of placer claim, had changed size or shape of claim. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[4] **Boundaries**
Location of Corners, Lines, and Monuments

Commissioner, establishing boundaries and corners of placer claim the monuments of which had disappeared, was not chargeable with disregarding available primary evidence. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[5] **Appeal and Error**
Admission of Evidence in General

Defendants in action for establishment of lost, destroyed and disputed corners and boundaries could not be heard to complain that commissioner failed to consider all primary evidence where only part not before him was that which defendants withheld. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[6] **Boundaries**
Trial of Issues

Commissioner in action for establishment of lost, destroyed and disputed boundaries

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and corners acted in accordance with normal procedures when he had both plaintiffs and defendants point out all known corners and monuments on ground before he began his work and, in so doing, could not be held to have conducted hearings or examined witnesses in a legal sense. C.R.S. '53, 118-11-1 et seq.

Cases that cite this headnote

[7] **Boundaries**
Costs

Trial court committed no abuse of discretion in assessing all costs in action for establishment of lost, destroyed and disputed corners and boundaries against defendants after rendering decision which was favorable to plaintiffs and which affirmed the commissioner's report. C.R.S. '53, 118-11-1 et seq., 118-11-11.

1 Cases that cite this headnote

Attorneys and Law Firms

***329** ****1050** Carl H. Noel, Denver, for plaintiffs in error.

Dolan & Dolan, Boulder, Holland & Hart, Philip A. Danielson, Dwight K. Shellman, Jr., Denver, for defendants in error.

Opinion

SUTTON, Justice.

The Bracketts filed a proceeding under R.C.P. Rule 105 in the trial court to establish boundaries and adjudication of rights in real property against the Clevelands ****1051** and others. After some preliminary proceedings the action was changed to one under the provisions of C.R.S. '53, 118-11-1 et seq. for the establishment of lost, destroyed and disputed corners and boundaries. The Clevelands and their co-defendants then became plaintiffs below. We shall refer to the parties either by name or as they appeared below in the realigned proceedings wherein the Clevelands and others were plaintiffs and the Bracketts were defendants.

The dispute is over determination of the correct ***330** boundaries of the Clem Thomas Placer Claim now owned by the Bracketts. The Clem Thomas was surveyed and patented in the early 1870's as an irregularly shaped placer claim along Four Mile Creek in Boulder County. It was surveyed prior to the approval of the official United States survey, and was the first parcel of land patented in the area.

Subsequently the lands surrounding the Clem Thomas were given 'lot' numbers on official United States plats, and were patented as lots contiguous to and bounded by the boundaries of the Clem Thomas. The defendants' title is derived from the Clem Thomas patent; the plaintiffs' titles are derived from the 'lot' patents; no question of title is at issue here.

In the years since the lots contiguous to the Clem Thomas were surveyed all of the original monuments marking the corners and boundaries of the Clem Thomas have disappeared.

Basically the problem presented arises because the original Clem Thomas claim, according to part of its patent description, lies about one-half mile south of where defendants claim it should be, its precise location along Four Mile Creek to the north being the issue here. Normally, worked out placer claims might not be of much economic value but here the exact location of the missing lines of the original survey are of great importance to all parties because at least some of the plaintiffs purchased their lots after having surveys made and then erected various improvements on what they believed to be their lands. As a result of the dispute over these lines the present litigation was instituted.

Pursuant to the statute, Ben H. Parker, Jr., a licensed surveyor and a registered deputy United States mineral surveyor, was appointed Commissioner by stipulation to establish the boundaries and report thereon to the court.

The method adapted by the Commissioner in establishing the boundaries involved four steps: (a) locating existing monuments in the area from which record ties ***331** to the original Clem Thomas corner monuments might be established; (b) running actual surveys between these

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monuments to check their correspondence with the records; (c) making alternative calculations to corroborate the accuracy of the work; and (d) establishing the corner monuments of the Clem Thomas at the points indicated by record survey ties from the most reliable existing monuments, using the standard compass rule to balance the small discrepancies between 'record' and 'found' distances and courses.

In understanding the Commissioner's approach to the problem it is necessary to bear in mind that none of the monuments set to mark the courses and boundaries of the original survey of the Clem Thomas are in existence; none of the bearing trees established in said original survey are in existence at this time; the tie contained in the original survey is in error (placing the location about one-half mile south of Four Mile Creek as previously stated) and cannot be used in re-establishing the location of any of the corners and boundaries of the Clem Thomas at this time; hence the boundaries of the Clem Thomas are in dispute.

There had been, prior to the commencement of this action, no recognition or acquiescence by any of the parties or their predecessors in interest, of any boundary, corner or monument presently existing or having existed in the past which would mark the corners or boundaries of the Clem Thomas.

****1052** Defendants filed exceptions to the Commissioner's report. Following a three and one half day trial and a personal inspection of the land by the trial judge, the report of the Commissioner was approved by the court and all costs of the action were assessed against the defendants. It is from this order and judgment that the defendants bring this writ of error.

In their argument here defendants urge five grounds for reversal:

1. The Commissioner's re-establishment of the placer ***332** corners by balancing, apportioning and calculating is contrary to law.

2. The Commissioner erroneously changed the size and shape of the Clem Thomas when size and shape had been predetermined for him.

3. In locating the Clem Thomas on the ground, the Commissioner erroneously disregarded the primary evidence available to him.

4. There were inconsistencies and erroneous procedures of the Commissioner which should not have been approved by the court.

5. The trial court's assessment of all costs to the defendants was harsh, unjust and inequitable.

[1] **[2]** Concerning the first point, under the circumstances involved, the method used by the Commissioner cannot be called either illegal or erroneous. The method of balancing used was the conventional method of the 'compass rule' specified in the 'Manuel of Surveying Instructions for the Survey of Public Lands of the United States', 1947, U. S. Government Printing Office. John E. Byron, an experienced surveyor of fifty years standing, in his testimony verified that the Commissioner had used the most appropriate method for re-locating the corners. We have held that where section corners have been obliterated, and there is a dispute as to boundaries, the correct rule in determining these boundaries is first to re-locate the corners, Gaines v. Sterling (1959), 140 Colo. 63, 342 P.2d 651. The Commissioner had very little to work with, no original starting point for the survey, few precedents to guide him, and an admittedly erroneous patent survey perpetuated by the United States land maps; the latter being so not only from the fact that it was not within one-half mile of the actual location on the ground but being also so noted in an authorized survey in the records of the United States Land Office in Denver when two of the later adjoining placer claims were surveyed. On this point defendants urge that such field notes cannot ***333** 'amend' a patent description and that the Commissioner had no right to consider such records. This begs the question, however, for the issue is not what was the original patent description but where did it in fact exist on the ground. Cf. Marr v. Shrader (1960), 142 Colo. 106, 349 P.2d 706. Having been there first, as it in fact existed on the ground, and as it had to be reconstructed here, the later adjoining claims had to tie to it. Obviously defendants' view cannot be correct because their claim cannot be both on Four Mile Creek and one-half mile south of it as the patent indicates. If the ground involved it is to be found we cannot see how else the Commissioner could have located it than as he did.

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[3] As to the second point, there is no evidence that the Commissioner changed the size or shape of the Clem Thomas. This was first determined at the time of patent by the corner monuments then on the ground. The courses and distances of the metes and bounds description used in the survey description and in the patent are subordinate to the actual corner locations in place. The Commissioner had to locate and re-establish the situs on the ground of the original monuments by the use of the best evidence and the best methods available to him, including the original patent survey in so far as it was applicable. The Commissioner did not, therefore, change the size or shape of the Clem Thomas. As we said in Everett v. Lantz (1952), 126 Colo. 504, 513, 252 P.2d 103, 108:

'Consequently, the question here for determination is whether the record contains sufficient competent evidence ****1053** of a survey, and, if so, the identification of the subdivisions of Township 51 North, Ranges 9 and 10 E, must be accepted, for, according to the evidence, it is an exact retracement of the original 1881 survey. If the acreage designated in the patents is inaccurate, that is a matter of which the patentees therein cannot complain. The undisputed testimony of qualified engineers established the boundary lines here questioned by a location ***334** of the original monuments erected in making the 1881 survey, and, as we have said, the fact that this was done in making a dependent resurvey is wholly immaterial. The monuments of the original survey control. 'It is a general rule that the original corners as established by the government surveyors, if they can be found, or the places where they were originally established, if that can be definitely determined, are conclusive on all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor without regard to whether they were correctly located or not. (Citing cases)"

[4] In their third point defendants claim that the Commissioner erroneously disregarded the primary evidence available to him. However, the record does not bear this out. Having re-established other corners with certainty on the basis of competent evidence, the Commissioner was forced to fall back, in the case of corners No. 4 and 5, on the original field notes. According to the Commissioner, an error is indicated in the original survey in regard to one of these which apparently fell close to the stream bed; a spot apparently placered over as well as flooded in subsequent years. There is no evidence available today as to the location of either of these corners except the original survey. As a result of the apparent error in the original survey, there is an inconsistency of thirty feet which the Commissioner's survey has to correct if the other proved corners of the Clem Thomas are to mean anything. Defendants object strenuously to this, but under the facts we must say without avail because it is still the actual ground location that governs not the legal description which has been proved erroneous.

[5] In this connection we note that the record indicates that defendants did not provide all the items of evidence they had stipulated to. The missing evidence includes the survey data under their control. Nor did defendants put their own surveyor on the stand. Accordingly, they cannot ***335** be heard to complain that the Commissioner failed to consider all the primary evidence when the only known part not before him is that which defendants withheld.

[6] They further complain of alleged inconsistencies and erroneous procedures by the Commissioner. They say that the Commissioner held hearings and examined witnesses without authority and without proper procedure being followed to allow for cross examination. This is not borne out by the record. The Commissioner did have both plaintiffs and defendants point out to him all known corners and monuments on the ground before he began his work. There is no evidence that this governed his survey. This was a normal procedure in surveying and cannot be said to come within the category of holding hearings or examining witnesses in the legal sense.

We have pointed out elsewhere our conclusion, upon reviewing the record, that the survey here at issue was competently and properly performed. The problem for the Commissioner was complicated by the fact that the 'Manuel of Instructions for the Survey of the Public Lands of the United States' contains no instructions for the restoration of mineral survey corners or lines. The Commissioner utilized therefrom the instructions applicable to the restoration of non-riparian meander lines, technically the problem most similar to that in hand. As a matter of fact, the 'compass rule' employed by him is set out as the most acceptable method for many types of resurveys in that manual. Cf. Gaines, supra.

****1054** **[7]** Finally, defendants seek to upset the trial court's assessment of all costs of the action against them. C.R.S. '53, 118-11-11 provides that the costs of such

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actions shall be taxed as the court thinks just. We find no abuse of discretion here and see no reason to reverse the trial court's ruling. The defendants have had the opportunity to present their facts three times: first to the Commissioner, then the trial court, and now this court.

***336** The judgment is affirmed.

DAY and McWILLIAMS, JJ., concur.

All Citations

147 Colo. 328, 363 P.2d 1050

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58 Colo. 243
Supreme Court of Colorado.

BIDDLE
v.
NEWMAN.

No. 7773.
|
Dec. 7, 1914.

Error to District Court, Morgan County; H. P. Burke, Judge.

Action by Pheby J. Biddle against Emily C. Newman. Judgment for defendant, and plaintiff brings error. Affirmed.

West Headnotes (3)

[1] **Boundaries**
Location of Corners, Lines, and Monuments

Evidence, in an action under Rev.St.1908, c. 24, as to establishment of disputed boundaries, held to sustain a finding that the corner stone called for in the field notes of the government survey was lost.

Cases that cite this headnote

[2] **Boundaries**
Location of Corners

When the place at which the surveyor subdividing the public lands for the government placed a stone to mark a section corner can be ascertained, that point is the corner.

Cases that cite this headnote

[3] **Evidence**
Opinions of Witnesses in General

The opinion of a single witness, not supported by any reason, that a particular stone found by him, many years before controversy arose, was a section corner, rejected.

Cases that cite this headnote

Attorneys and Law Firms

***243** ****880** James E. Jewel, of Ft. Morgan, for plaintiff in error.

***244** Stephenson & Stephenson, of Ft. Morgan, for defendant in error.

Opinion

MUSSER, C. J.

This writ of error brings up for review a judgment of the district court establishing the corner common to sections 5 and 6, township 3 north, and sections 31 and 32, township 4 north, range 58 west, in Morgan county. The action was prosecuted under the provisions of chapter 24, Code 1908. A commissioner was appointed, who took testimony, examined the ground, made a survey, and reported to the district court. Exceptions to the report were filed, heard, and overruled. The report was approved, and the corner, as therein located, was established by the decree. The case presented to this court in the briefs involves only the evidence and what was proved thereby. The plaintiff in error contends, with which contention the defendant in error and the district court agree, that where the government surveyor placed a stone or other monument to mark a corner, and the point where it was placed can be located, that point is the corner. The plaintiff in error seems to contend that her evidence shows conclusively, or by a preponderance, that the government surveyor placed a stone as called for in the field notes to mark the disputed corner at the point where she alleged the corner was. If this were so, the corner ought to have been established at that point. The commissioner and the court, however, took a different view of the evidence from that taken by the plaintiff in error. After reading and carefully considering all the evidence, which it would be unprofitable to analyze at length in an opinion, we are impressed that the district court was correct in the findings it made.

***245** There was some evidence that a corner stone had been found at the point which the plaintiff in error claimed was the corner. It appears to us that, aside from the

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testimony of one witness that was too vague and indefinite to be considered, the one-time existence of a corner stone at that point was indicated by an opinion of one witness who had made a survey many years before on the township line. This opinion, which was, no doubt, an honest one, was really unfortified by any good reason. The testimony did not identify the stone as a corner monument by any of the indicia that go to identify such a monument. The other witnesses based their conclusions on this opinion.

When all the evidence is considered, direct, circumstantial, and inferential, it leaves a distinct impression upon the mind that the stone was not a corner monument. The district court found that it was not, by finding that from the evidence the corner was a lost corner, as the court termed it. The rule that courses and distances must yield to monuments when identified was not violated by the court, as contended. The court held that the corner stone called for in the field notes was lost, and, in the absence of such monument, proceeded to establish the corner from the best evidence at hand. No sufficient reason appears for disturbing the conclusion reached.

The judgment is affirmed.

Judgment affirmed.

GARRIGUES and SCOTT, JJ., concur.

All Citations

58 Colo. 243, 144 P. 880

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57 Colo. 345
Supreme Court of Colorado.

DERHAM et al.
v.
HILL et al.

No. 7666.
|
July 8, 1914.

Error to District Court, Mesa County; Sprigg Shackleford, Judge.

Action by Robert A. Hill and another against William H. Derham and another. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

West Headnotes (7)

[1] **Boundaries**
Location of Lines

A conveyance of land held to require running of the boundary lines from the beginning point of the owner's land instead of a point which according to the particular description would have embraced land in a road not owned by the grantor.

Cases that cite this headnote

[2] **Boundaries**
Location of Lines

Lots 21 and 28, in a subdivision were separated by a road 40 feet wide. The proprietor of lot 28 executed a deed containing the following description: "The north nine acres, more or less of lot 28, etc., more particularly described as follows: Beginning at the southwest corner of lot 21" and running east 640 feet, south 605 feet, west 640 feet, and north to the place of beginning. Held apparent that the point of beginning at the southwest corner of lot 21 was false, and must be rejected; that the north line of lot 28 must be accepted as the north boundary of the lands intended to be conveyed, that with this line in view as controlling the initial point of the survey, the description by metes and bounds being found to include 8.88 acres, this corresponded sufficiently with the area declared to be conveyed, and fixed its locality; that subsequent purchasers from the grantee in this deed were chargeable with notice of the intention of the grantor so ascertained.

Cases that cite this headnote

[3] **Courts**
Dicta

Every opinion of the courts is to be construed in the light of the facts and circumstances of the case, giving each fact and circumstance its due weight.

Cases that cite this headnote

[4] **Deeds**
Certainty in General

Where part of a description in a deed is plainly false, it should be rejected; but if enough remains to locate the land, the deed is effective.

1 Cases that cite this headnote

[5] **Deeds**
Certainty in General

Where a deed contains two descriptions of the land conveyed, the one which when applied to the land owned by the grantor is found not true must be rejected.

3 Cases that cite this headnote

[6] **Deeds**
Intention of Parties

In construing a deed the whole instrument should be looked to for the purpose of ascertaining the parties' intent, and such intent given effect if agreeable to the rules of law.

Cases that cite this headnote

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[7] **Evidence**
In Construction of Deeds in General

Where a deed contains two descriptions intended to apply to the same land which are irreconcilable, evidence of extrinsic facts may be admitted to show the intention of the parties.

1 Cases that cite this headnote

Attorneys and Law Firms

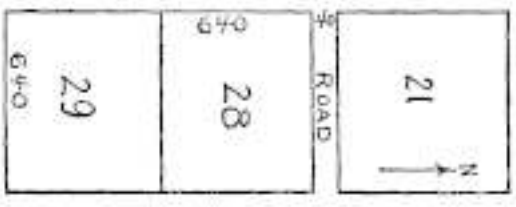
***345** ****181** Logan & Miller, of Grand Junction, for plaintiffs in error.

Wheeler & Weiser and Sam B. Berry, all of Grand Junction, for defendants in error.

Opinion

***346** MUSSER, C. J.

In 1892, there was made and filed for record, in Mesa county, a plat of more than 200 acres of land designated as the Grand Junction Orchard Mesa Land Company's Orchard subdivision. The plat showed the land subdivided into numbered tracts or lots of about ten acres each, with various portions, 40 feet wide, marked as roads. The particular lots, with which this lawsuit has to do, appeared on the plat as follows:



One Mrs. Powers became the owner of lots 28 and 29, by deed, wherein the land was described as lots 28 and 29 in the subdivision. In May, 1905, she made a deed to one Joynson, containing a description as follows:

> ***347** 'The north nine (9) acres, more or less, of lot twenty-eight (28) of the Grand Junction Orchard Mesa Land Company's Orchard subdivision, more particularly described as follows: Beginning at the southwest corner of lot twenty-one (21) of the Grand Junction Orchard Mesa Land Company's Orchard subdivision; thence east six hundred forty feet (640); thence south six hundred and five (605) feet; thence west six hundred forty (640) feet; thence north six hundred and five (605) feet to the place of beginning.'

In July, 1905, Joynson made a deed to the Hills, defendants in error, wherein the land intended to be conveyed was described the same as in the deed from Mrs. Powers to Joynson. At the time these deeds were made, the road between lots 21 and 28, shown on the plat, did not appear on the surface of the ground. Lot 28 was covered by fruit trees set in rows east and west, and these rows of trees continued north and occupied the road. The Hills went into possession of the land under their deed from Joynson. On the south part of what they supposed was their land, there was first a row of apple trees, and next, south, a row of prune trees. There was no fence between lots 28 and 29, nor any division fence between ****182** the land claimed by the Hills and the portion south of it. Just south of the row of prune trees and about a foot or a foot and a half from the trees there was a furrow or ditch, and from this the trees on the land were watered; the slope being to the north.

No survey or measurement of the land was made. The Hills supposed that the irrigation ditch south of the prune trees was their southern line or near it. When the dispute arose, measurements were made, and it was found that the center of this ditch was about 585 feet south of the north line of lot 28. In December, 1907, Mrs. Powers conveyed to the Derhams, the plaintiffs in error, lot 29 and the south 35 feet of lot 28. In the fall of 1911, the portion marked above as 'road' was opened up as the result of an action brought for ***348** that purpose by owners of adjoining tracts. The evidence seems to show that the parties here did not know of the existence of a roadway until it was forced open. Soon after getting their deed, the Derhams made some claim to the row of apple trees and the row of prune trees just north of the irrigation ditch, which claim was disputed by the Hills, and the latter remained in possession of and cultivated the two rows and gathered the truit therefrom. The Derhams testified that, at the time they bought the land in 1907, Mrs. Powers showed them a plat which she had caused to be made, on which there were shown 42 rows of trees on lot 29 and part of lot 28,

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and she represented that she proposed to convey these 42 rows to the Derhams. It was claimed that these 42 rows took in the south two rows north of the irrigation ditch. There was also evidence that the Derhams set out a row of trees just south of the irrigation ditch and on the land in controversy. If there were 42 rows already set out from the south line of lot 29 to the row of apple trees north of the irrigation ditch, it is not explained why there happened to be a vacant space south of the irrigation ditch on the land in controversy, on which to set out another row. As no measurements had been made, it is safe to say that none of the parties knew exactly where the dividing line was.

After making the deed in 1907 to the Derhams for lot 29 and the south 35 feet of lot 28, Mrs. Powers moved away from the neighborhood, evidently to California. Thereafter the Derhams made claim upon her for more ground, and after some controversy, in December, 1910, she made a quitclaim deed to the Derhams for the south 75 feet of lot 28. The north 40 feet of the south 75 feet of lot 28 is the land in controversy. In February, 1911, the Derhams took possession of this 40 feet and erected a fence on its northern line about 2 feet north of the row of apple trees above mentioned, so as to include these apple trees as well as the row of prune trees. About June, 1911, the Hills began an action to recover ***349** the possession of the 40 feet in controversy, which resulted in a judgment in their favor. The court found that by the deeds from Mrs. Powers to Joynson and by the latter to the Hills it was the clear intention of the grantors to convey the land in controversy, and that from the receipt of their deed the Hills were in the exclusive possession thereof and farmed the same until dispossessed by the Derhams.

It is the claim of the Derhams that the deed from Mrs. Powers to Joynson, and from the latter to the Hills, conveyed the north 565 feet only of lot 28, and that the remaining 40 feet included in the deeds was embraced in the road. They claim that the description 'the north nine (9) acres, more or less, of lot 28,' must be disregarded and the description by metes and bounds with the place of beginning at the southwest corner of lot 21 must be accepted as the true description of the land conveyed. They say that the words 'nine acres, more or less,' are merely descriptive and do not control the location by metes and bounds, and that the description by quantity must yield to the more certain description.

We do not, in any manner, dispute the many authorities cited to sustain this contention. Had the description in the deed been 'nine acres more or less described as follows,' and then the point of beginning and the metes and bounds given as in the deed, or had it started with the point of beginning and the metes and bounds and ended with the words, 'containing nine acres, more or less,' the quantity might have been of little importance, and the authorities cited might have been applicable.

What is said in this opinion, as is the case in every other opinion, is said in the light of all the surrounding facts and circumstances existing in the case, and each of these facts and circumstances are given weight in arriving at the conclusion reached. When the Derhams took their quitclaim deed, they took it with full knowledge, ***350** either actual or constructive, of the facts and circumstances which are mentioned, and, having done so, they ought to have been apprised with certainty of the land that was intended to be conveyed to the Hills. Where there are two repugnant descriptions in a deed, 'the court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties.' 2 Devlin on Deeds, § 1038; Wade v. Deray, 50 Cal. 376.

[1] In construing a deed, the object is to discover and effectuate the intention of the parties to it. While that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. ****183** Am. Nat. Bank v. Madison, 144 Ky. 152, 137 S. W. 1076, 38 L. R. A. (N. S.) 597.

[2] [3] [4] When a particular of a description is plainly false, that particular should be rejected, and, if enough remains to locate the land, the deed is effective. Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766. When necessary, where in a deed two descriptions intended to apply to the same land are not reconcilable, evidence of extrinsic facts may be admitted to show the intention of the parties, confining this for the present to such parties as the Hills and Derhams, who each had full knowledge of the extrinsic facts admitted in evidence and referred to herein. And where a deed contains two descriptions of the land conveyed, the one which when applied to the land owned by the grantor is found not true must be rejected. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

[5] In the deed in question, the description begins, 'the north nine (9) acres, more or less, of lot 28.' There is more than mere quantity in this. It states definitely and certainly

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that all the land intended to be conveyed is in lot 28 and it fixes the north line of that land as the north line of lot 28. The beginning in this description is definite and certain. Instead of being a point it is a ***351** line, to wit, the north line of lot 28, marked and limited on the plat as definitely and certainly as any corner of any lot. From this beginning the description certainly proceeds south with a width equal to that of lot 28 until a line is reached marking the southern limit of an area equal to nine acres, more or less. There is some uncertainty, it is true, in the expression, 'nine acres, more or less'; but the description by metes and bounds following definitely shows the area of the tract intended to be conveyed and definitely fixes that area as the amount of land contained in an area 605 feet by 640 feet, which the court found to be 8.88 acres, and which corresponds to the quantity expressed by nine acres more or less.

Looking closely at the description in the deed, it is plainly apparent that the point of beginning at the southwest corner of lot 21 is false. It says:
'The north nine (9) acres, more or less, of lot twenty-eight (28), * * * more particularly described as follows: Beginning at the southwest corner of lot twenty-one (21),' etc.

By this language it was an area located entirely in lot 28, and whose northern boundary was the north line of that lot, that was intended to be described by the particular description, and by reference to the plat it is plain that such an area cannot be described as attempted by beginning with the southwest corner of lot 21. Such place of beginning is so plainly false that it must be rejected as a point of location of the land conveyed, and when it is so rejected, and retained merely as a point from which to describe an area equal to that conveyed, there appears described an area of ground wholly within and of the width of lot 28, extending from east to west 640 feet, from north to south 605 feet, and bounded on the north by the north line of the lot.

From the county records, the Derhams, at the time they took their quitclaim deed, had notice that Mrs. Powers, when she made the deed to Joynson, owned lots 28 and 29 and did not own the 40 feet designated as 'road,' and could not convey such road, and that ***352** no part of lot 28 could be exclusively described by including that road. After making her deed to Joynson and her deed for the south 35 feet of lot 28 to the Derhams, Mrs. Powers moved away and exercised no more dominion over any part of lot 28, while the Hills were in possession and farmed all of lot 28 north of the 35 feet described in Derham's deed.

As plainly appears from this record, Mrs. Powers intended to convey only land that she owned. If the description, beginning at the southwest corner of lot 21, were applied to land owned by her, it would not fit; while, if the first description in the deed, together with the area of the tract as stated in the second description, were applied to her land, the description would exactly fit land owned by the grantor. All these facts and circumstances sustain the court below in its finding of what the intention of the parties to the deed was, and the Derhams knew, of ought to have known, that such was the intention at the time they took their quitclaim deed. The judgment is therefore affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

All Citations

57 Colo. 345, 142 P. 181

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87 Colo. 584
Supreme Court of Colorado.

LUNDQUIST
v.
EISENMANN.

No. 12267.
|
June 30, 1930.

Department 1.

Error to District Court, Pueblo County; Samuel D. Trimble, Judge.

Action by Andrew Eisenmann against Betsy Lundquist. Judgment for plaintiff, and defendant brings error.

Affirmed.

West Headnotes (7)

[1] **Appeal and Error**
Amount of Recovery or Extent of Relief

Defendant could not complain on appeal that trial court had no authority to apportion shortage in block as originally platted, where she solicited court to do so.

1 Cases that cite this headnote

[2] **Appeal and Error**
Sufficiency of Evidence in Support

Appellate court could not disturb trial court's findings sustained by evidence.

Cases that cite this headnote

[3] **Boundaries**
Maps, Plats, and Field Notes

Plaintiff could rely upon original plat filed by vendors as against subsequent plat under which defendant adjoining owner claimed strip.

Cases that cite this headnote

[4] **Adverse Possession**
Privity of Estate in General

Where there is privity of title or estate, possession of successive disseisors may be tacked together and regarded as continuous possession.

2 Cases that cite this headnote

[5] **Adverse Possession**
Privity of Estate in General

Privity essential to tack together possession of successive disseisors may be either of contract, estate, or blood.

4 Cases that cite this headnote

[6] **Adverse Possession**
Decedent and Heirs and Representatives

Where plaintiff, his wife, and son, all occupied premises, but title was vested in wife during part of 24-year period, there was continued adverse possession under which plaintiff could claim ownership.

2 Cases that cite this headnote

[7] **Appeal and Error**
Sufficiency of Evidence in Support

A finding of the trial court based upon sufficient evidence to sustain it, will not be disturbed on appeal.

Cases that cite this headnote

Attorneys and Law Firms

***585** ****278** E. L. Weitzel, of Pueblo, for plaintiff in error.

John A. Martin, of Pueblo, for defendant in error.

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Opinion

CAMPBELL, J.

Plaintiff, Eisenmann, is the record owner of lots 40 and 41 in block 12 of Lake Avenue addition, former town of Bessemer, now a part of the city of Pueblo. Each lot in the block, according to the original recorded plat of the property, is supposed to have a frontage of 25 feet. Defendant Lundquist is the record owner of lots 39, 38, and 37 in the same block, which lots lie immediately to the south of plaintiff's lot 40 and in the order above designated. This action by the plaintiff is to recover from the defendant possession of a strip of land 8 feet in width off of the south side of lot 40 extending the entire depth of the lot from the street line and back to the alley at the rear, which strip of land the plaintiff says has been ***586** wrongfully taken possession of and now is withheld by the defendant. Plaintiff claims ownership of this disputed strip as part of his lot 40, and the defendant asserts title thereto as a part of her lot 39. There is an admitted shortage in block 12 to the extent of 10 feet in width. The trial court, upon evidence that is not in serious dispute upon the essential and controlling facts, found in favor of the plaintiff's claim and rendered judgment in his favor for possession of the disputed 8 feet strip of land, together with damages sustained by him as the result of the defendant's unlawfully taking possession thereof, and also for other injuries inflicted. Upon this review the discussion, particularly by counsel for the defendant, has taken a wide range. The trial court found the facts generally in favor of the plaintiff. It also specifically found that the plaintiff purchased lots 40 and 41 on June 16, 1902. The block was then unoccupied and was vacant land. At the time of the purchase the plaintiff caused the lots to be surveyed by the city surveyor, and later staked and inclosed the lots with a solid board fence on the lines of the survey. The same year he erected a dwelling house on the premises, in which he has ever since continuously resided. He also laid a concrete sidewalk the entire width of the lots, which has ever since remained in place. In 1902, the year of his purchase, plaintiff planted trees within 5 feet of the south boundary line of lot 40, which was established by the official survey, planted the entire width of the enclosed property in lawn, built a solid board fence and outhouses across the rear, and has continuously maintained all of such improvements ever since, and also ever since 1902 has paid all of the taxes legally assessed against lots 40 and 41.

The court further specifically found that as to 3.12 feet of this 8-foot strip in question adjoining the premises of the defendant, the plaintiff was in open, notorious, exclusive, continuous, and hostile possession and occupancy of the same under claim of ownership in good faith for a ***587** period of 24 years prior to the origin of the claim of the defendant, or any adverse claim, and thereby became and is entitled to the ownership, possession, and enjoyment of said portion 3.12 feet of the 8-foot strip, free from the claims of the defendant and all other persons; and that under the conveyance of 1902 he has title to the remaining 4.88 feet in width of the strip in question. The court also found that the plaintiff's damage is $70, which the defendant conceded plaintiff sustained, if he was entitled to any relief whatever.

When the plaintiff purchased these lots and built his house, thereon and inclosed the same with a fence, built sidewalks, and otherwise improved them, the city surveyor had theretofore made a survey thereof for the plaintiff and the fence was built on the line indicated by the survey. In other words, the recorded plat of the lots in question was observed by the plaintiff in making his improvements upon the premises.

[1] One objection urged by the defendant is that the court, in the absence of all necessary parties, had no authority to distribute ****279** or apportion the shortage of 10 feet in the block, as the same was originally surveyed and platted. Defendant may not now be heard to complain of what she, herself, solicited the trial court to do.

If the findings of fact by the trial court above outlined are sustained by the evidence, we do not see any tenable ground upon which the judgment can be set aside. According to these findings the plaintiff under claim and color of title and been in actual, open notorious, exclusive, continuous, and hostile possession and occupancy of the entire tract of land for 24 years prior to the inception of the rights of the claimant at the time she purchased her lots. The record discloses that at or before the time defendant purchased her lots she caused a survey thereof to be made by a surveyor, but the court below evidently found, and the evidence justified the finding, that this survey was made, not upon the basis of the original plat, but of some amended plat which was erroneous. ***588** The trial court must have so found. Indeed, it appears from the record that the owners of this addition, in the making and filing

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of an amended plat, expressly stated therein that the same was not made for the purpose of encroaching upon, nor was it intended in any way injuriously to affect, the rights of those who had purchased property upon the basis of the original survey and the recorded plat thereof in reliance upon which the plaintiff obtained his deed.

Defendant's assignments of error-there are only three-are not in compliance with our rule 32, which requires that each error shall be separately alleged and particularly specified. While the assignments are separately alleged, there is no specification thereof. The first one is merely a statement that the trial court erred in overruling defendant's motion for judgment and refers to folio 113, which is not in the printed abstract. The second assignment is merely that the trial court entered an order that is contrary to the law and the evidence and contains no specification whatever; the third assignment is merely that the judgment is contrary to law and the evidence. If we should strictly enforce our rule, we might affirm the judgment without an opinion, but we take up in their order the five separate objections to the judgment which the defendant argues in her brief.

Defendant says that claiming ownership of property under a mistake as to the correct boundaries is not the character of possession sufficient to establish title by adverse possession under our statute law. This proposition assumes that plaintiff made a mistake as to the correct boundaries of his lots 40 and 41, and therefore his possession thereof is not sufficient to establish title by adverse possession. This presupposes that the plaintiff was thus mistaken. Such, however, is not the evidence, and the court found that no mistake was made by the plaintiff of this character, but that the plaintiff held continuous and undisputed possession of lots 40 and 41, as they were delineated on the recorded plat and of the dimensions ***589** just as the plat described them, and inclosed these lots, exactly as they were described on the recorded plat, by a fence and by planting trees on the disputed 8-foot strip and by using the entire inclosure as his own exclusive property. There is no merit in this contention.

[2] **[3]** The second proposition advanced by the defendant is that the plaintiff did not show an adverse possession of the strip in question for the statutory period of 20 years' time. The court found, and the evidence was amply sufficient to sustain the finding, that the plaintiff's title to this 8-foot strip of land in question was a part of his lots under the original plat as evidenced by his deed under this plat and the survey based thereon at the time of the purchase of his lots in 1902. We agree with the trial court that no evidence produced by the defendant overthrew or destroyed the probative effect of the testimony in support of this proposition. The plaintiff clearly established his right according to the findings of the trial court, which we cannot disturb, to this 8-foot strip in question by 24 years' continuous possession which was hostile, by his continuous occupancy thereof, improvement of the premises, and payment of all taxes under claim of ownership, before the defendant's adverse claim came into existence. It is true that an amended plat of this addition was filed. Plaintiff, however, is not claiming under that plat. The amended plat was clearly erroneous, and there is nothing therein which at all affects the rights of the plaintiff to this disputed strip. Plaintiff had a right to rely in making this purchase upon the original plat as made and filed by the owners of this addition, of which his lots 40 and 41 were a part. There is nothing in the evidence that would justify the trial court in disturbing the original lines of plaintiff's two lots, unless it be upon the theory of distribution or apportionment advanced by the engineer or surveyor of the defendant. Had it not been for this erroneous second survey and the filing of this second erroneous plat, there probably would have been no question as to the plaintiff's ***590** ownership of this disputed strip of ground. The trial court by its decree, as already stated, found that as to 3.12 feet of the 8-foot strip in question adjoining the premises of the defendant, the plaintiff had been in open, notorious, exclusive, continuous, and hostile possession and occupancy of the same under claim of ownership in good faith for 24 years before any claim by the defendant was asserted thereto or any adverse claim made with respect to the same. The court further found that under the conveyance to the ****280** plaintiff in 1902 he has title to the remaining 4.88 feet in width of the strip in question. We find no merit in the second proposition of the defendant.

The third point made by the defendant is that it is an established fact that possession of the plaintiff was not hostile in its inception and there is nothing shown in the evidence to establish a change in its original character. The trial court upon evidence which was not substantially in conflict found that plaintiff's possession was unquestionably hostile both in its inception and throughout his holding.

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As to the fourth and fifth grounds which seem not to be seriously asserted by the defendant, we find nothing in the record to justify the same. The trial court gave its reasons, already recited by us, for holding that the plaintiff was entitled by conveyance to all but the south 3.12 feet of land fenced by him and by hostile adverse possession to the remaining part of the disputed strip. The defendant, however, relies upon Brownlee v. Williams, 32 Colo. 502, 77 P. 250, and says that this case is authority for the proposition that possession of, and improvements made on, adjoining land by a land owner under a mistake as to the boundary line and belief that the improvements were made on his own land, does not constitute adverse possession. This statement of the law in the Brownlee Case was under a state of facts entirely different from the facts in the present case. In the Brownlee Case the party was mistaken, and we said no doubt honestly mistaken, as to where the dividing line in ***591** dispute there should be. He made some slight improvements on certain lands which at the time he thought he was making on his own homestead, and we said there that this could not be regarded as an adverse possession, and his adversary was not put upon inquiry by the making of such improvements as the other party had made. Reliance also seems to be made upon the case of Evans v. Welch, 29 Colo. 355, 68 P. 776. The facts of both these cases are quite different from the facts in the present case, and there is nothing in either one of them that is authority for any of the contentions of the defendant in this case. We quite agree with counsel for the plaintiff here that title by adverse possession could never be established if the defendant is correct in his construction of the decision in Evans v. Welch, supra. We find nothing in the Evans Case that justifies the defendant's assertion here that it is authority for her in this case. Aside from this, there is no evidence here, in fact the trial court found to the contrary, that the plaintiff made any mistake, of fact or otherwise, as to the boundaries of lots 40 and 41 at the time he bought them and inclosed them with a fence and made improvements upon them. We find no merit in any of these objections to the decree of the trial court in this case.

[4] **[5]** **[6]** We come now to the only objection to the decree of the district court which has any semblance of plausibility. Defendant virtually admits, but if she did not do so the fact is clearly established, that the plaintiff in his own person and his family consisting of himself, wife, and son, actually occupied the whole of this trip of 8 feet in width, and in dispute here, for more than 24 years before the defendant's rights, if any, therein accrued. But the defendant says that the possession by the plaintiff himself for more than 24 years was not a continuous possession; that the same was interrupted. And this is so, the defendant says, because the plaintiff in 1904, two years after he acquired title, conveyed lots 40 and 41 to his wife who held legal title thereto and was ***592** also in possession of the lots until her death, and upon her death intestate title passed one-half to her husband and one-half to her son. Therefore, the defendant says there was a break in the continuity of plaintiff's possession, which break was for about two years, and title in plaintiff by adverse possession for the statutory period of 20 years was not shown. The facts are that until the death of the wife, several years after the plaintiff acquired title and entered upon possession, the plaintiff, his wife, and son all occupied these premises as one family. Plaintiff paid all the taxes on these lots and all expenses in maintaining the home and the family, not only during the time that the title was vested in him, but also during the particular period that title was vested in the wife. After the wife's death plaintiff continued with his son in the exclusive possession of the property and the son, after his mother's death, conveyed his interest therein to the plaintiff, who has been ever since such time in the exclusive occupancy and possession of the premises. The defendant cites and relies upon the case of Maher v. Brown, 183 Ill. 575, 56 N. E. 181. We have examined the opinion in that case. It is clearly not authority for the defendant's contention in the case in hand. The Illinois decision, among other things, was that before the several possessions of successive disseizors can be joined together, so as to be regarded as a continuous possession, there must be privity of estate or title, since acts of possession at different times by different persons, between whom there is no privity, furnish no support to each other. The Illinois court also held that where there is adverse possession by a husband of a strip of land adjoining, and partly inclosed with, a city lot which he owned, the paramount title cannot be tacked to a subsequent possession of the wife under a deed from the husband describing the lot alone, though they continue, after the conveyance, to reside together upon the lot. To the holding of the Supreme Court of Illinois upon the second proposition cited, three of the seven judges dissented, but nothing ***593** in the Illinois decision is at all contrary to the conclusion which we have reached in this ****281** case. The law is firmly established in the courts of this country almost without exception,

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including Illinois, that where, as here, there is privity of title or estate, the possession of successive disseizors may be joined or tacked together so as to be regarded as a continuous possession. In 2 C. J. p. 82, § 66, the author states: 'It is a rule of almost universal application that, if there is privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding prescribed by the statute as against such title.' That doctrine is clearly applicable to the facts of this case. This privity that is essential to the doctrine may be either of contract, estate, or blood between the successive occupants. In this case before us there was privity of contract, estate, and blood.

To sum up. The actual occupancy and possession of this disputed strip of land has been in the plaintiff and his wife and son as one family for more than 24 years, and it has been a hostile possession, undisputed and undisturbed, during that period. The trial court could not properly under the evidence before it, under the applicable rules of law, have done otherwise than it did in entering a judgment in favor of the plaintiff, and that judgment is therefore affirmed.

Affirmed.

WHITFORD, C. J., and ADAMS and ALTER, JJ., concur.

All Citations

87 Colo. 584, 290 P. 277

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