MILLIGAN v. FRITTS.

(Supreme Court of Missouri, Division No. 1. March 1, 1910.)

1. APPEAL AND ERROR (§ 882*)—INDUCING ERROR BELOW—SUBMISSION OF ISSUES.

A party is not chargeable with having induced error in submitting an issue presented by an instruction given at his request after he had asked for a peremptory instruction of a verdict in his favor, which was refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3604; Dec. Dig. § 882.*]

2. ADVERSE POSSESSION (§ 65*)—INCLOSED PROPERTY—MISTAKE AND IGNORANCE AS TO BOUNDARY.

That defendant in ejectment or those under whom he claims entered on land and located a fence and barn by mistake, and in ignorance of the location of the true boundary line, without intent to take what did not belong to them, and within their fences may have inclosed a larger area than they might have found their deed called for if they had consulted the plat and had the land surveyed, would not destroy the adverse character of their possession with intent to hold and claim all that the fence inclosed, though, if they located the fence on what they supposed was the true line and intended to claim only thereto whenever and wherever it might be located, the possession would not be adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365–370; Dec. Dig. § 65.*]

3. ADVERSE POSSESSION (§ 85*)—POSSESSION TO BOUNDARY OR FENCE—EVIDENCE—SUFFICIENCY.

Evidence *held* to establish title by adverse possession of a lot bounded by a fence claimed to be over the true boundary line.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

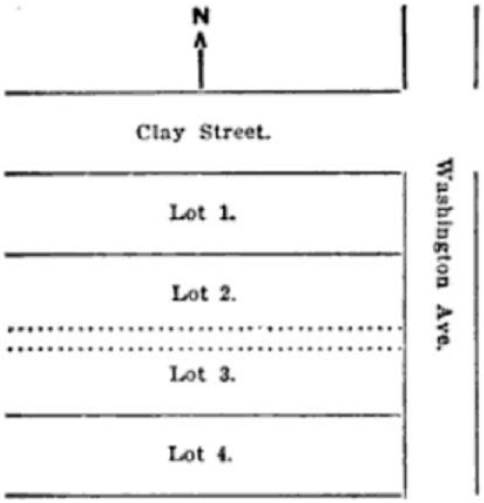
Appeal from Circuit Court, Audrain County; Jas. D. Barnett, Judge.

Suit by Ira S. Milligan against J. Rule Fritts. From a judgment for plaintiff, defendant appeals. Reversed.

Barclay, Fauntleroy & Cullen, for appellant. Fry & Rodgers, for respondent.

VALLIANT, J. This is a suit in ejectment filed April 7, 1906, for a strip of land 4 feet wide at the east end, 2½ feet wide at the west end, and 128 feet long, off of the north side of lot 3, in block 5, of Clark's addition to the city of Mexico, in Audrain county. The petition is in the usual form and the answer a general denial.

There seems to have been no dispute about the record title, it being conceded that defendant held the record title to lots 1 and 2, and that the plaintiff held the record title to lot 3; but the plaintiff's contention was that the strip of land in suit was a part of his lot 3, while the defendant's contention was that, without regard to what the respective deeds called for, the strip in dispute was his by adverse possession for more than 10 years. Plaintiff introduced in evidence the plat of Clark's addition to the town of Mexico laid out in 1855, by which it appeared that lots 1, 2, 3, and 4, block 5, were each 60 feet wide and 128 feet long. The lots run in their numerical order from north to south, all fronting east on Washington avenue. The north line of lot 1 is the south line of Clay street, which intersects Washington avenue at that point. The following diagram conveys an idea of the situation:



The dotted lines indicate the strip of land in dispute.

Plaintiff introduced the testimony of a witness, the county surveyor, which tended to show that by a recent survey made by him, starting in the south line of Clay street at the northeast corner of lot 1 running south B. McIntyre and wife to defendant dated February 23, 1898, conveying lots 1 and 2, block 5, Clark's addition. It came out in the plaintiff's testimony also that defendant's south fence had stood where it was at the beginning of this suit for more than 10 years, and that a building of defendant's which the witnesses called a barn had for the same length of time stood at the rear of lot 2 obtruding over what plaintiff claims to be the south line of defendant's property; the south wall of the building being on a line with defendant's fence, and that defendant and those under whom he claims had been in open occupation of the land up to his fence for more than 10 years.

Defendant's testimony tended to show that the fence, where it was at the beginning of this suit, had stood there for a period of more than 15 years and the building likewise; that during all that time defendant and those under whom he claims had been in the open occupation of the land included in the inclosure, exercising acts of ownership over it and claiming it as his own. The land except where the building stood was used and cultivated as a garden. Defendant introduced in evidence a contract for the purchase of the property under which he went into possession dated February 20, 1892. The contract was to the effect that in consideration of $2,200, of which $100 was paid and the balance in deferred installments, McIntyre and wife, then the owners, agreed to sell and convey the property to defendant as soon as he should pay the several installments into which the purchase money was divided; that on the date of the contract he went into possession, and subsequently paid the deferred installments and received the deed called for. The property is described in the contract as lots 1 and 2, block 5, Clark's addition. Plaintiff does not question the fact that defendant has been in open possession of the strip of land in suit for a period of more than 10 years exercising acts of ownership over it, but he contends that during all that time defendant's claim of ownership was conditional; that is, that he claimed it subject to the ascertainment of the true line between lots 2 and 3 whenever that line should be ascertained, and the case against defendant's objection was submitted to the jury on the theory that that was the issue in the case.

along the west line of Washington avenue 120 feet (assuming 60 feet as the correct front measure of lots 1 and 2), the fence of defendant at its front point was 4 feet south of the south line of lot 2, and therefore encroached that much on lot 3. Plaintiff's testimony also tended to show that plaintiff and those under whom he claimed had for many years paid the taxes assessed on lot 3, and that defendant and those under whom he claimed had paid the taxes assessed on lots 1 and 2. Plaintiff introduced the record of deeds showing a warranty deed from Warren

When we say that the case was submitted to the jury on that theory against defendant's objection, we are not overlooking the fact that in one of the instructions given at the request of the defendant that issue was presented, but the defendant had previously asked a peremptory instruction for a verdict in his favor, which the court should have given, even under the plaintiff's evidence, if there was no evidence that defendant's claim of title was conditional on the subsequent ascertainment of the true line. After the court had refused the defendant's instruction

and had given instructions for the plaintiff on that theory, thus forcing the defendant to meet that issue, he had a right to meet it and make the best fight he could, without being chargeable with having induced the error, if error there was. This case differs in

proved in Cole v. Parker, 70 Mo. 372, in which case the defendant, who was claiming by adverse possession, had by mistake gone over his line, and he testified that he had not intended to inclose any as his beyond the true line, but he did claim what was inclosed.

this respect from the case of Keen v. Schnedler, 92 Mo. 516, loc. cit. 526, 2 S. W. 312, where a similar instruction was given, and it was contended there was no evidence to support it. The court said: "We do not see how the defendants can well take this position, for they asked and had given an instruction involving the same principle. * * * But there was evidence to support the finding of the jury upon this issue whichever way they should find."

The first question we have to decide is whether there was any evidence to justify the submission of that question to the jury. Before taking up the evidence on which the plaintiff relies as supporting his claim that there was such evidence, we will look at the law on the subject of a claim of ownership conditioned on the ascertainment of the true boundary line as it has been pronounced by this court. In Hamilton v. West, 63 Mo. 93, the defense was adverse possession. The evidence showed that their house was three or four feet over their boundary line, and they had occupied it and claimed it as their own for more than 10 years. The plaintiff requested the court to instruct the jury that if defendant's ancestor, when he built the house, did not know where the true boundary line was, and by mistake and ignorance located the wall on plaintiff's land, then, although The court said: "It may have been a mistake, it is true, but honest men always inclose land not their own by mistake or with the consent of the owner, and, if the law on this subject were not as this court has held, the statute of limitations in such cases would never run in favor of an honest man, because he would never avow his purpose to have been to take the land of another." In Skinker v. Haagsma, 99 Mo. 208, 12 S. W. 659, it was held that the possession of defendants, though continuing more than 10 years, was not adverse, because the court said: "Yet the uncontradicted evidence is that they so occupied and claimed it under the belief that those fences were on the true line and without any intention to claim beyond the true line as called for in the deeds." In Mather v. Walsh, 107 Mo. 121, 17 S. W. 755, the court said: "The fact that a proprietor of land has taken possession (under a deed) of more land than its description calls for will not prevent his asserting later, on adverse possession of, or title to, the excess beyond his paper title. Though his original taking may have been the outgrowth of mistake, or in ignorance of the true line, he may notwithstanding afterwards begin an adverse holding which the law will recognize when sufficiently long continued." In McWilliams v. Samuel, 123 Mo. 659, 27 S. W. 550, the de-

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he and those under him occupied and claimed land up to the wall, their occupation was not adverse. The trial court refused to so instruct, and this court affirmed that ruling. The court said that if defendant in ignorance of the true line goes beyond it, and holds it intending only to hold up to the true line, wherever it might be, the holding is not adverse, but in such case, though he went over his line in ignorance of its true location, yet, if he took and held possession claiming up to his wall or fence, his possession was adverse; and the court said that, to render the possession adverse, it was not necessary that they should know that they occupied a part of the lot adjoining their own. In Walbrunn v. Ballen, 68 Mo. 164, the court, after referring to previous decisions, said: "The doctrine deducible from these utterances of this court is that if one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseisin, but, if ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the land up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the land of the adjoining proprietor, his possession of the land is not adverse." That language was quoted and approved ... fense was adverse possession, but the evidence for defendant was that the fences were set on what was believed to be the true line and the land was occupied up to the fences, but it was occupied with no intention of claiming anything but the right number of acres. There are other Missouri cases on this subject, but those cited above are sufficient to show what the law is. Applying the rules of law as in those cases declared to the case at bar, we may say that the fact that the defendant or those under whom he claims may have entered upon the land and located the fence and barn by mistake and in ignorance of the location of the true boundary line, the fact that they had no intention of taking what did not belong to them, the fact that within their fences they may have inclosed a larger area than what they might have found out their deed called for, if they had consulted the plat and had surveyed the lots, would not destroy the adverse character of their possession, if that possession was with the intention to hold and claim all that the fence inclosed. On the other hand, if they located the fence on what they supposed was the true line and intended to claim only to the true line whenever and wherever it might be located, the possession would not be adverse.

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The testimony shows that the defendant went into possession of the land in February, 1892, and has occupied it as his residence ever since. This suit was begun in April, 1906, more than 14 years after defendant's possession began. He testified that, when he took possession, the fence and barn were where they now are; that they were old structures then. He has since from time to time repaired the fence. The fence and barn were there when the premises were owned and occupied by McIntyre from whom defendant bought. How much longer they had been there the evidence does not show with accuracy, although one witness said he had seen them there for 15 or 20 years. The strip in question was embraced in defendant's garden and had been cultivated as such.

Mrs. Crawford, a witness for plaintiff, owned lot 3 in 1891. She conveyed it to her husband, Dr. Crawford, in 1892, and they lived on it until his death in 1898, when it passed by his will to his daughter, who lived there until she died, leaving it to her daughter Mrs. Groves, who lived there until 1903, when she sold it and moved to Kansas City. Mrs. the true line. He just refused to yield possession of the strip. So the matter rested until 1905, when Mr. Brown, who was then the owner of lot 3, again brought the subject to the defendant's attention and demanded the three feet, but defendant refused. Then Brown proposed to have the lots surveyed, but defendant again refused. "He wouldn't agree to it at all, wouldn't agree to survey it, have nothing to do with it, and he said all the land inside the inclosure was his, and he wouldn't have anything to do with it, and finally I went and had it surveyed myself. * * * Q. And he claimed the fence was the south line of lots 1 and 2? A. I don't think he said that to me. He claimed all the land inside the inclosure." That was plaintiff's own witness.

Defendant in his own behalf testified: "I have always claimed it as mine, all that is inside the fence there, the way I bought it. * * * I bought the property from Mr. McIntyre just as it was fenced, north, south, east, and west. That was the understanding between us. That was the line, and it has remained fenced ever since." There is noth-

Crawford testified that in 1892 a question arose between Mr. Nichols, who owned lot 4, and her husband about the boundary line between lots 3 and 4. The result was they had a survey made and then discovered that the fence between those lots was three feet south of the true line, whereupon Dr. Crawford moved his fence three feet north to correct the error. Then Dr. Crawford went to this defendant and requested him to move his fence the same distance north to conform to the survey, but defendant refused to do so. He refused to have the lots surveyed or to move his fence. That was in 1892, more than 10 years before this suit was brought.

Mrs. Groves, a granddaughter of Dr. Crawford, lived with him at the time and knew of the controversy. Her deposition was taken by the plaintiff, but was read in evidence by the defendant. She testified to the same incident that Mrs. Crawford mentioned, but she went more into detail. She said that, when Dr. Crawford asked defendant to move his fence, he answered that he had no more ground that he should have, and he would not move the fence. "Grandpa claimed three feet from Dr. Fritts, and he asked Dr. Fritts

ing in the testimony up to the time of the cross-examination of the defendant himself that gives any support to the contention that it was defendant's purpose to claim only up to the true line wherever and whenever that may be ascertained; but respondent contends that that fact was developed on the cross-examination of defendant himself. It therefore becomes necessary to quote literally so much of the cross-examination as bears on that point: "Q. You never bought or got a deed for any part of lot 3? A. Not that I know of; no, sir. Q. And you have never paid any taxes on lot 3? A. No, sir; not that I know of. Q. And you have never claimed lot 3? A. No, sir; never have. Q. Nor any part of it? A. No, sir; no part of it. I simply claimed my inclosure as I bought it. Q. You never had your lots surveyed? A. Never have. Q. Then, when you went in possession of your land there, when you bought that land and went in possession of lots 1 and 2, you didn't know where your north or south line was? A. Yes, sir; I knew it by the fencing on it. Q. You know now the fence is not on the south line, do you not? A. No, sir; I do not. I know it is on the line of the

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Thus we see that more than 10 years before this suit was brought Dr. Crawford, the then owner of lot 3, made a demand for the strip of land now in suit, and was positively refused; and we notice, also, that the refusal was not put on the ground that the fence was on the true line. He made no reference to

ing in the testimony up to the time of the cross-examination of the defendant himself that gives any support to the contention that it was defendant's purpose to claim only up to the true line wherever and whenever that may be ascertained; but respondent contends that that fact was developed on the cross-examination of defendant himself. It therefore becomes necessary to quote literally so much of the cross-examination as bears on that point: "Q. You never bought or got a deed for any part of lot 3? A. Not that I know of; no, sir. Q. And you have never paid any taxes on lot 3? A. No, sir; not that I know of. Q. And you have never claimed lot 3? A. No, sir; never have. Q. Nor any part of it? A. No, sir; no part of it. I simply claimed my inclosure as I bought it. Q. You never had your lots surveyed? A. Never have. Q. Then, when you went in possession of your land there, when you bought that land and went in possession of lots 1 and 2, you didn't know where your north or south line was? A. Yes, sir; I knew it by the fencing on it. Q. You know now the fence is not on the south line, do you not? A. No, sir; I do not. I know it is on the line of the premises I bought. Q. You know the fence is not on the true line between lots 2 and 3, don't you? A. I do not. Q. Don't you know you have more than 120 feet north and south there? A. I do not. I never measured it in my life, and never had it measured. * * * Q. Well, 120 feet is all you bought? A. No, sir. Q. All you have a deed for? A. I bought the inclosure there simply as it was inclosed. Q. You knew your deed didn't call for that inclosure? A. It calls for two lots. Q. Sixty feet across? A. I don't know whether it says 60 feet across. Q. I believe the first thing you got from Mr. McIntyre was this contract of February 20, 1892? A. Yes,

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sir. Q. And you held possession under this contract of the land described until you got your deed? A. Yes, sir. Q. And since that time you have held under your deed? A. Yes, sir. • • • Q. When you bought this land, you didn't know where the true line was between lots 2 and 3, did you? A. I didn't know anything about the lines. The fence was considered as the line, and that's the way I bought it. Q. But you never—when you bought the land and took possession, you never intended to claim more than you bought, did you? A. No, sir, and never have yet either. Q. And you bought what? A. I bought what was in the inclosure." The last question and answer were on redirect examination. The evident aim of the cross-examination was to force the defendant to take the position before the jury of either admitting that he never intended to claim ownership further than to the true line wherever and whenever it might be located, or else to confess that he intended to claim what did not belong to him. Counsel for respondent

ary lines and he claimed to the fences regardless of whether they were correctly located, and has so held for more than 10 years, his holding would not be cut down now because it might turn out on measurement that he had more front feet than his deed called for. It was so decided in the case of Mather v. Walsh, above cited, where the deed called for so many acres and the defendant had by mistake taken possession of a larger area. There is nothing in the cross-examination of defendant to indicate that he ever intended to limit his claim of ownership to the true boundary line when discovered. All the testimony is to the effect that he claimed as his own all that was inclosed by his fences. Even the testimony on the part of the plaintiff showed the adverse character of defendant's possession. More than 10 years before this suit was filed the then owner of lot 3 complained to defendant that his fence was three feet over the true line and asked him to join in a survey and move the fence, but defendant refus-

in their brief say: "It is evident that Dr. Fritts (the defendant) before going on the witness stand had informed himself as to the law of adverse possession, and it looks as though he had intended to give no evidence that could be used against him." If the witness had technical knowledge of the subject of adverse possession, he had in that respect no advantage of the learned counsel who conducted the cross-examination. His answers were not evasive or equivocal, and on the face of the record we see no cause to question his honesty. Under a skillful cross-examination, a less enlightened witness not fully comprehending the real purport of the question might by merely answering yes or no convey an erroneous idea. It was attempted to put a construction on the testimony of the defendant in the case of Cole v. Parker, above cited, who had testified that he intended to claim only to the government line, but claimed that the middle of the road was the government line, which is now sought to be put on the testimony of this defendant, but the court said, if such an effect was to be given to the testimony, "the statute of limitations in such cases would never run in favor of an honest man, because he would never avow his purpose to have taken the land of another." In the case at bar, the defendant said he claimed only the lots he bought, but he claimed that those lots embraced all that was within his inclosure. The defendant's deed (or the contract of purchase rather, the full deed not appearing in the record) calls for lots 1 and 2. It does not give the width or length of the lots. One would have to go to the plat to find that information, but, even if the deed had said the lots were 60 feet front, if the defendant bought, as he says he did, understanding that the fences marked his bounded, and asserted claim to all within his inclosure.

Defendant's title by adverse possession being clearly established, the trial court ought to have given a peremptory instruction for a verdict in his favor.

The judgment is reversed and the cause remanded, with directions to the circuit court to enter judgment in defendant's favor. All concur.