Bower, Henry v. Orrick, John + Cote, Cyprian 1859 St. Charles 3rd 420/3

Old Box 602/19

29
210

AKA Boewer
question of boundary
all claim title under Nicholas Jarvis
O from heir
B from adm.
LC = found for O

O59
F59
Ewing
aff
A = C. Wells
R = EA Lewis

COA = ejectment
GN = map
Scott absent

O = admission of ev. was good

The State of Missouri, ss.

The State of Missouri, to the Honorable the Circuit Court in the Third Judicial Circuit **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court held in and for the County of St. Charles

wherein John Orrick & Cyprian Cole were plaintiffs and Henry Bomer was defendant

in a Civil Action manifest error hath intervened, to the great damage of said defendant as by his complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in March, instant ~~next~~, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the fifth day of March in the year of our Lord one thousand eight hundred and fifty-nine

Wm S. Glanville,

CLERK.

State of Wisconsin
County of St. Charles } I, Ben. Emmons Jr. Clerk of the Circuit Court of St. Charles County
Certify that I have certified under the seal of said Court a transcript of the
record and proceedings in the matter entitled as fully as the same remain of
record. Witness my hand & seal of said Court
this 11th day of March 1859

Ben Emmons Jr. Clk

State of Missouri }
1 County of St. Charles } Be it remembered that heretofore to wit on the twenty first day of May eighteen hundred and fifty eight John Orrick filed in the office of the clerk of the Circuit Court of St. Charles County a petition in the words and figures following to wit

John Orrick and Cyprian Cole, plaintiffs
against
Henry Bower, sometimes called Henry Power defendant

} In the St. Charles Circuit Court June Term 1858

Plaintiffs state that on the twenty ninth day of April A.D. 1858, they were and still are entitled to the possession of the following described real estate situate in the County of St Charles and State of Missouri to wit: a tract of land ~~of land~~ lying northward of the City of St. Charles and including part of survey No 159. (one hundred and fifty nine) originally confirmed to Nicholas Janis, senior, under Antoine Janis, senior, and being all that part of said survey No 159 which lies southwardly of the lands conveyed by Arnold Krekel, Administrator of the estate of Nicholas Janis, deceased, to Caleb Rice and Thomas H. Barwise and Henry Bower. And plaintiffs being so entitled to the possession of the whole of said tract of land, the defendant afterwards, on the 29th day of April A.D. 1858 entered into the following described part of

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said tract of land, and unlawfully withholds from plaintiffs the possession thereof, to wit: Beginning at the North East corner of the said tract of land, thence North 84° West two and 24/100 chains to the East line of the Marais Croche Macadamized road — thence Southwardly with the said East line of the Macadamized Road, one and 69/100 chains — thence South 84° East, a line terminating at the East line of said Survey No 159 — thence North 15° 30' East with said line of the survey to the beginning, containing one and 62/100 acres — to the damage of plaintiffs of three hundred dollars — Plaintiffs state that the monthly value of the rents and profits of the said last mentioned premises is two dollars. Plaintiffs ask judgment for the recovery of the possession of the said last mentioned premises, and for the sum of three hundred dollars damages for the unlawfully withholding of the same from plaintiffs, and for two dollars per month for monthly rents and profits, from the rendition of the judgment until the possession of said last mentioned premises is delivered to plaintiffs and for other proper relief.

Lewis Alexander
Attorney for plaintiffs.

John Orick one of the plaintiffs, makes oath and says that he believes the foregoing petition and the matters therein as stated are true. John Orick

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Sworn to before me May 21. 1858

Ben Emmons Jr Clk

And thereupon the clerk issued a summons in the words following, to wit:

The State of Missouri

To the Sheriff of St Charles County

Greeting: We command you to summon the defendant Henry Roewer sometimes called Henry Power to appear in the Circuit Court of St. Charles County at the Court House in the city and County of St Charles on the second Monday of June eighteen hundred and fifty eight and answer the annexed petition of John Orrick and Cyprian Cote plaintiffs and have you then and there this writ:

(L.S.) Witness Ben Emmons Jr clerk of said Court with the seal of said Court hereto affixed this 22nd day of May 1858.

Ben Emmons Jr Clerk

And the Sheriff's return is in the words and figures following to wit:

Executed the within writ and petition on the within name Henry Roewer by reading the within writ and petition in the hearing of the said Henry Roewers and delivering the same to him on the 25th day of May 1858 in St Charles County and State of Missouri

Elias C. Stewart Shff

Shff fee $1.00

pr C. P. Boanham Dept

And afterwards in the Circuit Court of St. Charles County on the fourth day of August Eighteen Hundred and fifty eight the following proceedings were had in said cause to wit:

John Orick et al
v. } Ejectment
Henry Power } Answer filed.

And the said answer is in the words and figures following to wit:

John Orick & others pltf
v } Circuit Court
Henry Power deft } July Term 1858

The defendant for answer to the plaintiffs petition says. That he admits that Survey No 159 was originally confirmed to Nicholas Janis under under Antoine Janis Senr as is insinuated in the petition.
But he does not admit that the plaintiffs or either or any of them have any right or title to said land or any part thereof their petition not setting up or averring any such right or title.
Defendant further says that as to the part of said Survey No 159 sued for the defendant does not unlawfully withhold the possession thereof from the plaintiffs because he says that said part sued for was conveyed to said Caleb Rice and Thomas H Prince by the deed mentioned in the plaintiffs petition to wit the deed from Arnold Krekel Administrator of the estate of Nicholas Janis deceased

which deed is filed as an exhibit in this Cause.

5 And that said defendant holds the same lawfully as tenant of the persons claiming under and by virtue of said deed, wherefore he says that he is not guilty of the unlawful entry and ouster charged against him. He therefore prays for judgment for his costs &c

Cartz Wells

for defendant.

Caleb Rice one of the persons under whom the defendant claims in this case, and who has personal knowledge of the facts says on his oath that he believes the facts stated in the above answer are true.

Caleb Rice

Subscribed and sworn to before me this 4th day of Augt 1858. Ben Emmons Jr Clk

And afterwards in said Court on the tenth day of February 1859, the following proceedings were had in said cause, to wit:

John Orrick and Cyprian Cote
v
Henry Bower Defendant } Ejectment.

Now at this day appear the said parties and waive the trial of this cause by jury and the cause being submitted to the Court for trial the court finds that said defendant is guilty of unlawfully withholding from said plaintiffs the possession of the premises in the petition mentioned in manner and form as therein alleged and the court

doth assess the damages sustained by said plaintiffs by reason thereof at the sum of seven dollars and the Court finds that the monthly value of said premises is sixty cents. It is therefore considered by the Court that said plaintiffs have and recover against the said defendant the possession of the premises in the petition mentioned to wit part of Survey No 159, confirmed to Nicholas Janis Senr, Beginning at the North East corner of the said tract of land thence North 84° West two and 24-100 chains to the East line of the Marais Croche Macadamized Road thence Southwardly with the said East line of the Macadamized Road one and 60-100 chains thence South 84° East a line terminating at the East line of said Survey No 159, thence North 15° 30' East with said line of the Survey to the beginning containing one and 62/100 acres and that said plaintiffs also recover against said defendant the sum of seven dollars damages together with sixty cents per month until possession of the premises be given and costs and that they have thereof their writ of possession.
And thereupon said defendant moves the Court to set aside the verdict and grant a new trial which motion is overruled and said defendant tenders his bill of exceptions to the judgment and proceedings herein which is signed by the Court and made a part of the record.
And said bill of exceptions, is in the words and figures

following) viz:

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Be it remembered that at the trial of this cause evidence was given by the plaintiffs that they held by legal conveyances all the title of the heirs of Nicholas Janis decd from the date of their respective deeds — said deeds are dated subsequent to the deed from Arnold Krekle Admr of said Nicholas Janis, to Parrise & Rice herein copied — and convey all the land not conveyed by that deed — said deeds are quit-claim deeds and purport to convey all the right, title and interest of said heirs. The deed to Parrise & Rice was recorded prior to the dates of the deeds under which plaintiffs claimed — The deed to Parrise & Rice is as follows:

This indenture made and entered into this the 28th day of October eighteen hundred and fifty two by and between Arnold Krekel administrator of the estate of Nicholas Janis deceased of the first part and Caleb Rice & Thomas H. Parrise of the second part Witnesseth that at the February Term 1851 the County Court of St. Charles County made an order requiring Arnold Krekel Admr as aforesaid to advertise & sell according to law the whole or so much of the real estate of said deceased in his petition as administrator mentioned as would be sufficient to pay the debts of said deceased. That in pursuance of said order of sale I Arnold Krekel Admr as aforesaid caused a notice containing a particular description

8 of the Real Estate to be sold and stating therein the time place & terms of sale to be set up for twenty days at least prior to the day of sale in ten public places in St. Charles County which notice is in words & figures following to viz:

Administrators sale of Real Estate.

By virtue of an order of the County Court of St. Charles County State of Missouri made at the February term 1851 the undersigned administrator of the estate of Nicholas Janis deceased will sell at the Court House door in the City and County of St. Charles and whilst the County Court shall be in session on the 25th day of August 1851 between the hours of 9 o clock in the forenoon and 5 o clock in the afternoon of said day publicly and at auction to the highest bidder all their right title & interest which said deceased had at the time of his death in and to the following described real estate situated in St Charles County to wit a tract of land immediately below the City of St. Charles originally granted to N Janis dec, bounded South by said City West by the Kings Highway North by Charlesworth's farm East by Commons containing 102 1/100 acres to be sold in lots of 80 feet front each & running back 200 feet. Also 20 acres of land in lower bottom Lot No 68 in Block 10 – Terms 1/3 cash ballance in 12 months

Arnold Krekel Admr

That afterwards on the 26th day of May 1851 I, Arnold Krekel, administrator as aforesaid caused the said
9 real estate to be appraised by F. W. Gatzweiler, Robt McClarin and Wm McChristy three respectable disinterested householders of St. Charles county who were duly sworn for that purpose and they appraised the whole of the above real estate at two hundred and thirty dollars. That in pursuance of said order of sale & advertisement I Arnold Krekel administrator as aforesaid did on the 25th day of August 1851 expose for sale the said real estate mentioned in said order of sale, to the highest bidder publicly and by auction at the door of the Court House in St Charles County & whilst the county court for said county was in session and Caleb Rice & Thomas H Barwise the purchasers of lot No Eight of survey No 159, at the price & sum of one hundred sixty seven 00/100 dollars (being thirty dollars pr acre) they being the highest bidders for the same. And I, Arnold Krekel Adm as aforesaid afterwards at the next term of the County Court of St. Charles County made a full report of my proceeding under said order of sale with the certificate of appraisement and a copy of notice thereto attached & verified by affidavit as required by law, which said report was on the 26th day of November 1851 approved by the County Court of St Charles County. Now therefore I, Arnold Krekel, administrator of the estate of Nicholas

10 Janis, deceased, having received of Caleb Rice and Thomas H. Barwise one hundred sixty seven 20/100 dollars the full amount of purchase money for the lot above described & by them purchaised do in consideration thereof hereby bargain, sell transfer a & convey unto the said Caleb Rice & Thomas H. Barwise all the right, title and interest, which Nicholas Janis at the time of his death had in & to the Real Estate, being lot No Eight of Survey No 159, bounded South by part of said Survey, West by lots of Henry Böwer, Jean Komepeter & Henry Dave, North by Charlesworth's farm & East by Comons ... containing five 59/100 acres — as fully and completely as I am by law authorized to convey the same in pursuance of said order of sale. To have & to hold the same to them the said Caleb Rice & Thomas H. Barwise, their heirs & assigns forever together with all & singular the appurtenances thereunto belonging or in any wise appertaining. In testimony whereof I have hereunto set my hand & seal this the day & year aforesaid.

Arnold Krekel Admr of N. Janis Seal

State of Missouri }
County of St. Charles } Be it remembered that on this the 28th day of October eighteen hundred & fifty two before me the undersigned a Justice of the Peace for & within the County & State

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aforesaid personally came Arnola Krekel personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto & acknowledged the same to be his act & deed. Taken & certified this the day & year aforesaid——— Frederick W. Gatzweiler
Justice of the Peace

In the original acknowledgement, at the end between the words "aforesaid" and "Frederick" where the red dash occurs on this record, the words "Arnola Krekel Admr of Nicholas Lanis" are erased by being crossed with a pen.

Filed for record November fifth, Eighteen Hundred and fifty two. Ben. Emmons Jr
Recorder

The report of sale by the Admr is as follows:

To the hon the Judges of the County Court of St. Charles County and State of Missouri—

The undersigned Administrator of the estate of Nicholas Lanis deceased respectfully represent that in conformity to an order of the County Court, directing him to sell all or so much of the real estate of said deceased as would be sufficient to pay the debts, would respectfully report, that in conformity to said order and the law he advertised the real estate hereinafter described for sale by ten advertisements—a copy of which is hereunto

attached and made a part of this report, put up in as many public places in St. Charles County, twenty days at least before the day of sale in said advertisement mentioned; That he had the real estate to be sold divided into eight lots, seven of which being eighty feet in front by two hundred feet depth and the last one, being to eight containing five 59/100 acres as shown more fully by the plat, which is hereunto attached and made a part of this Report. That he had the real estate to be sold appraised by three disinterested house holders of St. Charles County who were duly sworn for that purpose, the appraisement by them made as aforesaid is hereunto attached and made a part of this Report. That he offered said real estate hereinafter described for sale publicly and at auction at the Court House door of St. Charles County on the day and between the hours in said advertisements mentioned and whilst the County Court of said County was in session and that Henry Dave became the purchaser of lots Nos one, two and three of survey No 159 at the price of one hundred and seventy one dollars, Jean Kompeter of lots Nos four and five of same survey at the price of one hundred and seventy dollars, Henry Boewer of lots Nos six and seven at the price of one hundred eighty six dollars and Caleb Rice & Thomas H. Barwise became the purchasers

of lot No eight at the price of thirty dollars per acre,
13 they being the highest and last bidders for the same,
and that each of said purchasers complied with
the terms of sale. The undersigned would further
state, that he did not advertise said sale in a
newspaper, the court having suspended that part
of the law, all of which is respectfully submitted.
I Arnold Krekel do upon oath state that I did
not directly or indirectly purchase the real estate
above described or any part thereof or any interest
therein and that I am not interested in the prop
erty sold except as stated in the report

Arnold Krekel

Subscribed & sworn to before me this 26th day
of November 1857.

Benj Emmons jr clk
By Robt. A. King D.C.

Administrator's Sale of real estate.

By virtue of an order of the County Court of St Charles
County State of Missouri, made at the February
Term 1857, the undersigned administrator of the
estate of Nicholas Janis deceased will sell at
the Court House door in the City and County of
St. Charles and whilst the County Court shall
be in session on the 25th day of August 1857
between the hours of 9 o. clock in the forenoon
and 5 o clock in the afternoon of said day
publicly and at auction, to the highest bidder

14 all the right, title and interest which said deceased had at the time of his death, in and to the following described real estate situated in St. Charles County, to wit: A tract of land immediately below the City of St. Charles, originally granted to N. Janis dec, bounded South by said City, West by the Kings highway, North by Charlesworths farm East by commons containing 10 21/100 acres to be sold in lots of 80 feet front each and running back 205 feet. Also 20 acres of land in lower bottom, Lot No 68 in Block No 10.

Terms 1/3 cash, ballance in 12 months

Arnold Krekel Admr

We the undersigned disinterested householders do upon oath declare that we are not interested nor of kin to any person interested in the estate of Nicholas Janis as heir or devisee and that we will to the best of our knowledge and ability view and appraise the estate to us shown

F. W. Gatzweiler
Wm. W. Christy
Robt. McClarin

Subscribed and sworn to before me

Eight lots of land, part of Survey No 159 originally granted to N. Janis lying immediately below the City of St Charles, County of

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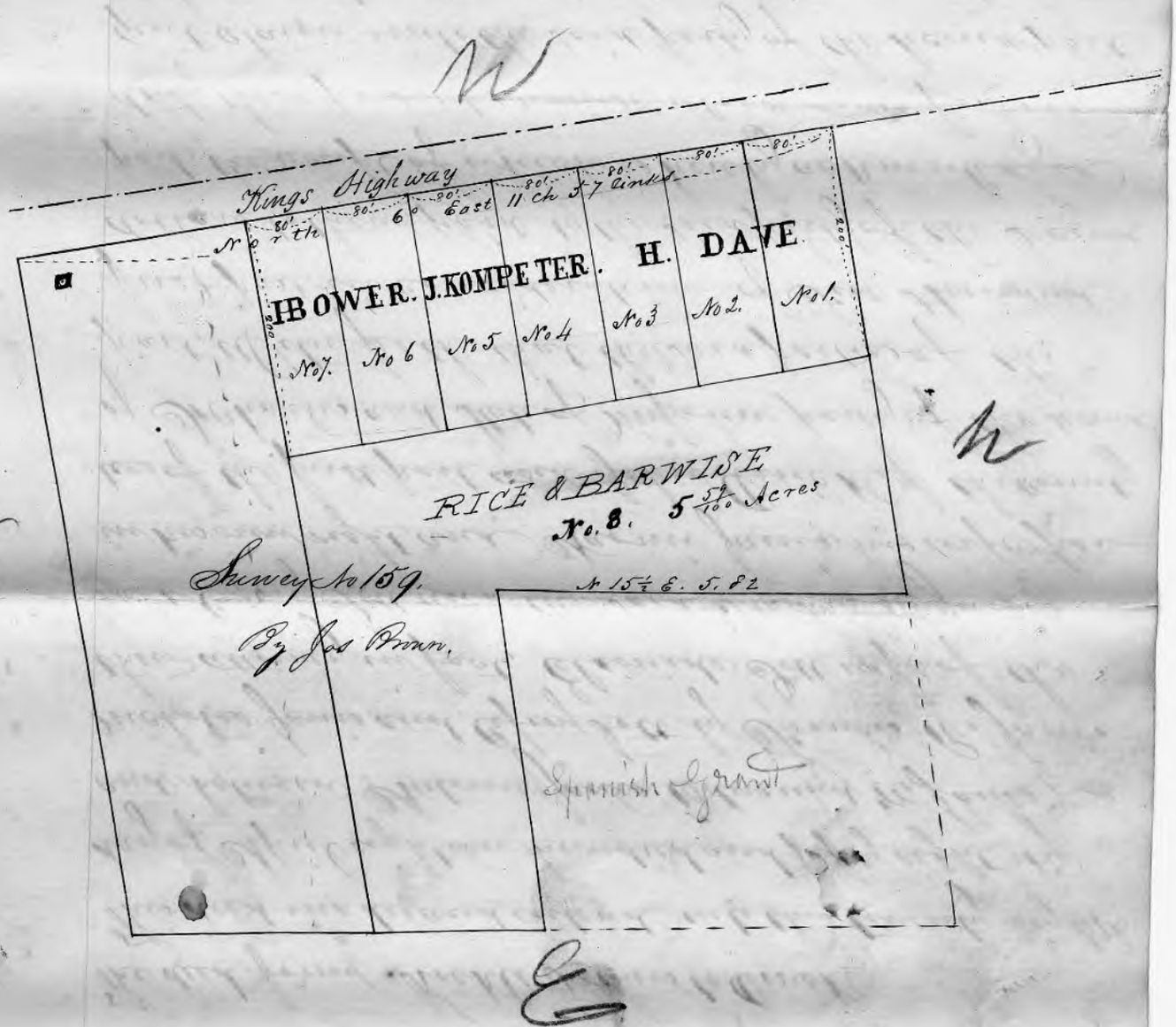
St. Charles, State of Missouri and we appraise the same of twenty five dollars per acres } $200 00/100
Lot 68 in block ten lower bottom
Commons of the City of St. Charles } $30.00

We the undersigned do hereby certify that the foregoing is a true appraisement of the Real Estate of Nicholas Jarvis deceased.

Given under our hands this the 26 day of May 1851.

F. W. Satzwieler
Robt McClarin
Wm. W. Christy



16 The deed from Krekle & others to Orrick

This deed made and entered into this twenty eighth day of April eighteen hundred and fifty eight by and between Antoine Janis. Edmund W. Janis, Nicholas Janis and Cefroy Iott by Francis R. Janis their attorney in fact, Eleonide Iott wife of the said Cefroy Iott and the said Francis R Janis in his own right, and Naomi Janis, his wife, parties of the first part and John Orrick of the county of St Charles and State of Missouri party of the second part, Witnesseth that the said parties of the first part, in consideration of Five Hundred dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents remise, release and forever quit claim unto the said party of the second part all the right title, interest estate and claim of the parties of the first part in and to the following described real estate situate in the County of St Charles and State of Missouri, to wit:

A tract of land lying northward of the City of St Charles and including part of Survey No 159 (one hundred and fifty nine) originally confirmed to Nicholas Janis under Antoine Janis, together with lands lying Southwardly of and adjoining said Survey — the tract hereby conveyed being bounded on the North by the lands sold by Arnold Krekel, Administrator

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of the estate of Nicholas Janis deceased, to Rice and Barrise and to H. Bower — on the East by lot claimed by Henry Beckman — on the South by lot of Lorenzo D. Holmes and on the West by the St. Charles and Macais Croche Macadamized road and being all the land there lying contiguously which belonged to the estate of Nicholas Janis deceased and which the parties of the first part claim by inheritance or otherwise. To Have and to Hold the same, together with all the rights, immunities, privileges and appurtenances, to the same belonging unto the said party of the second part and to his heirs and assigns forever. In Witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written

Executed in presence of } Antoine Janis (Seal)

By F. R. Janis his attorney in fact (Seal)

Edmond W. Janis

By F. R. Janis his attorney in fact (Seal)

Nicholas Janis

By F. R. Janis his attorney in fact (Seal)

Sefroy Sott

By F. R. Janis his attorney in fact (Seal)

Eloonide S. Sott — (Seal)

Francis R. Janis — (Seal)

Naomi Janis — (Seal)

State of Missouri } ss.
County of St Charles } Be it remembered that on this twenty ninth day of April A.D. eighteen hundred and fifty eight before me the undersigned a Justice of the Peace within and for said county personally came Eleonide S. Lott Francis R. Janis and Naomi his wife who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same to be their act and deed for the purposes therein mentioned. And the said Eleonide S. Lott wife of Cyprey Lott and the said Naomi wife of the said Francis R. Janis being by me made acquainted with the contents of said deed acknowledged on an examination apart from their said husbands that they executed the same freely and without compulsion or undue influence of their said husbands and the said Naomi then acknowledged that she relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband

Given under my hand this date above written Oliver C. Rood

Justice of the Peace.

State of Missouri, County of St Charles } ss

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Be it remembered that Francis R. Janis who is personally known to the undersigned a Justice of the peace within and for said County to be the person whose name is subscribed to the within deed as a party thereto in his own right and as attorney in fact for Antoine Janis, Edmund W. Janis, Nicholas Janis and Sefroy Jott came before me on this 29th day of April A.D. 1858 and acknowledged that he executed the said deed as the act and deed of the said Antoine Janis, Edmund W. Janis Nicholas Janis and Sefroy Jott for the purposes therein mentioned. Given under my hand the date above written. Oliver O. Rood Justice of the Peace.

State of Missouri } I. Ben. Emmons Jr Recorder for said County Certify that the foregoing deed
County of St. Charles } was filed for record in my office April 30: 1858 and is truly recorded in Book H No 2 pages 325 and 326 Given under my hand and official seal
August 16, 1858. Ben Emmons Jr
Recorder

A plat of the land in controversey is marked (A) and identified by the Signatures of Edward E. Lewis Atty for pltffs & Carty Wells Atty for defts — and hereto attached — it is agreed that said plat may be used in the Supreme Court without copying and that it correctly describes the lands in question and its abutals.

The plaintiff proved by Arnold Krekle that he had the lands sold by him surveyed — that stakes were set up at the corners of the lots sold — does not know whether Rice or Barwise ever saw them — That he made the plat attached to his

report — sold the land by it — it was used and seen by bidders at the sale — does not know that Rice or Barrise saw it — At the time when I sold the land as Admr of Janis, I did not know that Antoine Janis had a private claim on the East of the Nich. Janis tract but supposed from the shape in which the Nich Janis survey was laid out that it was done on account of some interfering survey.
It was proved that the land sued for was worth five dollars pr acre annual rent — defendants fence recently made includes the land sued for.

Defendant asked the following instructions which were refused

The defendant moves the Court to exclude from its consideration all verbal evidence tending to show the Southern boundary of Lot 8 sold to Barrise & Rice.

Also the plat returned with the report of the sale made by the Admr of said lot 8.

The Court is also asked to decide that if the estate at the date of the sale to Barrise & Rice owned the land South of the lot 8 sold to them, then the deed will be extended South so as to include the quantity of 5 59/100 acres mentioned in said deed — that the call in said deed for its Southern boundary cannot limit the quantity conveyed by that deed to less than the quantity called for in said deed

21 That the title shown by the deed to Barwise Price is a better title than that shewn by plaintiffs — That plaintiffs have not shown a legal title to the land in dispute

the refusal excepted to.

Defendant objected at the time to the verbal evidence of Mr Krekle & also to the admission of the plat attached to his report, his objection as to the report was averruled & he excepted — as to the verbal evidence it was excluded by the Court.

The Court refused the following instructions prayed for by defendant - (being the same herein above inserted) to this defendant excepts

The defendant filed a motion for new trial as follows

Orrick & Cote
vs
Bower } Circuit Court, Jan Term 1859.

The defendant moves the Court to set aside the verdict and grant a new trial because

1st The Court admitted illegal evidence.

2nd the Court erred in refusing to decide the law to be as prayed for by defendant —

3rd. The Court erred in deciding that plaintiffs was the better title

4th In its verdict. Carty Wells for deft

22 which was overruled — to this deft. also excepts & tenders this his bill of exceptions which is signed & ordered to be made a part of the record in the cause.

A. H. Buckner

State of Missouri
County of St Charles } I. Pen Emmons Jr. Clerk of the Circuit Court of St Charles County Certify the foregoing to be true and Complete transcript of the record and proceedings in the above entitled Cause as the same remain of record

In Witness Whereof I hereunto set my hand and affix the seal of said Court March 4th 1859

Pen. Emmons Jr
Clerk

(19) 11 ~~221~~

Oct 59

John Orrick & al.
Defts. in Error.

(3)

Henry Bower & al.
Pffs. in Error

Error to St. Charles Circuit Court.

Filed 5 March 1859.
Wm. S. Glanville Ck.

$9.80 this transcript to Benj Emmons Ck

Writ error 1.50, postage 6 / Survey No. 159 filed /

Affirmed 14 Dec. 1859, C. p. 24.

Plat of Survey No. 159 withdrawn by Jno. Orrick 20 April 1860.

John Orrick

Orrick et al
vs
Barwise et al } Sup Court
Oct Term 1859

Errors assigned by pltffs in error

1st The court admitted illegal evidence
2 Refused to give legal & proper instructions
3 In refusing to grant new trial

C Wells for
pltffs in Error
deft joins in Error
Lewis for
deft

Orrick

vs

Barnes

Mass

Filed 19 Oct. 1859
Wm. L. Glanville
Clk.

John Orrick & others,
Defts. in Error
vs.
H. Boewer, Plff. in Error.

} Error to St. Charles Circuit Court.

Statement of the case.

This was a suit in Ejectment for 1, 62/100 acres of land near the City of St. Charles. Plaintiffs claimed and proved a title under Nicholas Jamis, the original confirmee, to all the land in Survey No. 159 lying South of that embraced in a deed from the administrator of Jamis to Rice and Barwise. Defendant, claiming under Rice and Barwise, proved no connection between himself and them, but undertook to show that the land in controversy was embraced in the deed to Rice and Barwise, and was therefore not a part of that covered by the plaintiffs title. It thus became a question of boundary, to be determined by the effect of the deed to Rice and Barwise. That deed, which is an administrator's deed in the usual form, describes the land conveyed thus: "Lot No. Eight of Survey No. 159, bounded South by part of said Survey, West by lots of Henry Bower, Jean Kompeter and Henry Dave, North by Charlesworth's farm and East by Commons - containing five 59/100 acres." The deed recited as part of its foundation, the report of the sale and its approval by the County Court. Said report sets forth the division of the Survey into lots, ~~[illegible]~~ exhibits a plat of the lots with their

boundaries and states that Lot No. Eight was purchased by Rice and Barrise, as laid down in said plat. According to this plat, the land in controversy is not included in Lot No. Eight. It is claimed, however, by defendant, that by inspection of another plat of Survey No. 159 (which accompanies the record and is identified by endorsements of Counsel) it will appear that the land in controversy must be ~~included~~ embraced in the deed to Rice and Barrise, in order to make up the quantity therein stated to be conveyed — and that the alleged indefiniteness of the Southern boundary of the land conveyed authorizes an extension in that direction, which will include the land in controversy — in order to make up the quantity called for. Plaintiffs rely on the report and plat referred to ~~recited~~ in the deed, with the boundary lines thereby established, as the true method of determining the limits of the land conveyed.

Certain parol testimony was offered by plaintiffs to show what land was sold by the administrator, but was excluded by the Court — so that no question as to its admissibility is brought up by the record. See Record, page 21.

Points and Authorities.

1. The administrator's report of his sale being in part the foundation of the deed and therein expressly referred to as such, the grantees are as much bound by its contents as if they were incorporated in the deed itself. It is in effect a part of the deed for all purposes of interpretation, so far as it is capable of being used and applied as such.

Shelton vs. Maupin, 16 Mo. Rep. 124

Lithgow vs. Kavanagh, 9 Mass. 161 (Side paging)

Burkhart vs. Bucher, 2 Binney, 455.

2. The plat referred to in and accompanying the report is to be taken as a part of the description in the report, and the lines thereon laid down are to be considered the true lines intended, unless found to be wholly inconsistent with the description of them in the body of the instrument.

Davis vs. Rainsford, 17 Mass. 207.

Wolfe vs. Scarborough, 2 Ohio (New Series) 361.

Shelton vs. Maupin, 16 Mo. Rep. 124.

Magoun vs. Lapham, 21 Pick. 135.

Lunt vs. Holland, 14 Mass. 149.

McIvers vs. Walker, 9 Cranch 173. – 4 Wheaton, 444.

3. The boundary lines of the land intended to be conveyed being ascertainable from the deed with the report and plat referred to, the quantity expressed is to be

taken as a mere estimate, and not a part of the description, or is at least of secondary importance, and a discrepancy therein cannot disturb the location of the boundary lines thus ascertained.

Wolfe vs. Scarborough, 2 Ohio (N.S.) 361.

Pierce vs. Faunce 37 Maine, 63.

4. The administrator had no authority to convey any land whatever, except in accordance with his report. And if the true construction of his deed embraces more land than was covered by his report, it is so far void, and vests no title to the excess in the grantees.

Rev. Stat. p. 147, §§ 33, 34, 35.

5. The acceptance of the deed by the grantees involved an acceptance of the report recited therein, and they are estopped from impeaching the plat forming part thereof, whether the same was made before or after the sale.

6. There is no rule of law, that "the quantity named in the deed passes, if grantor had that amount in his tract" – when the boundaries

intended may be ascertained from the deed or any paper to which it refers, or which it recites as being its foundation.

E. A. Lewis,
for Deft. in Error,
(Plff. below.)

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Jno. Orrick, Deft. in Error

vs.

Henry Bower - Plff in Error

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Brief of Deft. in Error

Filed 19 Oct. 1859
Wm. S. Granville
Clk.

John Orrick et al
defts in Error
vs
Henry Barnise et al
pltffs in Error

Error from St Charles
Sup Court Oct Term
1859

Statement of the Case

In the month of May 1858 the plaintiffs brought their action of Ejectment against the defendants for 1.$\frac{62}{100}$ acres. The answer denies plaintiffs title to the land sued for and sets up title in defendants.

Both parties claim title under Nicholas Janis-ded - the plaintiffs by virtue of deeds from the heirs and the defendants under a deed from the Admr of said Janis.

The deed of the Admr of Janis to the defendants is dated 28th October 1852 - filed for record Nov 5th 1852 -

But the Sale to defendants was made August 25th 1851.

The Admrs Report of Sale was made Nov 26 Nov 1851 - and then the report and plat were for the first time put on the record.

The deed under which the plaintiffs claim bears date April 1858.

On the trial of the Cause the Court permitted the defendant to give in in evidence a report and plat made after the Sale

and also verbal evidence to limit the amount of ~~of~~ land conveyed in the deed from the Adm^r to the defendants.

The defendant objected to all this evidence tending to qualify the deed or to limit the amount thereby conveyed.

Points by plaintiffs in Error

1st The Court erred in admitting the report of the Adm^r to limit the amount of land conveyed ~~by~~ the deed to defendant — the Report not having been referred to by the deed.

2nd The Court erred in admitting the platt attached to the report — because it conflicts both with the report and the deed

3rd The Court erred in admitting verbal evidence to qualify the deed —

Authorities 13 Mo R p 151
Roberts on Frauds 1st chapter

4th The Court erred in refusing instructions asked for by defendants —

The principal of law asserted is a correct one — that the quantity named in the deed passes — if grantor had that amount in his tract & it can be included in the description —

C Wells for
pltff in error

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Orrick. et. al
vs
Barnise et. al.

Pltffs brief

Filed 19 Oct. 1859
Wm J Glanville
Ck.

C Wells

John Brick et al Defts in Error & Henry Bower et al Pffs in Error

The first points that will be noticed is whether the Court below erred in admitting, as evidence, the report of sale made by the administrator, and the plat accompanying it. It is urged, first, that the report could not be admitted to limit the amount of land conveyed by the deed to defendants, because it is not refered to in the administrators deed, and second, that the plat attached to the report was improperly admitted because it conflicts with both the report and deed.

The report of a sale of real estate made by an administrator is the foundation of the title, and its approval by the Court is his only authority for executing a conveyance. And when it is refered to in the deed, it thus becomes a part of it, and they have to be construed together as one instrument.

In this case, the statute on the subject of administration sales of real estate seems to have been duly complied with. The deed of the administrator shews that a full report of his proceedings

was made to the County Court, and that decree was duly approved. It is true, that there is no express reference in the deed to the plat, but the plat is referred ~~in the report~~, to and made a part of the report, and thus becomes virtually a part of the deed — as much so, as if it had been incorporated with the body of it.

The admissibility of the plat as evidence, and its effect, are different things which seem to have been confounded in the second point made by counsel. If the ~~report~~ and plat by reference, in the deed becomes a part of the latter they are admissible for that reason, irrespective of any supposed conflict that may appear between them. What its effect may be in this respect, or how far one may control the other, in ascertaining the description of the land conveyed is a question of interpretation, and not one of competency. In such cases the entry referred to may or may not qualify the descriptive parts of the ~~deed~~ conveyance and one may correct an erroneous description contained in the other or even vary or add to as well as explain

it.

But the objection is not well taken for another reason. The acceptance of the deed was an acceptance of the plat, which was a part of it, and the defendants in error are estopped from impeaching it. They claim title under the deed of the administrator, and set it up as a defense, alleging in their answer that the land in controversy was conveyed thereby. If they have title to any part of the land conveyed by that deed the report and its approval is the basis of it. The land claimed by the plaintiffs in error, is described in the deed as lot number Eight, which is a small part of a large survey, and is described in part by reference to the land of third persons which is also similarly designated on the plat. The plat is thus made a necessary means of identifying the land, and of ascertaining its relative situation to other lands sold by the administrator according to the plat, and which are referred to in the deed as its boundaries, and under the deed only, also upon the report and plat. plaintiffs in error in claiming

The question in this case is one of boundary, and it relates to the southern boundary of the land conveyed by the deed of the administrator. In

the and it is described as all the right, title and interest which Nicholas Jains at the time of his death had in and to the real estate, being lot No Eight of Survey No 159, bounded south by part of said Survey; west by lots of Henry Boner Jean Kornepeter and Henry Dare; north, by Charles worthy farm; and East by Commons, containing five & 59/100 acres. The and from the heirs of Nicholas Jains the Brick Defendant in error, describes the land thereby conveyed as a tract of land lying northward of the city of St Charles and including part of Survey No 159, together with lands lying southwardly of and adjoining said Survey - being bounded on the north by the lands sold by Arnold Krekel Administrator &c to Rice & Barwise and to H Bower - on the East by lot claimed by Henry Beckman; south by lot of Lorenzo Holmes and on the west by the St Charles and Macais Creche macadamized road and being all the land there lying contiguously which belonged to the estate of Nicholas Jains deceased

and which the parties of the first part claim by inheritance or otherwise.

It is ~~conceded~~ contended by the plaintiffs in error that the land in controversy must be embraced in the deed to Rice & Barnes in order to make up the quantity therein stated to be conveyed; and that the southern boundary is so indefinite as to authorize an extension ~~for that p~~ in that direction for that purpose. On the contrary the defendants in error insist that no part of the land in dispute is included in lot number eight according to the deed and plat.

If the boundaries of the land designated as lot number eight can be ascertained from the deed with the report and plat, the quantity embraced within such boundaries, whether more or less than the quantity called for in the deed passes thereby. Quantity becomes material only, where the boundaries are uncertain or doubtful and then it is entitled to consideration according to the circumstances of the particular case. It forms

no part of the description of the land conveyed, where monuments or visible objects are called for as boundaries, but is mere matter of estimate. Therefore if all the particulars of the description by meets and bounds do not concur in designating as lot Eight a parcel of land which includes the 1.59/100 acre in controversy, then it is no part of the land intended to be conveyed.

There is no difficulty in applying ~~those~~ these rules satisfactorily to this case. It is evident by comparing the deed and plat together that to fix the southern boundary of lot Eight, where ~~defendants~~ Plaintiffs in error claim it should be, would be to derange the the boundaries of the land, and substitute another and different description. The call in the deed and plat for the western boundary, is lots of Henry Bower Jean Komp ster and Henry Leave. but if the southern boundary is extended as proposed, the western boundary would then be the lots of the persons named and the King high way; and the northern boundary instead of the call for Charles north farm, would be that farm and the land of Henry Bower.— Thus giving an entirely different form to the land, and substituting

~~one other~~ other and different calls, and ~~describing at by~~ so varying the description as to include ~~land~~ ~~of~~ ~~not~~ a parcel of land ~~not~~ designated by the plat, or deed.

If instead of the call for the lands Boner Komptu and Dare, as the western boundary it had been designated by a commencing at a point on the southern line of Charles Smith's farm; thence south to the southeast corner of the land of Boner then it is evident that upon well established principles the purchaser would have been ~~entitled~~ restricted to the quantity within the area thus bounded although it may have been less than the deed called for, and for a like reason ~~should~~ he be restricted to the quantity within the area of which the lands Boner, Komptu and Dare form the western boundary. In the one case the ~~starting~~ beginning and terminating points are visible objects or monuments, ~~definite~~ and certain: in the other, ~~the~~ it is a line coinciding with the ~~lands of these persons~~ eastern boundary of the ~~lots~~ of those persons, ~~throughout~~ its whole extent, which is equally ~~definite~~. Hence the quantity called for in the deed must yield as being

a less certain criterion of the intention of the grantor, to the more definite description by meets and bounds. Had the eastern and western lines of the tract been described as extending from points on the Charlestown farm, south to points on the land of Davis so indefinite as not to be ascertainable with the requisite certainty, the quantity in such case might ~~be the~~ become material as descriptive of what land was intended to be conveyed; and the rule of interpretation insisted upon by the counsel for plaintiff in error, would apply.

Judge Napton concurring the judgment will be affirmed. Judge Scott absent.

E B Ewing

11.

Orrick et al
v
Bonner et al

Opinion of the Court

E B Ewing

Affirmed.

Filed 14 Dec. 1859.
Wm. S. Glanville
Ck.

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