St. Louis University v. McCune, John S. et al 1859 St. Louis 439/9

607/12
58/M59
28 Mo 481

SLU plaintiff resp

Garesche, Alex J.P. (attny)

says that as an incorporated inst of STL county they are entitled to a tract of land

claims title Jacques under Labbe's survey

wins $4.06
court/no jury

McCune app

Vandeventer, Peter L
Haeff, John

SLU is not & was not entitled to possession
& they did not unlawfully deny access
denies plaintiff has suffered any damages
fence goes onto SLU's land

Rich - r&r

instructions contained correct statement of the law but evidence preserved in the record did not warrant it

Limitations Land Court.

St Louis University } Conf. by Act. Ap. 29, 1816
v } to be surveyed.
McCune et al } Survey returned 1842, approved 1857.

1. Prop. by Until Survey made no title passed to any definite tract of land, against which prescription could run.

Jourdan v Barrett 4 How R. 169, 184. Prescription does not run until the fee has passed out of the government. Calanne v Lindell 12 Mo R. 184

By 3 Sec Act. 1816, confirmation was to be surveyed & thus located.

"Where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the land of others, then it is not open to controversy that the title attaches to no land; nor has a court of justice any authority in law to ascertain and establish its boundaries this being reserved to the executive department

Stanford v Taylor 18 How R. 409. 412.

When confirmed by survey, he takes title on which he may sue in ejectment. Bissell v Penrose 8 How R. 317.

Before a survey of the confirmation of an imperfect Spanish title, an entry and patent will be a good title.

Ledoux v Black 18 How R. 475. nor did the mere act of confirmation tend to locate the claim and sever the land from the public domain; this could only be done by a public survey. Id.

Until Survey made and approved the U. S. could sell the land and a purchase of it must stand good

Cousin v Blanc 19 How. R 202. 210.

In Bissell v Penrose 8 How R 317. 339 the Supreme Court, note the distinction, between a confirmation by act of 1836, of land "as surveyed" and "to be surveyed". In the latter case errors could be corrected upon resurvey. Menard v May 8 How 313. determines the effect of a survey.

The Acts of 1816 & 1836 are alike in the language used. If government retain the right to survey, the confirmation does not attach to any particular land by metes & bounds, until Survey. Bryan v Forgey 19 How. 334

Cousin v Blanc 19 How R. 203. Leclerc v Black 18 How 475 were both confirmations by act of Congress, see 19 How 334.

West v Cochran 17 How R 415 Stoddard v Chamber 2 How R. 313.

The very question in this case is decided in Bryan v Forsyth 19 How R. 334. In this case the land was confirmed in 1823, but surveyed in 1840. In 1838 a patent was issued subject to all claims vs on another title to other parties. Court say, "We are of the opinion that the act of 1828 conferred on the grantee an incipient title, and reserved to the executive department administering the public lands the authority to settle the boundaries by actual survey among the claimants; and until this was done, the courts of justice could not interfere and establish boundaries". It was competent for Congress thus to provide vs 335. When the survey was made, and the plat returned approved and recorded by the Sur. Gen., and recognised as valid at the General Land Office it bound the parties to it vs. p. 336.

The patent of 1838 was a good title until 1840 when the confirmation ripened into a better right. After that those claiming under patent of 1838 held the position of one claiming protection by act of limitations under a younger patent against an older one. 338.

The survey must be approved vs. Ballance v Papin 19 How R 343. Bryan v Forsyth 19 How R. 336. Menard v Mafey 8 How R. 313.

2. The possession over the lines of plaintiffs title was not adverse until survey & knowledge of the lines by the parties.

Cottle v Sydnor 10 Mo R. 763. Cutter v Wadding-
ham 22 Mo. R. 206. Ang. on Lim 464. 465
Ed 1854 Burell v Burell 11 Mass R 296.
Bryan v Forsyth 19 How R 336

3. The doctrine of estoppel does not apply to this case. for estoppel in pais must always rest upon contract in some form or other. express or implied, Parties having contiguous tracts agree "we fix this mark as the on the earths surface as the line called for in my deed" &c"

This is so laid down in Blair v Smith 16 Mo R 273. 281. Taylor v Zepp 14 Mo. R. 482.
Neither verbal admissions nor presence at a survey can operate as an estoppel in pais
Valle v Clemens 18 Mo R. 486. 492
2 Smiths L. C. Am. notes 531.

Whittelsey
Atty pl. d.

The plaintiffs are estopped by their own agreement and attendance at the survey if any there is any estoppel

87 ~~82~~

Aubuchon
v
Ames.
St Louis University
v
John S. McCune

Defts Brief
Whittelsey
Ap. d.

Filed 15 April 1858.
Wm S Glanville
Cp.

1

State of Missouri }
County of St. Louis } S.S. Be it remembered that on the Ninth day of September, in the year of our Lord one thousand eight hundred and fifty seven, there was filed in the office of the Office of the Clerk of the St. Louis Land Court, a Petition, which is in the words and figures as follows, to wit:

Petition

St. Louis University, Plaintiff
vs
John S. McCune, Peter L. Vandeventer, and John Watt
Defendants

} In the St. Louis Land Court
St. Louis County.

Plaintiff by Alex J. P. Garesche, its attorney states that it is by the laws of the State of Missouri an incorporated institution of the said County of St. Louis. Plaintiff further states that on the 13th day of August, A. D. 1856, it was and still is entitled to the possession of a certain tract or parcel of land situate in the township and County of St. Louis aforesaid and described as follows: Commencing at the South East corner of the land belonging to the said plaintiff and the South west corner of land belonging to Dr John Gano Bryan, situate in Grand Prairie, thence Westwardly along the Southern boundary line of the land of the said plaintiff North 60° 50' West eighteen chains and twenty and one half links to a stone the North West corner of lands belonging to the said Plaintiff, and the South East corner of lands belonging to Walker R. Carter, thence Northwardly along the line between the lands of the said Plaintiff and of said Carter, North 20° 45' west, twenty five and one half links to the Northern fence or enclosure of the said John S. McCune, and Peter L. Vandeventer, thence Eastwardly along said McCune, and Vandeventer's enclosure, South 61° 10' West, Eighteen chains and twenty six links to the line between the lands of the said plaintiff and the said Dr Bryan, thence Southwardly along said line, South 37° 45' west, fourteen links to the place of beginning, containing thirty five hundredths of an acre - which said land is twenty chains and fifty six links distant westwardly from the Eastern

2

line of the Grand Prairie fields, in the centre line of Grand Avenue. Plaintiff further states that being so entitled to the possession thereof, the defendants on or about the day and year aforesaid unlawfully entered into and upon the said premises and unlawfully withholds the possession thereof from plaintiff to the damage of said plaintiff of a hundred dollars.

Plaintiff further states that the monthly value of the rents and profits of said premises is two dollars.

Plaintiff asks judgment for the possession of said premises and for its said damages and also for the monthly rents and profits yet to accrue.

Alex S. P. Garesche
Atty of Plaintiff

John S. Verdin, Agent for plaintiff makes oath & says that the above petition and matters as stated therein he believes are true.

Sworn to & Subscribed before me this 9th day of Sept 1857
C. A. Mauz, Clk.
Jno S Verdin, S. P.

Upon which Petition a Summons was issued to the Sheriff of St. Louis, which is in the words and figures as follows, to wit:

County of St. Louis S.S.

Summons

The State of Missouri

To the Sheriff of St. Louis County - Greeting:

We command you to summon John S. McCune, Peter L. Vandeventer, and John Hoett, to appear before the Judge of our St. Louis Land Court, on the first day of the next term thereof, to be held in the City of St. Louis, within and for the County of St. Louis, on the Second Monday of October next, then and there to answer the complaint of St. Louis University, as set forth in the annexed petition: and have you then and there this writ.

Witness, Charles A. Mauz, Clerk of our

3

seal

said Court with the seal thereof hereto affixed, at office in the City of St. Louis, this Tenth day of September in the year of our Lord eighteen hundred and fifty seven.

Charles A Maniz Clerk.
By E. P. Walsh, D.C.

Upon which Summons the Sheriff made his return in the words and figures as follows, to wit:

Sheriffs Return

Executed this writ in the County of Saint Louis September 14" 1857, by delivering a copy of the same with the petition as furnished by the Clerk to John S. McCune, one of the defendants; further September 18" of said year by delivering a copy of said writ to Peter L. Vandeventer, one of the defendants: further September 22d of said year by delivering a copy of said writ to John Haelt the other defendant.

James Castello Shiff
By Thos Chadbourne. Deputy

And afterwards the following further proceedings were had in this cause, to wit:

Wednesday October 21st 1857

Answer filed

St Louis University
vs
John S. McCune. Peter L. Vandeventer, and John Haett. } Answer filed in this cause.

Which Answer is in the words and figures as follows, to wit:

Answer

St. Louis University
vs
John S. McCune. and Peter L. Vandeventer } St. Louis Land Court October Term 1857

These defendants answering say.

That plaintiff was not and is not entitled to the possession of the premises described in the petition, and that they did not unlawfully enter, nor do they unlawfully withhold possession of said premises from the plaintiff, nor is the plaintiff damaged as stated in the petition.

4 Defendants say, that they own and are in possession of a tract of land in the Grand Prairie Common Fields. Known as United States Survey No Fifteen hundred and ninety two, in the name of Francois Lachapelle's or his legal representatives, and that their said possession is within the lines of said Survey as the same was approved and recorded by the United States Surveyor General for Missouri and beyond the lines of said Survey they are not in possession of any land. Whether the land described in plaintiffs petition is within the lines of said Survey No 1592, defendants cannot say, and if it be then defendants claim title to said land as their own.

The monthly rent of said premises is not two dollars per month. Defendants say that said Peter Haett is their tenant and they answer for him also. Defendants pray to be discharged hence with their costs.

Whittelsey
Atty p.d.

County of St. Louis. }

John S. McCune, being sworn says that the above answer and the matters therein stated he believes to be true.

Sworn to & Subscribed this 21st day of Oct 1857
C. A. Mantz Clk

J. S. McCune —

And afterwards the following further proceedings were had in this cause to wit,

Friday March 12, 1858

Judgment

Saint Louis University
vs
John S. McCune,
Peter L. Vandeventer &
John Haett

Judgment,

Now at this day the Court being fully advised of and concerning the premises, in this cause, heretofore submitted to the Court, doth from the evidence and proofs find the issues herein, joined in favor of the plaintiff, and that the damages sustained by said plaintiff be assessed at the sum of Four dollars and six cents, and the monthly value of the rents

5

and profits at the sum of Sixty six and two third cents. It is therefore ordered and adjudged by the Court, that the plaintiff recover of said defendants. the possession of the premises described in the plaintiffs petition, as follows, to wit: A certain tract or parcel of land situated in the township and County of St. Louis aforesaid and described as follows: Commencing at the South East corner of the land belonging to the said plaintiff and the South west corner of land belonging to Dr John Sano Bryan, situate in Grand Prairie, thence, westwardly along the Southern boundary line of the land of the said plaintiff, North 60° 50' West, eighteen chains and twenty and one half links to a stone the North west corner of lands belonging to the said plaintiff, and the South East corner of lands belonging to Walther R. Carter: Thence Northwardly along the line between the lands of the said plaintiff and of said Carter, North 20° 45' west, twenty five and one half links to the Northern fence or enclosure of the said John S. McCune, and Peter L. Vandeventer, thence Eastwardly along said McCune, and Vandeventer's enclosure, South 61° 10' west, eighteen chains and twenty six links to the line between the lands of the said plaintiff and the said Dr Bryan, - thence Southwardly along said line, South 37° 45' west, fourteen links to the place of beginning, containing thirty five hundredths of an acre which said land is twenty chains and fifty six links distant westwardly from the eastern line of the Grand Prairie fields, in the centre line of Grand Avenue, and also that said plaintiff recover of said defendants the damages and the monthly value aforesaid in form aforesaid as assessed together with its costs and charges herein expended and that a writ of possession, issue therefore - Motion for New Trial, filed in this cause.

And afterwards the following further proceedings were had in this cause, to wit:

Thursday April 22d 1858

St. Louis University

vs

John S. McCune, Peter L. Vandeventer, and John Hackett } Bill of Exceptions, filed in this cause.

Bill of Exceptions filed

6

And afterwards the following further proceedings were had in this cause, to wit:

Thursday May 6th 1858

St. Louis University
vs
John L. McCune, Peter L. Vandeventer & John Hazett

Motion for New Trial Overruled

Now at this day the motion heretofore filed in this cause for a New Trial, being by the Court fully understood, it is ordered and adjudged by the Court, that said motion be overruled. Defendants Bill of Exceptions re-filed in this cause.

Which Bill of Exceptions is in the words and figures as follows, to wit:

Bill of Exceptions

St. Louis University
vs
John L. McCune & als

This cause came on for trial, on the 13 Feb 1858, before the jury when by consent of parties the case was withdrawn from the Jury and submitted to the Court sitting as a jury for trial, and placed upon the law docket for argument. It was admitted, that plaintiffs claim and hold title under confirmation to Jacques Labbes representatives for so much of United States Survey No 1587, as lies between Bryan and Clay Avenues as shown by plat of Survey made by Cozens (left out by agreement of parties)
And that defendants claim and hold title and possession of United States Survey No 1592, under confirmation to Francois Leschappelle Leg Rep.

Plaintiff then gave testimony showing that they and those under whom they claim, had, had open continued notorious uninterrupted and visible possession of the land sued for more than twenty years prior to the entry of defendants, by actual enclosures, and that in March 1856, the division fence was upon the line claimed by plaintiffs, as the South line of the land sued for, and that said fence was then old and had the appearance of having been there many years, and that prior to defendants entry in 1856, the line had not been disputed and that plaintiffs possession had

7

been held by the line of the old fence. and that defendants entered upon and put up the fence on the line of Survey in August 1856. as shown by the Survey of the land sued for.

There was no evidence showing any agreement as to the lines, except the actual possession by the fences, and which possession was recognized and acquiesed in by the neighboring proprietors.

The plaintiffs closed. and defendants then read confirmation to F. Leschappelles Leg Rep (left out by agreement of parties) and gave in evidence a copy of United States Survey No 1592, made in 1842, and approved in 1857. (left out by agreement of parties)

Defendants also gave in evidence a connected plat of United States Surveys Nos 1591. 1592. 1587 & als. (left out by agreement of parties)

Defendants then proved that the land they had entered upon and possessed, was within the lines of United States Survey No 1592. as surveyed by the United States for Leschappelles Leg Rep. and that the possession of plaintiffs had extended South over the North line of the said tract, the fence not being on the dividing line of said Surveys as made by the United States, but over upon the land claimed by defendants, and that the fence had not been strait from the corners of said Surveys, and that the fence the defendants had put up was upon the line dividing Surveys Nos 1592 & 1587. as shown by a plat of Survey showing the line of Survey and line of fences. (left out by agreement of parties)

Defendants also gave evidence to prove, that in 1856. after defendants had entered upon the land and commenced building their fences plaintiff remonstrated when it was agreed between plaintiffs and defendants, that Wm H. Cozens, a surveyor, should run the line between the parties, and that parties should abide by his Survey, and that said Cozens made said Survey in presence of said parties and that defendants had put up their fence according to his Survey.

Plaintiffs in rebuttal gave evidence tending to prove that

said agreement was conditional, that the plaintiffs had the quantity of land called for in their deeds, that then the line might be corrected, but that the line of the U. S. Survey did did not give them their quantity called for by their deeds, then the plaintiff would insist upon its rights acquired by possession.

Defendants then asked instructions No. 1. 2. & 3. which the Court refused and defendants excepted.

1. If the jury believe from the evidence that the defendants are in possession of the land sued for within the lines of Survey of 1592. for F. Lachappelles Leg. Rep. as made by the United States and that said Survey was made in 1842. and approved in March 2. 1857. then the jury will find for the defendants.

Refused
C. B. Lord

2. If the jury believe from the evidence that the plaintiff claimed title to part of Survey No 1587. under Jacques Labbe, and his possession has extended over the line, before the Survey was made by the United States for defendant then said possession was not adverse to the title of defendants, as it was a mistake as to the true line.

Refused March 9th 1858
C. B. Lord

3 The plaintiff claiming title under the confirmation to Jacques Labbe and Survey No 1587. any possession by plaintiff over the lines of his confirmation, will not be adverse to the defendants claiming under F. Lachappelles Survey No 1592. until a Survey was made by the United States marking out the dividing line between the confirmations of the plaintiff and defendant respectively.

Given March 9th 1858
C. B. Lord.

The Court then gave for defendants instruction No 4

4 If the Jury believe from the evidence that the possession of the plaintiff of the land sued for, was by mistake as to the true line between the parties then said possession was not adverse.

The Court gave for plaintiffs the following instructions.

Given March 9th 1858
C. B. Lord

If the jury find from the evidence in this cause that after the confirmation respectively to the Representatives of Jacque L'Abbe, and Lachappelle of adjoining tracts of land Lachappelles Representatives or those claiming under them entered upon the land so confirmed to Lachappelles Representatives, and fixed a boundary line, between

9

the tracts of land so respectively confirmed to said Lachappelle representatives, and said Labbe's representatives and marked the same by stones, or other monuments, and built a fence along and upon said line, and claimed and occupied only up to said line for more than 20 (twenty) years, and that the representatives of said Jacques L'Abbe or those claiming under them agreed and assented to said line, and took possession of and occupied the land in question up to said line for more than twenty years before the commencement of this suit, the plaintiff ought to recover.

to the giving of which defendants excepted.

The Court took the case under advisement and on the day of March gave judgment for the plaintiffs, and defendants on the day of Mar. filed their motion for a new trial as follows.

Motion for New Trial

St. Louis University
vs
John S. McCune, et als.

Land Court.

defendants come and move the Court to set aside the verdict and judgment in this cause for the reasons.

1. That the Court gave erroneous instructions for the plaintiff.
2. That the Court erroneously refused the instructions asked by defendants.
3. That the verdict was against evidence in not finding that plaintiffs possession over the line of his survey was by mistake, and therefore not adverse to defendants and those under whom they claim.
4. Because the verdict is against evidence.
5. Because the instructions given of the Courts own motion is erroneous.

Whittelsey. p.d.

which the Court on Mar overruled, to which decision of the Court the defendants excepted, and pray that this bill of exceptions be signed and made a part of the record which is done.

It is agreed that the survey & plats used upon the trial may be used in the Supreme Court without being copied into the bill of Exceptions and record

C. B. Lord.

And afterwards the following further proceedings were had in this cause, to wit:

Monday June 7th 1858.

appeal to Supreme Court

St. Louis University
vs
John S. McCune.
Peter. L. Vandeventer, &
John Watt

Appeal to Supreme Court.

Now at this day come said defendants by their attorney, and on motion, an appeal is granted to the Supreme Court, from the decision herein rendered, and by consent of parties an affidavit for appeal is waived, and thereupon said defendants file herein a bond as required by the Court, in the sum of three hundred dollars, with John S. McCune, as principal, and Napoleon Mullikin, and Ansel Phillips, as sureties, which is approved by the Court.

Which appeal Bond is in the words and figures as follows, to wit:

Appeal Bond

Know all men, by these presents, that we John S. McCune, as principal, and Napoleon Mullikin, Ansel Phillips, as sureties, are held and firmly bound unto the St. Louis University, in the sum of Three hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St. Louis, this day of June, A.D. 1858. The condition of the above obligation is such, that Whereas John S. McCune, and Peter L. Vandeventer, have appealed from the judgment rendered against them, and in favor of the St. Louis University, in the St. Louis Land Court, for the sum of Four fou dollars damages and sixty six 2/3 cents, monthly value, together with costs. Now, if the said appellants shall stay all waste and will pay all costs and damages with accruing rents and profits, that may be awarded against them occasioned by such appeal; and shall prosecute their appeal; and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court, may direct the St. Louis Land Court to give

and shall, if the judgment or any part thereof be affirmed comply with and perform the same so far act may be affirmed; and pay all damages and costs which may be awarded against them by the Supreme Court, then this obligation shall be void, otherwise it shall remain in full force and effect.

approved by the Court.
June 7th 1858.
C. A. Mantz. Clk.
By C. P. Walsh. D.C.

John S. McCune (seal)
By Chas C Whittelsey, atty
N. Mullikin (seal)
A. Phillips (seal)

State of Missouri }
County of St. Louis } s.s.

I, Charles A. Mantz, Clerk of the St. Louis Land Court, within and for the County aforesaid certify the foregoing to be a true and correct copy of the Record and proceedings (as required) in the case of St. Louis University, plaintiff, and John S. McCune, and others defendants, as fully as the same remains of Record in my Office.

In testimony whereof, I hereto set my hand and affix the seal of said Court, at office in the City of St. Louis this 22nd day of July A. D. 1858.

Charles A. Mantz, Clerk.

Index.

	Pages
Petition	1. & 2.
Summons	2.
Sheriff Return	3.
Answer filed	3
Answer	3 & 4.
Judgment	4 & 5.
Bill of Exceptions filed	5
Motion for New Trial overruled	6.
Bill of Exceptions Re-filed	6.
Bill of Exceptions (inclusive)	6. 7. 8 & 9.
Instructions Refused	8
" Given	8 & 9.
Motion for New Trial filed	9
Appeal to Supreme Court	10.
Appeal Bond	10. & 11

87 ~~203~~

(12)

March. T. 1859.

St. Louis University
Reppts.

vs

John S. McCune, et al.
appts.

St. Louis Land Court.

A. J. P. Garesche for Pltff
C. C. Whittelsey " deft

Filed 23 July 1858.
Wm S Glanville
Ck.

$6.20 Paid by Jno S. McCune.

87

tr fr. Field atty $1.40/
Opt. cons/ ap. stat/ ap. brief/ ser. brief/ (winner)
Reversed & remanded, 18 June 1859 - 13. p. 379/

Four documents with drawn by Whittelsey atty 29 June 1859 from this case

396

St Louis University Respondent

v

John S. McCune
& als Appellants

Appellants come and say that the Court below erred.

1. In refusing the instructions asked by the defendants.
2. In giving the instructions asked by the plaintiff.
3. In its instruction given of its own motion.
4. In refusing the defendants motion for a new trial.

Whittelsey & Field
Attys for Appt.

~~Defendant joins in~~

Plaintiff joins in error

Henry A. Br. Jaeschke
Atty

Filed 7 April 1859
Wm S Glanville, Ck.

87

St Louis University
Respt
v
John S. McCune
et al Appts

Assignment of Error
Whittelsey & Field
Attys p. Apts

Filed 22 Oct. 1858,
W S Glanville
Ch

The Reporter will make a statement

87. St Louis University vs McCune.

The dispute in this case is about a small strip of land on the line between two common fields in the Grand Prairie of St Louis. Both of the lots were confirmed by the act of Congress of the 29th April 1816. but the official survey of the defendants lot was not approved until 1857, and it does not appear when the survey of the plaintiffs confirmation was approved.

The first question that arises is whether there can be an adverse possession of a confirmation under the act of 1816. until the confirmation has been surveyed, and the survey approved. That question was discussed and decided in the case of Aubuchon vs Ames 27. Mo. 89 which is not distinguishable from this case, and the instructions therefore asked by the defendant bearing on that point were properly refused

If the plaintiffs erected their fence accidentally upon the defendants land, through mistake or ignorance of the correct line seperating the tracts, and without intending to claim beyond their true line, then the line of occupation thus taken and the possession that followed it, did not work a dissession. This proposition is fully sustained by the authorities cited in the defendants brief.

The instruction given for the plaintiff contained in the abstract a correct statement of the law, which is illustrated and approved by the Supreme Court of the United States in the case of Boyd vs Graves 4 Wheat. 518. but the evidence preserved in the record did not warrant it, and for that reason it is erroneous

The other judges concurring the judgment will be reversed and the cause remanded

Jno C Richardson

87

St Louis University

v

Mr Cunningham

Opinion of the Court

Ren remanded

Filed 18 June 1859.
Wm. S. Glanville
Cl.

Richardson

X X.

St. Louis University
Respondent
vs:
John S. McCune
Appellant.

Points of Respondent, by John M. Krum

II. The only material question in this case arises on the instruction given by the Court, at the instance of the plaintiff. –

The right of the plaintiff to recover in this action is based upon twenty years adverse possession before ouster. –

Uninterrupted, continuous possession for more than twenty years is shown by the testimony – In fact this was admitted – the only question raised at the trial was whether the possession shown by the plaintiff was adverse –

It was sufficient for the plaintiff to show that the possession set up to the locus in quo was in pursuance of a claim – this was done by showing the making of a fence upon a line dividing the two tracts of land – by taking possession immediately after, + holding up to such fence, + that Lachapelle's representatives acquiesced in such claim + possession –

It was not necessary to show that Lachapelle's representatives expressly agreed that the line upon which the fence in question was placed was the proper dividing line between the two tracts –

The case shows that the possession of Labbe's representatives up to the line marked by said fence was recognized – that is, acknowledged – – such possession was acquiesced in, that is

passively submitted to, without objection —

This recognition of the line marked by the fence + the acquiescence or passive submission to the possession of Labbe's representatives, tend to prove that such possession was adverse —

The case made by the facts presented in the bill of exceptions is clearly within the rule that twenty years adverse possession before ouster, will sustain an action of ejectment —

Biddle vs Mellon 13. Mo R. 335
Joyal vs Rippy 19 Mo. R. 660.

III. The instruction given at the instance of the plaintiff is perfectly defensible on another ground.

A division fence was upon the ~~ground~~ line claimed by the plaintiff as long ago as March 1836 — and already even then, had the appearance of having been a long time there. There was uninterrupted, visible + notorious possession for more than twenty years to the line of that fence — this possession was acknowledged + virtually assented to —

By these acts the parties claiming respectively under the confirmations of Labbe & La Chapelle, made a practical location or designation of the dividing line between them —

Here is shown the positive acts of Labbe's representatives in making a fence upon the dividing line, + taking possession, + claiming for more than twenty years to the line of that fence; + on the other hand Lachappelle's representatives had notice + recognized such

possession + claim, + acquiesced or assented thereto.

From these acts an agreement of the parties, in respect to the dividing line, may well be inferred. —

Taylor + Mason vs Zepp 14 Mo. 482

Rockwell vs Adams 6 Wend. 467.

Blair vs Smith XVI Mo — p 273

III. The instructions asked by the defendant below + refused by the Court, were properly refused.

The 1st + 3d instructions are directed wholly to the effect of the official surveys in establishing the dividing line between the two tracts of land; leaving out of view altogether the matters in pais touching the same question —

By the 2d instruction the defendant asks the Court to declare as matter of law, what was necessarily a matter of fact. —

Supreme Court

St. Louis University
Respondent

vs:

John S. McCune
appellant

Points of Respondent
by John M. Krum

IN THE SUPREME COURT OF MISSOURI,

AT ST. LOUIS.

MARCH TERM, 1859.

ST. LOUIS UNIVERSITY, Respondent,

vs.

JOHN S. MCCUNE, ET AL., Appellants.

STATEMENT AND BRIEF FOR APPELLANTS.

This was a suit in ejectment, commenced in the St. Louis Land Court on the 9th day of September, 1857, to recover an irregular strip of land in the Grand Prairie common fields, near St. Louis —9 10-12 feet wide at one end, 16 10-12 feet at the other, and 18 26-100 chains, or 1205 feet long. The titles of the parties and the question brought into this Court will appear from the bill of exceptions, which is here given in full.

BILL OF EXCEPTIONS.

This cause came on for trial on the 13th of February, 1858, before the Jury, when, by consent of parties, the case was withdrawn from the Jury and submitted to the Court, sitting as a Jury for trial, and placed upon the law docket for argument. It was admitted that the plaintiffs claim and hold title under confirmation

to Jacques Labbes' representatives, for so much of United States survey, No. 1587, as lies between Bryan and Clay avenues, as shown by plat of survey made by Congress, (left out by agreement of parties).

And that defendants claim and hold title and possession of United States survey, No. 1592, under confirmation to Francois Lachappelle's legal representatives.

Plaintiffs then gave testimony showing that they and those under whom they claim, had had open, continued, notorious, uninterrupted and visible possession of the land, sued for, more than twenty years prior to the entry of defendants, by actual enclosures and that in March, 1836, the division fence was upon the line claimed by plaintiffs as the south line of the land sued for, and that said fence was then old and had the appearance of having been there many years, and that prior to defendant's entry in 1856, the line had not been disputed, and that plaintiff's possession had been held by the line of the old fence, and that defendants entered upon and put up the fence on the line of survey in August, 1856, as shown by the survey of the land sued for.

There was no evidence showing any agreement as to the line, except the actual possession by the fences, and which possession was recognized and acquiesced in by the neighboring proprietors.

The plaintiffs closed, and defendants then read the confirmation to F. Lachappelle's leg. rep. (left out by agreement of parties,) and gave in evidence a copy of United States survey No. 1592, made in 1842, and approved in 1857, (left out by agreement of parties).

Defendants also gave in evidence a connected plat of United States surveys Nos. 1591, 1592 and 1587, *et als* (left out by agreement of parties.)

Defendants then proved that the land they had entered npon and possessed was within the limits of United States survey, No. 1592, as surveyed by the United States, for Lachappelle's legal representatives, and that the possession of plaintiffs had extended south over the north line of the said tract, the fence not being on the dividing line of said surveys as made by the United States, but over upon the land claimed by the defendents, and that the fence had not been straight from the corner of said surveys, and that the fence the defendants had put up was upon the line dividing surveys Nos. 1592 and 1587, as shown by a plat of surveys showing the line of survey and line of fences (left out by agreement of parties).

Defendants also gave evidence to prove that in 1856, after defendants had entered upon the land and commenced building their fences, plaintiff remonstrated, when it was agreed between plaintiffs and defendants, that Wm. H. Cozens, a surveyor, should run the line between the parties, and that both parties should abide by his survey; and that said Cozens made said survey in presence of said parties; and that defendants had put up their fence according to his survey.

Plaintiffs in rebuttal gave evidence tending to prove that said agreement was conditional; that the plaintiffs had the quantity of land called for in their deeds; that then the line might be corrected, but that the line of the United States survey did not give them their quantity called for by their deeds, then the plaintiff would insist upon its rights acquired by possession.

Defendants then asked instructions Nos. 1, 2 and 3, which the Court refused, and defendants excepted.

1. If the Jury believe from the evidence that the defendants are in possession of the land sued for within the lines of survey 1592, for F. Lachappelle's legal representative, as made by the United States; and that said survey was made in 1842, and approved (in) March 2d, 1857, then the Jury will find for the defendants.

2. If the jury believe from the evidence, that the plaintiff claimed title to part of survey No. 1587, under Jacques Lobbe, and his possession has extended over the line before the survey was made by the United States, for defendant, then said possession was not adverse to the title of defendants, as it was a mistake as to the true line.

3. The plaintiff claiming title under the confirmation to Jacques Labbe and survey No. 1587, any possession by plaintiff over the lines of his confirmation, will not be adverse to the defendants claiming under F. Lachappelle's survey No. 1592, until a survey was made by the United States, marking out the dividing line between the confirmations of the plaintiff and defendants respectively.

The Court then gave, for defendant's instructions, No. 4.

4. If the Jury believe, from the evidence, that the possession of the plaintiff of the land sued for was by mistake, as to the true line between the parties, then said possession was not adverse.

The Court gave for the plaintiff the following instructions:

If the Jury find from the evidence in this cause that after the confirmation respectively to the representatives of Jacques Labbe and Lachappelle of adjoining tracts of land, Lachappelle's representatives, or those claiming under them, entered upon the land so confirmed to Lachappelle's representatives, and fixed a boundary line between the tracts of land so respectively confirmed to said Lachappelle's representatives, and said Labbe's representatives, and marked the same by stones or other mon-

uments, and built a fence along and upon said line, and claimed and occupied only up to said line, for more than 20 years; and that the representatives of said Jacques Labbe, or those claiming under them agreed and assented to said line, and took possession of and occupied the land in question up to said line for more than 20 years before the commencement of this suit, the plaintiff ought to recover.

To the giving of which defendant excepted.

BRIEF.

The statement of the case made in the bill of exceptions and illustrated by plats to be exhibited to the Court, is shortly this:

The plaintiff claimed title under a confirmation to Labbe, of a lot of 1 by 40 arpens, in the Grand Prairie; and the defendants claimed title to the adjoining lot on the south, under a confirmation to Lachappelle. Both confirmations were made by the act of April 20th, 1816. The derivative titles of the parties respectively, were admitted. The surveys of these confirmations were first made in 1842.

It appeared in evidence that many years before the lots were surveyed, and more than twenty years before the defendant's entry, a fence had been built near the dividing line of the lots, according to which the lots had been actually occupied by the parties in interest. This fence commenced at the true corner, but in proceeding westwardly encroached on the lot of Lachappelle, describing an irregular course to the western corner of the lots. It did not appear whether this fence was originally erected by parties claiming under Labbe or under Lachappelle. In 1856 the defendants entered and removed the old fence, whereupon a dispute arose and the parties agreed upon a surveyor to run out the true dividing line. The defendants then built their fence along the true line and the plaintiff commenced this suit to recover the land lying between the new and the old fence.

The only question arising on the record, is whether the plaintiff obtained a title by prescription under the statute of limitations beyond the true line of the lots.

On behalf of the defendants it is insisted, that under the cir-

cumstances of this case there was no adverse possession beyond the true line, for the reason that manifestly there was no claim of title beyond that line.

It is well settled that a bare possession, unaccompanied with a claim of title, or originating in accident, ignorance or mistake, is not adverse to the true owner.

Thus, in *Cutter vs Waddingham*, 22 Mo., 266, which was the case of a party building a house on one lot, and encroaching with his fence upon another, this Court said: "If the party built upon one of the lots, and extended the enclosure about the house over upon this lot accidentally, through mistake or ignorance of the boundaries and without any design of taking possession of it, this is not a possession within the meaning of the statute of limitations, although the actual detention, *pedis possessio*, exists, there is wanting the intention on the part of the possessor, which is necessary to constitute a civil possession."

So, in *Jackson vs Porter*, 1 Paine, 466, c. ct., Judge Thompson said: "Possession *per se* is evidence of no more than the mere fact of the present occupation by right. It is not possession alone, but that it is accompanied with the *claim of the fee*, which, by construction of law, is evidence of such an estate."

So, in *Riley vs Grifin*, 16 Georgia, R., Judge Lumpkin said: "Possession, which is the result of ignorance, inadvertance, misapprehension, or in other words mistake, will not work a disseisin. An occupancy under such circumstances would not, we apprehend, constitute adverse possession. It is the intention to claim title which makes the possession of the holder adverse; and this is the doctrine upon which the decision in every case proceeds. If it be clear, therefore, that there is no such intention, there can be no pretence of an adverse possession."

So, in many cases it has been decided that a fence erected by mistake on a wrong line, gives no adverse possession.

Rrown vs Gay, 3 Greenl., 226.
Ross vs Gould, 5 Greenl., 240.
Lincoln vs Edgcomb, 31 Maine, 345.
Gilchrist vs McLauyhlin, 7, Ired., 315.
McKenny vs Kenny, 1 A. K. M., 460.

In *Cleveland vs Flagg*, 4 Cush., 76, the Supreme Court of Massachusetts applied the same principle to a fence erected by agreement, but under a common mistake as to the true line.

So, in *Olwine vs Holman*, 11 Harris, 285, it was held that there was no abandonment of title where there was a mistake as to the position of the lines. In this case Judge Lewis, speaking of the instructions of the Judge below, says: "It is of the utmost importance that land titles should be held by rules of property not likely to be varied by the feelings or prejudices growing out of each particular case. In all cases where the facts are clearly ascertained, and the question is one of law merely, the Court should take the responsibility of deciding it."

The learned Judge in the present case declared the true rule of law in the instruction which he gave on motion of the defendants; but his final decision shows that although he had learned the rule in the abstract, he had no just conception of it in the concrete.

In contrasting the two instructions of the Court below, it is plain that the Judge labored under a confusion of ideas. In the instructions for the defendants, it is declared that a mistaken or unintentional possession gave no title. In the instruction for the plaintiff, it is declared that a possession by a line agreed upon was sufficient to give a title. Now, there was no evidence as to any line being agreed upon by the parties. On the contrary, the existence of any such agreement was expressly negatived in the case. Besides, it is manifest that if any such agreement had existed in respect to the line of the old fence, it must have arisen from a mistake common to both parties as to the position of the true line.

It is plain that the court below was misapplying the doctrine of estoppel. If a wrong line had been fixed by the agreement of the parties and a change of circumstances had taken place on the faith of that line rendering the restoration of the true line injurious to one party, the other party would be holden to the line as fixed by the agreement. This is the principle of the case of *Taylor vs Zepp*, 14 Mo., 482. But in the present case one principal element of the estoppel, is wanting. Neither party is injured by the restoration of the true line; for no change of circumstances has taken place on the faith of the true line's being

justly represented by the old fence. The case, therefore, is one in which a plain mistake may be rectified without injury or injustice.

Until the survey made by the United States definitely located the line between the lands of the parties, the intention which constitutes an adverse possession was wanting.

In *Jourdan vs Barrett*, 4 How R., 169, 184, the Court say that until the land was surveyed, and the survey approved, there can be no limitation. This same doctrine is more positively affirmed in *Bryan vs Forsyth*, 19 How R., 334, 336, in the following words; "The survey was made in 1840, by order of the Surveyor General of Illinois and Missouri, which was duly returned, approved and recorded. We are of opinion that the act of 1833, conferred on the grantee an incipient title, and reserved to the executive department administering the public lands to settle the boundaries by actual survey among the claimants; and until this was done, the Courts of Justice could not interfere and establish boundaries. It was competent for Congress to provide that before a title should be given to a confirmee, the exact limits of his confirmation should be ascertained by a survey executed by authority of the United States. (*West vs Cochran*, 17 How, 415.)"

See also *Ledoux vs Black*, 18 How R., 475, *Cousin vs Blanc*, 19 How R., 202.

The confirmation to Lachappelle, was, by its terms, "to be surveyed," as was also the case in *Bryan vs Forsyth*, above quoted, so that until the survey was actually made on the ground, the line could not be known.

Cobanne vs Lindell 12 Mo. R., 1821.

The point presented in the case at bar differs from that of *Aubuchan vs Ames*, decided, 27 Mo. R., or that of *Landes vs Brant*, 10 How R., 348. In those cases, the question presented under the statute of limitations, was, *who was the representative or person to whose benefit the confirmation enured;* for, the defendants claimed under the same title as the plaintiffs; both parties claimed under the confirmation. But in this case the plaintiff claims that his confirmation to Jacques Labbe, covers this strip of ground by virtue of his possession twenty years, while

in fact, until the survey was made, the possession was not adverse nor hostile, as it could not be known where the line would be; it might have varied twenty feet one way or the other.

See, *Merhens vs Blumenthal*, 19 Mo., 496, *Ang. on Lim.* § 384, *Comegys vs Carley*, 3 Watts Penn. R., 280.

The real enquiry is, as to the fact of entering and the intention to *usurp* possession, "in legal language, the *intention* guides the entry and fixes its character." *Bradstreel vs Huntington* 5 Pet. R., 440, *Ewing vs Burrett*, 11 Pet. R., 41. Until the survey was made, it would have been impossible for Lachappelle's representatives to prove where the exact line was, and until this line was established by legal surveys, the courts could not interfere and establish boundaries and locate the line.

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