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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002665-MR

EDWARD VANHORN;
CLIFFORD FRAZIER;
AND BEULAH FRAZIER — APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
CIVIL ACTION NO. 98-CI-00161

THOMAS JORDAN AND
MARTHA JO JORDAN, HIS WIFE,
AND NELSON SPARKS — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: A real property owner with record title may not adversely possess his own land. Edward Vanhorn and Clifford and Beulah Frazier appeal from a circuit court judgment that ruled Thomas and Martha Jordan to be the record title owners of disputed land. But the judgment also found that the Jordans owned the same disputed land by adverse possession. So these

are legally inconsistent findings that require us to vacate the judgment and remand the case to circuit court for new findings consistent with the law and the evidence. Also, because the Fraziers had at least colorable title to the disputed land, the trial court erred when it awarded treble damages and attorney's fees on the Jordans' statutory "tree piracy"[1] claim against Vanhorn and the Fraziers. So we must also vacate the separate judgment awarding damages and order a new trial on damages consistent with this opinion.

Thomas and Martha Jordan filed an action in circuit court against Vanhorn claiming damages under Kentucky Revised Statute (KRS) 364.130 for timber that Vanhorn cut and removed from land the Jordans claimed to own. Vanhorn moved the court to require the Fraziers, the people who hired him to cut the timber on this disputed land, to be joined as indispensable parties. The trial court denied Vanhorn's motion but then allowed the Fraziers to intervene in the case. Even though the Fraziers never filed pleadings, they were treated as defendants in further proceedings.

The trial court bifurcated the claims and referred the case to the Master Commissioner who first heard and recommended findings on the proper boundary line between the Jordans and the Fraziers. At that hearing, the Jordans primarily relied upon

[1] *See* King v. Grecco, 111 S.W.3d 877, 881 (Ky.App. 2002).

the testimony of Joseph Curd, a land surveyor. Curd testified that based on a survey from the 1920s, the property line between the Jordans and the Fraziers ran through a cove, not along the ridge. Thus, according to Curd, the Jordans' property included the area from which Vanhorn cut the timber. In contrast, the Fraziers' surveyor, Randall Thompson, testified that based on his own survey using 1870 deeds from a predecessor in title common to both the Fraziers' and Jordans' property, the true boundary ran along the ridge. So based upon Thompson's testimony, the Fraziers' property encompassed the area from which the trees were removed.

Faced with contradictory evidence, the Master Commissioner issued a report and recommendation finding that the property description in the 1870 deeds used by Thompson were too imprecise to be reliable. So the Master Commissioner found that the proper boundary line ran through the cove, which comported with the evidence presented by Curd. Accordingly, the Master Commissioner found that the Jordans owned the disputed property from which the trees were removed. Curiously, however, despite the finding that the Jordans had record title to the disputed property, the Master Commissioner also found that the Jordans were the owners of the same disputed property by adverse possession. The circuit court ultimately adopted the Master Commissioner's recommendations regarding the proper placement of

the boundary line and denied the Fraziers' motion to alter, amend, or vacate those findings.

Having resolved the boundary line dispute, the Master Commissioner then moved on to a hearing to determine what damages, if any, the Fraziers and Vanhorn owed the Jordans for cutting the trees. The Master Commissioner found that the Fraziers and Vanhorn owed the Jordans, jointly and severally, $45,957.98. The circuit court adopted the Master Commissioner's recommendations and entered judgment accordingly. The court denied the Fraziers' motion to alter, amend, or vacate those findings. The Fraziers and Vanhorn have appealed.

Appellants raise several issues on appeal. But we are precluded from addressing many of those issues because of the inherent flaw in the judgment created by the trial court's inconsistent factual findings.

As stated before, the trial court found that the Jordans had record title to the disputed property and also found that they owned that same property by adverse possession. It is a basic tenet of property law that a property owner with record title may not adversely possess his own land because "[o]ne claiming title by adverse possession always claims in derogation of the right of the true owner, admitting that the legal title

is in another."[2] The evidence supporting adverse possession and record title varies in type, scope, and volume; different levels of proof are required for each determination.[3] So the inconsistency of the findings prevents us from undertaking a review of the trial court's judgment regarding the ownership of the disputed property.[4] Consequently, the trial court's judgment must be vacated and this action remanded for a specific determination of the method by which the trial court finds from the evidence that the Jordans own the disputed land.

As we mentioned before, this case must also be remanded for a new determination of damages. KRS 364.130 governs damages for cutting timber from another person's land. Subsection 1 of that statute states in relevant part that "any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the

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[2] 3 Am.Jur.2d *Adverse Possession* § 11 (2002).

[3] For example, a party claiming to own land by adverse possession must prove each required element by clear and convincing evidence. Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

[4] *See* 5 Am.Jur.2d *Appellate Review* § 689 (1995) ("But review is generally not possible where . . . the reviewing court is left in doubt as to just what the trial court believed the facts to be and is left to speculate as to the basis for judgment.").

rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber." The statute says that a person is liable for treble damages for cutting timber from another person's land only if the person cutting the timber did not have at least color of title to the land from which the trees were cut. So in order for the Jordans to receive treble damages, the evidence must show that the Fraziers did not have color of title to the disputed property from which the timber was cut.

If the trial court believed that the Jordans owned the disputed land by way of adverse possession, then the record titleholders to that disputed land must necessarily be the Fraziers. Thus, under those circumstances, the Fraziers had far more than mere color of title[5] to the disputed property when they hired Vanhorn to cut timber from it. Under the express terms of KRS 364.130, neither the Fraziers nor Vanhorn would have been liable for treble damages.

On the other hand, if the trial court found that the Jordans owned the disputed land because they simply had record title to it, then the Fraziers may still have color of title to

[5] Color of title is "that which gives the semblance or appearance of title, but which is not title. . . . " 3 Am.Jur.2d *Adverse Possession* § 123 (2002). *See also* Shutt v. Methodist Episcopal Church, 187 Ky. 350, 218 S.W. 1020, 1021 (1920) ("It must be remembered that 'color of title' is title in appearance only and not title in fact. If the instrument itself passes or constitutes title, it is not 'color of title.'").

the disputed property by virtue of the fact that their deed also purports to encompass it, at least according to Thompson's interpretation of the 1870 deed. It has long been the rule in Kentucky that "[g]enerally speaking, any instrument, however defective or imperfect, and no matter from what cause invalid, purporting to convey the land and showing the extent of the tenant's claim, may be 'color of title[.]'"[6] Thus, the Fraziers may have color of title to the disputed property, even though the legal description in the 1870 deed does not close and the monuments called for in its legal description cannot now be found.

Although it is a criminal case involving a charge of feloniously cutting timber from the land of another, Hurst v. Commonwealth[7] is instructive. As in this case, Hurst cut down timber on land that he allegedly thought he owned but which another party also claimed to own. In order to be convicted for that alleged timber piracy, Hurst must have cut the timber without color of title to the land upon which the timber was growing. The court noted the existence of two plausible boundary lines, one of which would cause Hurst to own the land

[6] Shutt, 216 S.W. at 1021; Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992) ("any instrument that purports to convey land and shows the extent of the grantee's claim may afford color of title. Thus even a deed that is defective or invalid is sufficient to afford color of title."). (internal citation omitted).

[7] 276 Ky. 824, 125 S.W.2d 772 (Ky. 1939).

in question, another of which would not. The court found that Hurst, therefore, was entitled to a directed verdict of acquittal because he had color of title to the land. In reaching that conclusion, the court stated:

> It is clear from the evidence that the line claimed by appellant [Hurst] to be the correct one is the one called for in the division of the Miller estate, and constituted the closing line of the Duncan tract and the beginning line of the Hurst tract, and it is admitted that if this line be the correct one the timber in question was taken from appellant's land. Appellant claiming under this line, it cannot be said that he had no color of title. Whether this line be the correct one we need not determine since that question is not before us. "Color of title" does not mean title in fact, but appearance of title[;] and it cannot be said that the line claimed by appellant did not furnish appearance or "color" of title. It is clear that there was a bona fide dispute between the parties and appellant had reasonable grounds to believe that the line claimed by him was the correct one.[8]

Similarly, as the Fraziers apparently believed in good faith that they owned the disputed land, it would appear that they may have had colorable title to it.

On remand, the trial court must first determine how the Jordans own the disputed property (record title or adverse possession). The trial court must then determine whether, regardless of the how the Jordans own the disputed property, the

[8] *Id*. at 774 (internal citation omitted).

Fraziers had color of title to that property. If the Fraziers did have color of title, which appears likely from the evidence presented at the hearings, then the Jordans' damages do not flow from KRS 364.130. Rather, the Jordans' damages, if any, must be assessed as follows:

> The rule heretofore adopted by this court is that where timber is cut and removed by an innocent trespasser, the measure of damages is the reasonable market value of the timber on the stump. If the trespass is willful, a different measure is applied. In that event the measure of damages is the gross sale price at the point of delivery.[9]

Thus, it is necessary for the trial court to make more specific findings regarding the damages owed to the Jordans.

For the foregoing reasons, the judgments of the Lawrence Circuit Court are hereby vacated and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
Don A. Bailey Louisa, Kentucky	Nelson T. Sparks Louisa, Kentucky

[9] D.B. Frampton & Co. v. Saulsberry, 268 S.W.2d 25, 27 (Ky. 1954) (internal citation omitted). *See also* Gum v. Coyle, 665 S.W.2d 929, 930-931 (Ky.App. 1984).