

Case No. 5,063.

FRASER ET AL. V. HUNTER ET AL

[5 Cranch, C. C. 470.]¹

Circuit Court, District of Columbia.

Oct. Term, 1838.

BOUNDARIES—EVIDENCE—EXTENTORPOSSESSION—LOCUSINQUO—PARTIES—PROOF—JOINT ACTIONS.

1. When the question is upon a disputed boundary line, the court will not permit hearsay evidence to be given that a particular object (such as a spring), was on the land of one of the parties.

[Applied in *South-West School Dist. v. Williams*, 48 Conn. 508.]

2. The possession of a person claiming title without definite metes and bounds, will not, in law, be deemed to extend beyond the actual possession proved.

3. A husband, who has conveyed all his estate to a trustee for the sole and separate use of his wife, may join with her in an action of trespass quare clausum fregit, and in law would be entitled to the damages recovered, although in equity he might be considered as receiving them in trust for the separate use of the wife.

4. A deed of bargain and sale by a person not in possession conveys no title.

5. There must be actual possession by the plaintiff, of the locus in quo, at the time of the supposed trespass.

6. The plaintiff must prove every abuttal set forth in his declaration. Boundaries may be proved by hearsay.

7. All the plaintiffs must have a right to recover, or none can recover. There must be a joint cause of action.

Trespass quare clausum fregit.

Mr. Brent, for plaintiffs [A. R. Fraser and W. S. Alexander and wife), offered to prove by a witness, that some years ago, Simon Summers, an old and legal surveyor of the county of Alexandria, who is now dead, showed the witness a line of Chapman's land, under whom the defendants [Alexander Hunter and Robert Ball,] claim to hold, at or near Hall's Spring, and stated to the witness that Hall's Spring was on the land of the Alexanders; to which evidence the defendants objected, and THE COURT (THRUSTON, Circuit Judge, absent), refused to permit the same to be given; to which refusal the plaintiffs took a bill of exceptions.

The plaintiffs offered in evidence a trust deed, dated April 20, 1807 (under which the plaintiffs claim), from the plaintiff W. S. Alexander to Baldwin Dade (the father of Mrs. Alexander, wife of W. S. Alexander, and one of the plaintiffs), conveying "all his right, title, and interest in any lauds lying between the lines north six west, and north seventeen west, supposed to be the west boundary of Howison's patent," without describing his claim by metes and bounds; and contended, that as they had proved Mrs. Alexander's possession east of the disputed line, such possession was evidence of his possession

up to the line north seventeen west, including the land in dispute.

CRANCH, Chief Judge, was of opinion that as the deed did not describe the lands conveyed by W. S. Alexander to Air. Dade, by metes and bounds, his possession could not be considered as extending beyond his actual possession proved. *Ellicott v. Pearl*, 10 Pet. [33 U. S.] 442.

MORSELL, Circuit Judge, was of opinion that the deed should go to the jury with such parol evidence as had been given.

The plaintiffs, however, gave subsequent evidence of acts of possession, by cutting wood for fuel and other purposes, on the disputed lands, by the son of the plaintiff Walter S. Alexander, about sixteen years ago, and then THE COURT (THRUSTON, Circuit Judge, absent), permitted the deed to be read in evidence to the jury.

THE COURT also permitted the following question to be asked of the plaintiffs' witness, Mrs. Zimmerman: "Do you know, by general reputation, any of the lines, or boundaries, or corners, of Mr. Walter Alexander's land? She answered, "No;"but said that Hall's Spring was generally reputed to be on Alexander's land;but THE COURT said that that was not admissible evidence. They, however, permitted her to be asked whether Hall's Spring was generally called "the head of long branch," that being one of the calls of Robertson's patent See *Leland v. Wilkinson*, 6 Pet [31 U. S.] 317; *Ellicott v. Pearl*, 10 Pet [35 U. S.] 412.

THE COURT also permitted the declarations of the plaintiff W. S. Alexander, to be given in evidence by the defendants, although he had conveyed all his estate to a trustee for the sole use of his wife, (who is also a plaintiff,) it being an action of trespass quare clausum fregit, and not a real action; and the damages, so far as his wife is to participate in them, will, at law, become the property of her husband, although in equity he might be considered as a trustee of them for her separate use.

Mr. Taylor, for defendants, moved the court to instruct the jury, that upon the plaintiffs' evidence they cannot recover. 1. Because one of the plaintiffs, by their own showing, has no interest After his deed to Dade, W. S. Alexander was only the agent of Dade, and of his wife, and in that character cannot maintain an action for a trespass; and if an improper party is one of the plaintiffs, it is a misjoinder, and there must be a nonsuit 1 Chit. Pl. 54; *Goodtitle v. Morgan*, 1 Term R. 758. 2. Because the plaintiffs have not proved possession at the time of the supposed trespass. Com. Dig. 377, tit "Trespass." B. 3; *Wells v. Prince*, 4 Mass. 64; *Stuyvesant v. Tompkins*, 9 Johns. 61; *Dunham v. Stuyvesant*. 11 Johns. 569; 5 Dane, Abr. 553, 554; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Graham v. Peat*, 1 East, 244.

R. J. Brent, contra, admits that If there has been a misjoinder it is fatal. But this is not a misjoinder, because in all actions to vindicate the rights of the wife against a stranger,

the husband must be joined, although he has no personal interest in the event of the suit. *Cookson v. Castline*, Cro. Eliz. 96; *Weller v. Baker*, 2 Wils. 423.

The deed of trust for the benefit of the wife cannot be set up to defeat her right of action. She as cestui que trust has a right of action for a trespass upon her possession, and her husband "must be joined for conformity." *Hopkins v. Ward*, 6 Munf. 38; *Ricard v. Williams*, 7 Wheat [20 U. S.] 59; *Smith v. Lorillard*, 10 Johns. 347; *Catteris v. Cowper*, 4 Taunt. 547; *Ewen v. Burnett*, 11 Pet. [36 U. S.] 53; 7 Com. Dig. 510, tit. "Trespass," B. 2. Possession alone is sufficient to support the action against a mere wrongdoer. *Graham v. Peat*, 1 East, 246. Mrs. Alexander is one of the heirs at law of the deceased Baldwin Dade, the trustee, and is also the cestui que trust, and is therefore properly made one of the plaintiffs; and if she is entitled to sue, her husband must also be made a plaintiff. *Brotherson v. Hodges*, 6 Johns. 108; 1 Saund. note g; 2 Tuck. Bl. Comm. 218; *Harper v. Charlesworth*, 4 Barn. & C. 574; *Catteris v. Cowper*, 4 Taunt 546; *Ellicott v. Pearl*, 10 Pet [35 U. S.] 442. To constitute actual possession, it is not necessary that there should be any fence or in-closure on the land. *Id.*; *Ewen v. Burnett*, 11 Pet [36 U. S.] 52; *Lessee of Sicard v. Davis*, 6 Pet. [31 U. S.] 139, 140; *Jackson v. Lunn*, 3 Johns. Cas. 118; *Hunt v. Wiekliffe*, 2 Pet. [27 U. S.] 204; *Alexander v. Pendleton*, 8 Cranch [12 U. S.] 462; *Jackson v. Wheat*, 18 Johns. 44; *Bicard v. Williams*, 7 Wheat [20 U. S.] 105; *Lessee of Clarke v. Courtney*, 5 Pet [30 U. S.] 354, 356.

Mr. Brent proposed to ask young Mr. Alexander (who had testified that about sixteen years ago he had gone upon the land now in dispute and cut wood upon it), whether, at the time of his going upon the land in dispute he did so under a claim of title by his father and mother up to the line N. 17 west the supposed west line of Howison's patent; but

THE COURT (MORSELL, Circuit Judge, contra,) refused to permit the question to be asked, because no title was shown by metes and bounds up to that line, and therefore there can be no constructive possession to that line.

Mr. Coxe in reply, as to the defendant's motion to instruct the jury that the plaintiffs cannot recover upon their evidence, contended that the plaintiffs must prove all their abuttals, which they have not done. *Martin v. Kesterton*, 2 W. Bl. 1089; 5 Dane, Abr. 594; 2 Salk. 453; 2 Chit. 388, note n; Bull. N. P. 89. The deed from W. S. Alexander to Dade, under which the plaintiffs claim, is only of his interest in any lands in Howison's patent lying between the lines north 6 west, and north 17 west; and bounded on

the north by Mason's land, on the west by the Glebe, and on the east by Custiss's land. There is no evidence that the locus in quo is in Howison's patent, nor is that patent located on the plat. There is no evidence that it is bounded on the north by Mason's land, nor on the west by the Glebe, nor on the east by Custiss's land. It is admitted that possession alone will maintain trespass against a mere wrongdoer; and the plaintiffs, if they can recover in this action, must recover upon their possession alone, for they have not made out a title. There is no evidence of any possession by Eraser; and as all must have a joint cause of action, or none can recover, it is evident that the plaintiffs cannot recover in this action. Besides, there is no evidence that Alexander was in possession at the time of his deed to Dade. And a deed of bargain and sale without possession in the bargain or is void. There is no evidence of possession until about the year 1822, and the deed was made in April, 1807. *Peters v. Condron*, 2 Serg. & It. 83; *Wickham v. Freeman*, 12 Johns. 183. Mr. Alexander had no possession at the time of the supposed trespass, and therefore is improperly made a plaintiff in the cause. *Starr v. Jackson*, 11 Mass. 519; 15 Petersd. Abr. 148.

As to the abuttals, Mr. Brent cited *Roberts v. Karr*, 1 Taunt. 497, and *Durgin v. Leighton*, 10 Mass. 56.

THE COURT (nem. con.) was of opinion that the plaintiffs could not recover upon the evidence, for the reasons stated in the argument of the defendant's counsel. The plaintiffs became nonsuit, acquiescing in the opinion of the court

¹ [Reported by Hon. William Cranch, Chief Judge.]