

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

**JUANITA GRIFFIN, PATSY WALTS,
JAMES E. HAGGARD, and REUBEN
HAGGARD,**

Plaintiffs-Counter-Defendants-Appellees,

Vs.

Decatur Chancery No. 2482
C.A. No. 02A01-9606-CH-00134

FILED

March 31, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

DONNIE INMAN UNDERWOOD,

Defendant-Counter-Plaintiff-Third-
Party Plaintiff-Appellant,

**ALSON HICKERSON and WABORN
HICKERSON,**

Third-Party Defendants-Appellees.

FROM THE DECATUR COUNTY CHANCERY COURT
THE HONORABLE WALTON WEST, CHANCELLOR

Carthel L. Smith, Jr., of Lexington
For Appellees

Edwin C. Townsend of Parsons
For Appellant

AFFIRMED AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This is a boundary dispute case. Defendant, Donnie Inman Underwood, appeals the judgment of the trial court holding, *inter alia*, that the plaintiffs, Juanita Griffin, Patsy Walts, James E. Haggard, and Reuben Haggard, have color of title to the disputed property.

The land involved is located in Decatur County, Tennessee. The parties are adjoining landowners, and the plaintiffs' tract of land is north of the land owned by the defendant. The plaintiffs assert that their southern boundary is an old fence line that runs from east to west, while the defendant asserts that the boundary line is Byrd Road, a public road that also runs from east to west but lies north of the fence line. Both parties assert that they own the two acres of timber land that lie between the fence line and Byrd Road.

The dispute between the parties arose in 1994 when the plaintiffs hired Alson Hickerson and Waborn Hickerson to cut timber on the disputed property. Although it is not clear in the record, the defendant apparently objected to the timber cutting. The plaintiffs then filed a complaint in October of 1994, which alleges that they own the disputed tract of land and requests that the court establish a boundary line between the adjoining tracts. The complaint further alleges that the defendant knew or should have known of the boundary between the parties' respective tracts of land based on old surveys and old fence lines, but that the defendant disregarded these by exercising control over a portion of the plaintiffs' property. The complaint avers that the defendant filed false and malicious charges against the timber cutters who were attempting to cut timber on the plaintiffs' land. The complaint further avers that the plaintiffs' deed encompasses the disputed property and, in the alternative, that they have established the requirements for adverse possession under T.C.A. § 28-2-101 *et seq.* (1980). The complaint also seeks an award of damages.

The defendant filed an answer to the complaint, a counterclaim against the plaintiffs, and a third-party complaint against the timber cutters, the Hickersons. The defendant's answer asserts that the plaintiffs' boundary line is Byrd Road and that the plaintiffs disregarded this boundary by hiring the Hickersons to harvest timber between this road and the fence.

In the counterclaim, the defendant avers that she is the owner of the disputed property by virtue of a survey recorded in 1978 and a deed recorded in 1990, and she requests that the court establish the boundary line between the parties pursuant to T.C.A. § 16-11-106 (1980). The defendant also asserts that the plaintiffs' action is barred because she and her predecessors in title, and not the plaintiffs, have paid the taxes on the disputed property for more than twenty years. Alternatively, the defendant claims that she is the owner by virtue of adverse possession. The defendant also seeks to recover damages for the wrongful cutting of timber under T.C.A.

§ 43-28-312 (1993).

The case was tried before the court without a jury. The trial court's judgment provides in pertinent part:

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT, that the Plaintiffs have color of title to the disputed property in question and the Defendant Underwood's color of title as evidenced by the 1921 deed does not encompass the disputed property.

IT IS FURTHER ORDERED BY THE COURT, that the Court finds that neither party has adversely possessed the disputed property for the prerequisite period of time to claim any ownership by virtue thereof or to use the theory of adverse possession as a defense.

IT IS FURTHER ORDERED BY THE COURT, that the Plaintiffs have failed to pay taxes on the property for more than twenty (20) years and are barred from bringing this action pursuant to the provisions of T.C.A. 28-2-110, and their suit is hereby dismissed.

IT IS FURTHER ORDERED BY THE COURT, that the Third-Party Complaint filed by Third-Party Plaintiff, Donnie Inman Underwood, against Third-Party Defendants, Alson Hickerson and Waborn Hickerson, is dismissed.

The judgment incorporated the trial court's memorandum opinion stating the issues for determination and the court's findings thereon. The first listed issue is, "which part[y]'s deed encompasses the disputed tract." Although the trial court's judgment used the term "color of title," it is implicit from the issue under consideration and the findings of the trial court that the court's determination is that plaintiffs' deeds established title to the property extending south to the fence line. The court also noted in the memorandum opinion that the dismissal of their suit pursuant to the provisions of T.C.A. § 28-2-110 (Supp. 1996) does not preclude them from defending their title in the counterclaim filed by defendant.

Defendant has appealed and basically presents two issues for our review: 1) Whether the weight of the evidence preponderates against the findings of the trial court, and 2) Whether the trial court erred in failing to award the defendant treble damages for the timber that was cut and removed from the land on behalf of the plaintiffs by the third-party defendants, the Hickersons.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court.

Unless the evidence preponderates against the findings, we must affirm, absent error of law.
T.R.A.P. 13(d).

The plaintiffs' chain of title dates back to a deed recorded in 1937, when F.M. Miller, the plaintiffs' grandfather, purchased two tracts of land from the Decatur County Court Clerk. This deed contained a boundary description of the second tract, which is the land relevant to this dispute:

On the North by Miller; On the South by McMillan; On the East by Miller and on [the] West by Johnson; Containing 112 acres more or less.

In 1941, Jessie Miller, the widow of F.M. Miller, conveyed the property to the plaintiffs' mother, Faye Haggard, for life, with a remainder to her heirs, and that deed was recorded in 1957. The 1941 deed provided the following description of the second tract of the property:

Bounded on the North by Cherry; on the South by Gibson; on the East by Tract [No.] one above described in this deed; on the West by Quinn, containing 112 acres more or less.

The plaintiffs inherited this real estate upon the death of their mother.

The defendant's chain of title dates back to a deed recorded in 1921 by which her father, V.C. Inman, acquired the property from E.M. Quinn. The 1921 deed provided the following description of the defendant's property:

Beginning on the North East corner of E.M. Miller land on a post oak. Thence west with the meanderings of said road to a red oak. Thence North East to a white oak on the Frank Cary land. Thence east with the Cary line to a Hickory. Thence north with E.M. Miller's line to the point beginning Cooper, containing by estimation 25 acres to be the same more or less.

When the defendant's father died in 1939, title vested in the defendant and her sister subject to their mother's homestead and dower rights. The defendant had the property surveyed in 1978, and the survey was recorded that same year. The survey provided that the defendant owned the land between the fence line and Byrd Road. The defendant purchased her sister's one-half interest in the land by a deed recorded in 1990 and is now the sole owner of the property. The description of the property in the 1990 deed was based on the 1978 survey and provided that the defendant's property included the disputed tract of land. The issue in this case is who owns the land between the fence line and Byrd Road, the plaintiffs or the defendant. Since the counterclaim seeks to establish a boundary line, this case falls within the ambit of T.C.A. § 16-

11-106:

16-11-106. Boundary disputes. —(a) The chancery court has jurisdiction to hear and determine all cases in which the boundary line or lines of adjoining or contiguous tracts of land is one, or the only question at issue in the case.

(b) In all such cases a complete deraignment of title by the complainant from a state grant or common source of title shall not be required as in ejectment cases, but it shall be sufficient to establish title in complainant, that he prove clearly that he is the true owner of the lands described in his bill.

T.C.A. § 16-11-106 (1994). As pointed out in *Carr v. Wilbanks*, 45 Tenn. App. 372, 324

S.W.2d 786 (1958):

This [paragraph (b) quoted above] simply means that the complainant must prove that he is the true owner or that he had become entitled to the possession of land adjacent to the boundary which he undertakes to have established, —that is, the disputed area of land, by clear proof, and in such an action the Chancellor would be confined to a determination by such clear proof,—if he rested his decree upon title, to decree title only to the particular disputed area.

Id. at 386, 324 S.W.2d at 792.

The trial court in the case before us dismissed the plaintiffs' complaint under T.C.A. § 28-2-110 because they had not paid taxes for more than twenty years on the property. T.C.A. § 28-2-110 provides, in pertinent part:

28-2-110. Action barred by nonpayment of taxes. — (a) Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom he claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in any of the courts of this state

T.C.A. § 28-2-110(a) (1980 & Supp. 1993). The trial court allowed the defendant to introduce tax maps into evidence, but only for the purpose of establishing who paid the taxes on the disputed property. The tax maps indicated that the disputed property was assessed to the Gibsons until 1978. Since 1978, the disputed property has been assessed to the defendant and her family, and they have paid the taxes on the property. The defendant argues that these tax maps establish that she is the owner of the disputed property. We disagree. Tax maps are admissible only as evidence of who paid taxes on the disputed property, and not as evidence of who owns the disputed property. *Whitworth v. Hutchison*, 731 S.W.2d 915, 917 (Tenn. App.

1986). Thus, the trial court property limited the admissibility of the tax maps to the issue of the payment of taxes.

Because the plaintiffs have not paid taxes for more than twenty years on the disputed property, the trial court correctly dismissed their complaint under T.C.A. § 28-2-110. However, the failure to pay taxes under T.C.A. § 28-2-110 does not bar a defense of title. *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984). Given that the defendant in this case filed a counterclaim against the plaintiffs alleging that she owned the disputed property, the plaintiffs' defense in the posture of a counter-defendant was not barred. *Catlett v. Whaley*, 731 S.W.2d 544, 546 (Tenn. 1987). Thus, the trial court properly determined the ownership of the disputed property.

The trial court examined the deeds in the parties' chains of title and held that the plaintiffs' deed encompassed the disputed property. As noted previously, the plaintiffs' chain of title dates back to a deed recorded in 1937. The 1937 deed provides that the disputed property is bounded "on the South by McMillan." The next deed in their chain of title, the 1941 deed, provides that their property is bounded "on the South by Gibson."

In a suit to determine the true owner of a tract of land, the parties may resort to the deeds of others as well as their own deeds. *Patterson v. T.J. Moss Tie Co.*, 330 S.W.2d 344, 351 (Tenn. 1959). "Where a landowner's boundaries are described in the deed by the boundaries of others only, the court looks to the deeds of the adjoining landowners to establish the boundaries." *Buis v. Henry Medford, Inc.*, 798 S.W.2d 530, 531 (Tenn. App. 1990) (citing *Cusick v. Cutshaw*, 34 Tenn. App. 283, 237 S.W.2d 563 (1948)). Because the deeds in the plaintiffs' chain of title refer to the boundaries of adjoining landowners, the trial court examined the deeds relating to the land south of the plaintiffs' property. The property south of the fence line is presently owned by Jennetta Johnson.¹ The trial court found that the fence line forms the northern boundary of her property. In 1982, Johnson's mother, Bonnie Gibson Miller, conveyed the property south of the fence line to her by a deed recorded that same year. Bonnie Gibson Miller inherited the property upon the death of A.L. Gibson, her husband and Jennetta Johnson's father. A deed recorded in 1941 indicates that A.L. Gibson bought the property from Nina

¹ Johnson is referred to inconsistently in the record as Jennetta Johnson, Jeanetta Johnson, and Jenetta Johnson.

McMillan. Thus, the Johnson property was formerly known as the Gibson property and, before that, the McMillan property.

The plaintiffs introduced the testimony of Eddie Coleman, Jr., a surveyor, who was tendered and accepted as an expert. Coleman testified that he examined the deeds in the plaintiffs' chain of title and the deeds in Jennetta Johnson's chain of title. As noted earlier, the 1937 deed in the plaintiffs' chain of title provides that the plaintiffs' property is bordered on the south by the McMillan property. The 1941 deed in their chain of title provides that their property is bordered on the south by the Gibson property. The property that was once owned by the McMillans and later by the Gibsons is now owned by Jennetta Johnson, and it is undisputed that this fence line is the northern boundary of this property. Based on the language in these deeds, Coleman determined that the fence line, and not Byrd Road, is the southern boundary of the plaintiffs' property.

Coleman further testified that he examined the deeds in the defendant's chain of title and found that the particular call descriptions in her 1990 deed were not the same as those in the 1921 deed in her chain of title. Coleman stated that he could not find the defendant's property, much less plot it out, by the description of the property contained in the 1921 deed.

The defendant introduced the testimony of Lyndell Daniel, a surveyor, who was tendered and accepted as an expert. Daniel testified that he was hired by the defendant to perform a survey of her mother's property in 1978 and that the survey was recorded that same year. The 1978 survey indicated that the defendant's mother owned the property between the fence line and Byrd Road. The defendant and her sister used the survey's description of the property in their 1990 deed.

On cross-examination, however, Daniel admitted that he could not plot out the defendant's property by following the calls in the 1921 deed in her chain of title. Daniel further admitted that the deeds in the plaintiffs' chain of title provide that the fence line is their southern boundary. As such, the trial court found that the defendant's 1921 deed did not support the 1978 survey and did not encompass the disputed property. Our review of the record leads us to conclude that the evidence does not preponderate against the trial court's finding that the plaintiffs' 1941 deed, and not the defendant's 1921 deed, encompasses the disputed property.

Alternatively, the defendant argues that she and her predecessors in title have adversely possessed the land from the fence line up to Byrd Road. The defendant relies upon the following statutes:

28-2-101. Adverse possession – State conveyance. – (a) Any person having had, by himself or those through whom he claims, seven (7) years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the state of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title.

28-2-102. Action barred after seven years. – On the other hand, any person, and those claiming under him neglecting for the said term of seven (7) years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in § 28-2-101, are forever barred.

28-2-103. Seven year period runs from time right accrued–Extent of possession.–(a) No person or anyone claiming under him shall have any action, either at law or in equity, for the recovery of any lands, tenements or hereditaments, but within seven (7) years after the right of action accrued.

28-2-105. Adverse possession – Assurance of title. – Any person holding any real estate or land of any kind or any legal or equitable interest therein, and such person and those through whom he claims having been in adverse possession of same for seven (7) years, where said real estate is held and claimed by him or those through whom he claims by a conveyance, devise, grant, a decree of a court of record, or other assurance of title purporting to convey an estate in fee, and such conveyance, devise, grant, or other assurance of title, has been recorded in the register's office of the county in which the land lies for a period of thirty (30) years or more, is vested with an absolute and indefeasible title to such real estate or interest therein.

T.C.A. §§ 28-2-101 to 28-2-103, 28-2-105 (1980). To constitute adverse possession, the possession must be actual, visible, continuous, exclusive, hostile and notorious, and under a claim of right. *Harrison v. Beaty*, 137 S.W.2d 946, 952 (Tenn. App. 1939). If any of these elements is not present, there is no adverse possession. *Id.*

The trial court in this case held that the defendant failed to establish adverse possession for the requisite statutory time periods. The defendant claims the 1978 recorded survey is a recorded assurance title under the adverse possession statutes. To establish adverse possession under a recorded assurance of title, the assurance of title must purport to convey a fee. *Slatton v. Tennessee Coal, Iron & R.R.*, 109 Tenn. 415, 424, 75 S.W. 926 (1902). The only instrument

in the defendant's chain of title encompassing the disputed property and purporting to convey a fee is her 1990 deed. Thus, the evidence does not preponderate against the trial court's findings that the defendant did not adversely possess the property for the requisite statutory time periods.

In summary, the evidence does not preponderate against the trial court's findings that the plaintiffs' deed encompasses the disputed property and that the defendant did not satisfy the requirements for adverse possession. Thus, the defendant's second issue is pretermitted.

Accordingly, the trial court's judgment is in all respects affirmed. The case is remanded to the trial court with instructions to enter a judgment specifically establishing the boundary line between the parties as found by the court. Costs of appeal are assessed against the appellant.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE