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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002189-MR

JOHN SCOTT LEE
AND AMANDA LEE — APPELLANTS

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CI-00032

CALVIN TIPTON — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

TAYLOR, CHIEF JUDGE: John Scott Lee and Amanda Lee (collectively referred to as the Lees) bring this appeal from a September 17, 2010, Order of the Estill Circuit Court adjudicating a boundary line dispute between the parties and awarding Calvin Tipton damages of $18,333, representing his one-third interest in

certain real property known as Muncy Bottom. We affirm in part, reverse in part, and remand.[1]

The underlying facts of this case are rather complicated, so we will recite only those facts necessary to our disposition of this appeal. The Lees and Tipton own adjoining tracts of real property; both tracts were originally owned by their grandfather, Andrew Tipton. Andrew held these tracts as a single tract prior to his death. Upon his death, Andrew devised by will his real property, including one tract of property to Tipton and one tract of property to John's mother, Ethel Tipton Lee.[2] Ultimately, a boundary line dispute arose between Tipton and the Lees as to the exact location of the boundary line separating their respective adjoining properties.

Consequently, the Lees filed a quiet title action seeking an adjudication of the common boundary line between their tract and Tipton's tract. The Lees claimed to hold record title up to their claimed boundary line and

[1] As a procedural matter, we note that the original final judgment was entered in this case on July 6, 2010. Neither party appealed this judgment within thirty days. On August 26, 2010, John Scott Lee and Amanda Lee filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to set aside the judgment on the premise that the Lees' attorney failed to receive notice of entry of the judgment. The trial court granted the motion, set aside the judgment and reentered the same judgment on September 17, 2010, from which this appeal follows. As a general rule, the failure of a party to receive notice of entry of a judgment does not affect the judgment's validity. *Com., Dept. of Highways v. Hatcher*, 386 S.W.2d 262 (Ky. 1965). Under CR 60.02, a narrow exception to this rule is recognized where a party's failure to receive notice of entry of the judgment was due to a mistake or error by the court. *Kurtsinger v. Bd. of Trustees of Ky. Ret. Sys.*, 90 S.W.3d 454 (Ky. 2002). Nothing in the record on appeal reflects that there was an error or mistake committed by the trial court. Nonetheless, appellee, Calvin Tipton, did not object to the entry of the second judgment nor has Tipton raised this issue on appeal. Thus, we have reviewed this case on the merits notwithstanding the possible jurisdictional defect.

[2] John Scott Lee inherited his tract of real property from his mother, Ethel Tipton Lee, upon her death. Ethel was Andrew Tipton's daughter. Calvin Tipton inherited his property directly from his grandfather, Andrew Tipton, as Calvin's father had predeceased Andrew.

particularly pointed out that they built a garage upon the disputed property in 2000. Alternatively, the Lees claimed to have either adversely possessed such property up to their boundary line or to have established their boundary line by estoppel.

Tipton answered and disputed the Lees' location of the common boundary line. Tipton also filed a counterclaim. In the counterclaim, Tipton asserted that he acquired through Andrew's will a one-third fee-simple interest in another tract of real property commonly referred to as Muncy Bottom and that the Lees improperly conveyed Muncy Bottom to third parties in 2005.[3] Tipton sought damages to compensate him for the loss of his one-third fee-simple interest in Muncy Bottom.

In the Lees' answer to the counterclaim, the Lees maintained that they held fee simple absolute title to Muncy Bottom and possessed full authority to alienate the property. In support thereof, the Lees claimed to have acquired fee simple absolute title to Muncy Bottom from Beatrice Tipton by deed dated September 6, 1969, or, alternatively, to have adversely possessed Muncy Bottom.[4]

The trial court heard this matter without a jury and made findings of fact and conclusions of law in accordance with Kentucky Rules of Civil Procedure (CR) 52.01. In its order, the trial court found the testimony of Tipton as to the

[3] John Scott Lee and Amanda Lee conveyed Muncy Bottom to Gerald Rader and Susan Rader by deed recorded August 9, 2005. The Muncy Bottom tract was located up the road from the Lees' and Tipton's tracts, and the Muncy Bottom tract's boundary was not in dispute.

[4] Beatrice Tipton was the wife of Halline Tipton. Halline was Andrew's son. By deed dated September 6, 1969, Beatrice conveyed to Ethel Tipton Lee, Eugene Lee and John Scott Lee "[a]ll of the right, title and interest" Beatrice owned in Muncy Bottom. Tipton asserts that his one-third fee-simple interest in Muncy Bottom was acquired under Andrew's will, which was probated in 1951.

location of the common boundary line credible and fixed the boundary line between the Lees' and Tipton's tracts accordingly. The trial court rejected the Lees' claims of adverse possession or of boundary by estoppel in connection with the establishment of the common boundary line. The trial court also concluded that Beatrice held only a life estate in Muncy Bottom and, thus, only conveyed the Lees her life estate by deed. As a result, the trial court determined that the Lees did not hold fee simple title to Muncy Bottom and improperly conveyed same to third parties. The court recognized Tipton's one-third fee-simple interest in Muncy Bottom and awarded him $18,333 as damages arising from the Lees' conveyance of the property. This appeal follows.

We initially address the Lees' allegations of error related to Muncy Bottom and then address allegations related to the trial court's determination of the common boundary line.

I. MUNCY BOTTOM

The real property known as Muncy Bottom was originally owned by the parties' grandfather, Andrew. As with his other real property, Andrew devised Muncy Bottom in his will. The relevant portion of Andrew's will read:

> I give, devise and bequeath to my son Halline Tipton . . . the tract of land known as Muncy Bottom, for and during his natural life, with remainder to his wife and children, to be divided equally among them, so long as said Halline Tipton's wife shall remain his widow, and in the event that said Halline Tipton's widow remarries, then in that event, her share shall descend to their children, and in the event there are no children by the

> said marriage, then the said land shall descend to his brother and sisters and their children.

From the above language, the trial court believed that Halline Tipton and his wife, Beatrice, were both devised a life estate in Muncy Bottom with remainder in fee simple to either Halline's children or Halline's siblings. Therefore, the trial court determined that Beatrice only conveyed a life estate to the Lees by deed dated September 6, 1969, and that the Lees erroneously conveyed Muncy Bottom in fee simple absolute to third parties. The trial court also noted that Halline and Beatrice had no children; hence, under the terms of Andrew's will, the trial court determined that Halline's brothers and sisters and their children acquired fee simple title to Muncy Bottom upon Beatrice's death. As one of Halline's brothers was Tipton's deceased father, the trial court recognized that Tipton acquired a one-third fee-simple interest in Muncy Bottom.[5]

We begin by observing that interpretation of a will presents an issue of law, and our review proceeds *de novo*. *Hammons v. Hammons*, 327 S.W.3d 444 (Ky. 2010). From the plain terminology utilized in the will, it is certainly clear that Halline was devised a life estate in Muncy Bottom. In particular, the will reads that Muncy Bottom was devised to Halline "during his natural life." *See* 31 C.J.S. *Estates* § 37 (2012). Thus, we agree with the trial court that Halline possessed a

[5] In other words, the trial court concluded Ethel Tipton Lee, Calvin Tipton, and Morris Tipton acquired an equal one-third interest in the Muncy Bottom tract upon Beatrice Tipton's death. As noted, Beatrice Tipton, Halline's widow, conveyed the property in fee simple to the Lees in 1969.

life estate in Muncy Bottom. We, however, disagree that his wife, Beatrice, was also devised a life estate in Muncy Bottom through Andrew's will.

Per Andrew's will, Halline was specifically devised Muncy Bottom "during his natural life, with remainder to [Beatrice] and children . . . so long as . . . [Beatrice] shall remain his widow, and in the event . . . [Beatrice] remarries, then and in that event, her share shall descend to their children, and in the event there are no children . . . to [Halline's] brother and sisters and their children." Of particular import is the language devising the remainder to Beatrice so long as she remains a widow.

It has been recognized that a devise or conveyance to a spouse "so long as she remains a widow . . . presents a difficult problem of construction." Cornelius J. Moynihan, *Introduction to the Law of Real Property* 45 (2nd ed. 1988). Kentucky Courts have been inconsistent when interpreting the "so long as she remains a widow" language contained in an instrument of conveyance.[6] Some of our Courts have interpreted the "so long as she remains a widow" language as creating a defeasible fee simple estate while others have interpreted the language as creating a defeasible life estate.[7] *See Hutter v. Crawford*, 225 Ky. 215, 75

[6] Our opinion should not be misconstrued as dealing solely with the language "to wife so long as she remains a widow." A plethora of terminology may be utilized; for example, "during her widowhood" or "until she remarries." This opinion is equally applicable to diverse terminology. We simply utilize the "so long as she remains a widow" language to promote clarity in our opinion and to serve as the quintessential example.

[7] We are cognizant of Kentucky Revised Statutes (KRS) 381.218. Therein, the legislature abolished the fee simple determinable estate in favor of a fee simple subject to condition subsequent estate. The primary difference between the two estates is the future interest created. With a fee simple determinable, the future interest created is a possibility of reverter; conversely, the future interest created with a fee simple subject to condition subsequent is the right of entry

S.W.2d 1043 (1928); *Duncan v. Cole*, 303 Ky. 746, 199 S.W.2d 438 (1947); *Hopson's Trustee v. Hopson*, 282 Ky. 181, 138 S.W.2d 365 (1940); *Hutter v. Crawford*, 225 Ky. 215, 7 S.W.2d 1043 (1928); *Mann v. Frese*, 203 Ky. 739, 263 S.W. 21 (1924). *But see Thomas v. Stafford*, 305 Ky. 559, 204 S.W.2d 940 (1947); *Mouser v. Srygler*, 295 Ky. 490, 174 S.W.2d 756 (1943); *Morgan v. Christian*, 142 Ky. 14, 133 S.W. 982 (1911). This inconsistency is partly explained by the innately ambiguous nature of the "so long as she remains a widow" language and by the particular context in which the language is utilized. Simply put, the language "so long as she remains a widow" is insusceptible of a singular interpretation applicable in every case. *Hopson's Trustee*, 138 S.W.2d at 366. Rather, it is dependent upon the facts of each case per the analysis as follows.

When confronted with the "so long as she remains a widow" language in an instrument of conveyance, two rules of interpretation are paramount to the court's analysis. First, the intent of the parties should be given full effect by interpreting ambiguous terminology consistent with such intent. In so doing, the court must initially look to the four corners of the instrument of conveyance and attempt to glean intent therefrom. *Taylor v. Farrow*, 239 S.W.2d 73 (Ky. 1951); *Cuddy v. McIntyre*, 312 Ky. 606, 229 S.W.2d 315 (1950).

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for condition broken. And, the distinction between the two future interests is that the possibility of reverter automatically becomes a present estate upon the occurrence of the contingency while the right of entry for condition broken merely vests the power to terminate the preceding fee simple estate upon the occurrence of the contingency. *See* Cornelius J. Moynihan, *Introduction to the Law of Real Property* 107 (2nd ed. 1988).

Second, an interpretation should be adopted that favors the conveyance of a fee simple estate. Often, an instrument of conveyance may be susceptible to two reasonable interpretations – one conveying a fee simple estate and another conveying a lesser estate. In such instance, an interpretation favoring conveyance of a fee simple estate should prevail. *Scheinman v. Marx*, 437 S.W.2d 504 (Ky. 1969); *Lincoln Bank & Trust Co. v. Bailey*, 351 S.W.2d 163 (Ky. 1961); *Boggs v. Baxter*, 261 S.W.2d 684 (Ky. 1953). And, Kentucky Revised Statutes (KRS) 381.060(1) mandates the court to adopt an interpretation favoring conveyance of a fee simple estate unless the instrument of conveyance expressly or impliedly provides otherwise.[8] *Hopson's Trustee,* 138 S.W.2d 365; *see also* 2 James R. Merritt, *Kentucky Practice – Probate Practice and Procedure* § 1160 (2d ed. 2012).

In this case, Andrew devised to Halline a life estate with remainder to Beatrice so long as she remained a widow. By devising a life estate to Halline with "remainder" to Beatrice, Andrew signaled his intent that Beatrice be conveyed the remaining fee simple interest in Muncy Bottom. Thus, Andrew intended to devise a fee simple estate to Beatrice; however, this fee simple estate was conditioned

[8] KRS 381.060(1) states:

> Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of.

upon Beatrice remaining a widow. Within this context, we think Andrew intended to convey to Beatrice a fee simple subject to executory interest.

A fee simple subject to executory interest is a type of defeasible fee simple where the grantor retains for himself or conveys to a grantee a fee simple estate, but such fee is subject to defeasance in favor of a second grantee upon the happening of a stated contingency, like remarriage.[9] *Duncan*, 199 S.W.2d 438; *Hopson's Trustee*, 138 S.W.2d 365; *Walker v. Walker's Adm'r*, 239 Ky. 501, 39 S.W.2d 970 (1931); *see also* 123 Am. Jur. *Proof of Facts 3d Establishing Fee-Simple Title Subject to Executory Interest* §§ 5, 6 (2011). With a fee simple subject to executory interest, the first grantee is recognized as receiving a present fee simple estate, and the second grantee receives a particular future interest called an executory interest.[10] *See* Cornelius J. Moynihan, *Introduction to the Law of Real Property* 190-192 (2nd ed. 1988); 123 Am. Jur. *Proof of Facts 3d Establishing Fee-Simple Title Subject to Executory Interest* §§ 5, 6 (2011). The first grantee's fee simple estate is analogous to a fee simple absolute estate; except it is subject to divestment upon the happening of a stated contingency. *Taylor*, 239 S.W.2d 73; *Duncan*, 199 S.W.2d 438; *Hopson's Trustee*, 138 S.W.2d 365. It must be

[9] A fee simple defeasible estate is a general type of estate and specifically includes a fee simple determinable estate, a fee simple subject to condition subsequent estate, and a fee simple subject to executory interest estate. With a fee simple determinable estate and a fee simple subject to condition subsequent estate, the future interests created by these two defeasible estates are held by the grantor. By contrast, a fee simple estate subject to executory interest creates a future interest (executory interest) in favor of a second grantee.

[10] With a fee simple subject to executory interest, the present fee simple estate is either retained by the grantor or conveyed to a grantee. For clarity purposes, we shall refer to the "first grantee" as encompassing both circumstances.

remembered that the stated contingency may never occur, and if not, the fee simple estate remains intact, and the executory interest held by the second grantee terminates as a matter of law under the terms of the devise. *Taylor*, 239 S.W.2d 73; *see also* 123 Am. Jur. *Proof of Facts 3d Establishing Fee-Simple Title Subject to Executory Interest* §§ 5, 6 (2011).

In this case, we hold that Beatrice was devised a fee simple subject to executory interest contingent upon divestment in the event she remarried. Hence, Beatrice received a present fee simple estate with full power of alienation, and Halline's siblings received an executory interest. As Beatrice did not remarry, the executory interest possessed by Halline's siblings terminated upon Beatrice's death.[11] As a result, the Lees acquired fee simple absolute title to Muncy Bottom from Beatrice by deed of conveyance dated September 6, 1969.[12] The trial court's judgment in favor of Tipton regarding Muncy Bottom is reversed.

II. THE BOUNDARY LINE DISPUTE

Our appellate standard of review in a boundary line dispute is governed by CR 52.01. *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980); *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002). Thereunder, a trial court's findings of fact are entitled to deference and will only be disturbed if not supported by

[11] We do not discuss the potential impact, if any, of KRS 381.218, KRS 381.219, KRS 381.221, KRS 381.222, or KRS 381.223, upon the fee simple subject to executory interest estate devised through Andrew's will, as the future executory interest held by Halline's siblings terminated naturally by the terms of the devise.

[12] John Scott Lee actually acquired fee simple title upon the deaths of Ethel Tipton Lee and Eugene Lee. John Scott Lee's acquisition of fee simple title from other Lee heirs is not in dispute other than the belief that the Lees could only have acquired a one-third interest under the 1969 conveyance. All other contentions of error as to Muncy Bottom are rendered moot.

substantial evidence of a probative value. *Phelps v. Brown*, 295 S.W.2d 804 (Ky. 1956). The credibility and weight of evidence are within the sole province of the trial court, as fact-finder. And, we, as an appellate court, review issues of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005).

As to the boundary line dispute, the Lees allege that the common boundary line between the parties' properties was properly established by the terms of Andrew's will or alternatively, established by either the doctrine of adverse possession or the doctrine of boundary by estoppel. Each allegation will be analyzed *seriatim*.

A. Andrew's Will

In resolving a boundary line dispute, the trial court's primary task is to ascertain the true and correct location of the boundary line as intended by the original parties who initially subdivided the property. *Wood v. Harmon*, 288 Ky. 746, 157 S.W.2d 292 (1941); *see also* 12 Am. Jur. 2d *Boundaries* § 2 (1997). This intent is usually gleaned from the instrument of conveyance between the original parties; however, if the instrument of conveyance proves ambiguous, it may be analyzed using established rules of interpretation and construction. *Kentucky-West Virginia Gas Co. v. Browning*, 521 S.W.2d 516 (Ky. 1975); *Collins v. Inland Gas Corp.*, 382 S.W.2d 194 (Ky. 1964); *Monroe v. Rucker*, 310 Ky. 229, 220 S.W.2d 391 (1949).

In the case *sub judice*, the Lees' and Tipton's tracts of property were once held in common by their grandfather, Andrew. Andrew originally subdivided

his property into several tracts and devised these tracts to beneficiaries through his will. In his will, the descriptions of such tracts of property did not provide objective measurements; rather, the descriptions of each tract wholly relied upon natural and artificial monuments as calls to establish the boundaries.[13] As to the particular descriptions of the Lees' and Tipton's tracts, a single corner call has become pivotal and has generated much controversy between the parties. This corner call is common to both tracts and serves to locate the beginning point of the common boundary line between the two tracts.

As to the Lees' tract, this corner call is described in paragraph 6 of Andrew's will:

> Beginning at a post at the lane and **with the State Highway to a post in Calvin Frank Tipton's line**, thence with his line to a post in his line at the creek . . . . (Emphasis added.)

And, in reference to Tipton's tract, it is particularly described in paragraph 7 of Andrew's will:

> [B]eginning at the corner of Cas Walling and Andrew Tipton at the State Highway, **thence with the said highway in the direction of Ravenna to a post,** thence a straight line to a post at the creek . . . . (Emphasis added.)

[13] A "monument" is generally "some tangible landmark established to indicate a boundary." 11 C.J.S. *Boundaries* § 17 (2008). "Natural monuments" are "permanent objects found on the land as they were placed by nature." 11 C.J.S. *Boundaries* § 18 (2008). Natural monuments may include trees, rivers, creeks, and stones. "Artificial monuments" are "landmarks or signs erected by human hands." 11 C.J.S. *Boundaries* § 19 (2008). Artificial monuments may include roads, posts, and buildings. A "call" is generally defined as "a landmark chosen by a surveyor or utilized in a deed to designate real property boundaries." 11 C.J.S. *Boundaries* § 5 (2008).

In paragraph 6, the corner call is specifically described as "a post in Calvin Frank Tipton's line," and in paragraph 7, this same post is simply described as "a post." It is uncontroverted that this corner post no longer physically exists upon the property, and the parties adamantly disagree as to its proper location.

It is well-established that the interpretation and construction of an ambiguous term in an instrument of conveyance ordinarily presents an issue of law for the court. *Camenisch v. City of Stanford*, 140 S.W.3d 1 (Ky. App. 2003). An ambiguity either may appear on the face of the instrument or may be "latent." *Carroll v. Cave Hill Cemetery Co.*, 172 Ky. 204, 189 S.W. 186, 190 (1916); *see also Thornhill Baptist Church v. Smither,* 273 S.W.2d 560 (Ky. 1954). A latent ambiguity is generally "one which does not appear upon the face of the words used, and it is not known to exist until the words are brought in contact with the collateral facts." *Carroll*, 189 S.W. at 190; *see also Thornhill Baptist Church*, 273 S.W.2d 560. As to the description of property conveyed in a deed or will, a latent ambiguity may arise when a monument designating the boundaries of such property is physically missing upon the property. 11 C.J.S. *Boundaries* § 21 (2008). Upon the physical disappearance of a monument identified in a deed or will, the proper location of such missing monument may be ascertained through use of extrinsic evidence:

> Evidence of various kinds is admissible to determine the location of lost monuments. For the purpose it is proper to consider the testimony of persons who saw them when they were formerly discernible, and the courts will also admit proof of acquiescence of the

> parties concerned, acts of public authorities, the location of established boundary lines, and the general reputation and tradition as to where the lost monuments had been located.

Sells v. Hurley, 301 Ky. 199, 191 S.W.2d 212, 213 (1945)(citation omitted); s*ee also Wagers v. Wagers*, 238 S.W.2d 125 (Ky. 1951); Kentucky Rules of Evidence 803(2).

If the extrinsic evidence is conflicting upon the location of the missing monument, its proper location presents an issue of fact for the fact-finder, and such finding of fact will not be disturbed by an appellate court unless clearly erroneous. *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980); *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002); CR 52.01. When considering conflicting evidence as to the location of the missing monument, the trial court must be ever cognizant of the underlying intent of the parties and of the other calls as set forth in the property's description in the instrument of conveyance. 11 C.J.S. *Boundaries* § 5 (2008). As a matter of law, a call will be disregarded or rejected if it does not comport with the underlying intent of the parties as gathered by the entire instrument of conveyance or if its inclusion would give rise to absurd results. *Merritt v. Palmer*, 289 Ky. 141, 158 S.W.2d 163 (1942); *see also* 11 C.J.S. *Boundaries* § 5 (2008).

In our case, the extrinsic evidence as to the location of the missing corner post was contradictory. Acting as fact-finder, the trial court viewed Tipton's testimony concerning the location of the missing corner post more credible and fixed its location accordingly. Tipton testified that the missing corner

post was positioned directly behind an old "storehouse" once located upon Andrew's property. Tipton further stated that the front of this old storehouse was situated only a few feet away from State Highway 52 and upon what currently serves as the driveway to the Lees' home.[14] By the trial court locating the missing corner post just behind the old storehouse and directly upon the Lees' current driveway, the common boundary line between Tipton's and the Lees' tracts starts at a point several feet back from State Highway 52. This fact is pivotal.

Both Tipton's tract and the Lees' tract are more or less rectangular in shape with the front side directly abutting State Highway 52.[15] In the descriptions of Tipton's and the Lees' tracts as contained in Andrew's will, both tracts' beginning calls are at points located directly next to State Highway 52. Thereafter, the descriptions take the front boundaries from their respective beginning calls to the missing corner post that constitutes the beginning call for the common boundary line between Tipton's and the Lees' tracts. From this corner post, both tracts' common boundary then regresses away from State Highway 52 in a perpendicular line to another post.

By locating the missing corner post several feet back from State Highway 52, the apex of both tracts' front boundary lines is now, likewise, located several feet back from State Highway 52. The effect was to carve out from Andrew's devise to either Tipton or the Lees a small triangular-shaped piece of

[14] The home of John Scott Lee and Amanda Lee previously served as Andrew Tipton's home.

[15] When these tracts were owned in common by Andrew, it appears that State Highway 52 and the tract's front boundary line were conterminous.

real property located between the corner post, State Highway 52, and the beginning calls of each tract. This excluded triangular piece of real property directly abuts State Highway 52 and is located directly between each tract and State Highway 52. As a consequence, most, if not all, of each tract's frontage to State Highway 52 is eliminated. By eliminating such frontage, it appears that Tipton's tract may be now completely landlocked, and both Tipton's and the Lees' tracts are left with no direct access to State Highway 52.

When reconstructing the boundary lines by using the calls found in the respective descriptions of Tipton's and the Lees' tracts, it becomes readily apparent that the trial court's location of the missing corner post was intrinsically flawed. It is simply untenable that Andrew would draw the boundaries of Tipton's and the Lees' tracts in such an absurd manner so as to leave both tracts without useful frontage to State Highway 52. Accordingly, the trial court's location of the missing corner post creates an absurd boundary line when considered in relation to the other calls in the properties' descriptions.

For the above reasons, we hold that the trial court's location of the missing corner post must be rejected and reverse the trial court upon this issue. Upon remand, the trial court shall reconsider the evidence and, if possible, determine the proper location of the missing corner post that creates a realistic boundary when considered with the other calls contained in the properties' descriptions per the will.

B. Adverse Possession

In a boundary line dispute, a landowner may acquire title to disputed real property up to his professed boundary line through adverse possession. For the landowner to prevail upon a claim of adverse possession, the landowner must demonstrate that his possession of the disputed property was: (1) hostile and under claim of right, (2) actual, (3) exclusive, (4) continuous, and (5) open and notorious. *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010). Additionally, the landowner must maintain the possession for the statutory period of fifteen years (KRS 413.010) and bears the burden of proving each element by clear and convincing evidence. *Moore*, 307 S.W.3d 71.

In rejecting the Lees' adverse possession claim, the trial court determined that John Lee "believed the land adjoining the Homestead upon which [his] garage was built belonged to him, meaning that his possession was not 'adverse' under *Brunton v. Roberts*, 265 Ky. 569, 97 S.W.2d 413 (1936)." In essence, the trial court concluded that the Lees' possession could not be hostile because it was premised upon a mistaken belief as to the true boundary line between Tipton's and the Lees' tracts. This legal conclusion was in error.

The mere fact that a landowner possesses real property under the mistaken belief as to the true boundary line is not solely dispositive upon the issue of whether such possession was hostile; rather, it is the intent of the landowner at the time possession begins that controls its character. This rule is more thoroughly explained in *Johnson v. Kirk*, 648 S.W.2d 878 (Ky. App. 1983):

> The intention with which the occupation is made always determines and fixes its character as being adverse or otherwise, and not the fact, that the occupation is based upon a mistake or in other words, the fact, that the occupation is based upon a mistake, does not prevent it from being adverse, if the intention is to claim and hold the land, as one's own, up to a mistaken line, if the occupant claims the line to be the true one, and that his deed embraces the land.

Johnson, 648 S.W.2d at 880 (quoting *Heinrichs v. Polking*, 185 Ky. 433, 215 S.W.179, 181-182 (1919)). To restate the rule more succinctly, a landowner's possession of real property subsequently discovered to have been based upon the mistaken belief as to the true boundary line may be, nonetheless, deemed hostile. To hold adversely while laboring under such mistaken belief, the landowner must have intended to hold and to claim the property as his own up to such boundary line at the time his possession began. *Johnson*, 648 S.W.2d 878; *Mudwilder v. Claxton*, 301 S.W.2d 3 (Ky. 1957); *Tarter v. Tucker*, 280 S.W.2d 150 (Ky. 1955); *Marcum v. Noble*, 242 S.W.2d 866 (Ky. 1951); *Scoville v. Burns*, 306 Ky. 315, 207 S.W.2d 756 (1948).

Upon remand, the trial court shall reconsider the Lees' claim of adverse possession in relation to Tipton's tract in accordance with the legal precepts outlined above.

C. Boundary by Estoppel

In a boundary line dispute, a boundary line may be also established through operation of the doctrine of boundary by estoppel. *Faulkner v. Lloyd*, 253 S.W.2d 972 (Ky. 1952); *Embry v. Turner*, 185 S.W.3d 209 (Ky. App. 2006). The

doctrine of boundary by estoppel is simply an extension of the equitable estoppel doctrine. In its basic form, boundary by estoppel "arises when one owner erroneously represents to the other that their common boundary is along a certain line, and the second owner in reliance takes detrimental action." 11 C.J.S. *Boundaries* § 140 (2008). The boundary by estoppel doctrine estops the first owner from denying that the common boundary line is not where he acquiesced or represented it to be located.

In this Commonwealth, our Court has set forth the necessary elements to invoke the doctrine of boundary by estoppel:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Embry, 185 S.W.3d at 215. As set out above, detrimental reliance is an essential element in a boundary by estoppel claim. The mere "acquiescence" of a landowner to a common boundary line is insufficient to support a claim of boundary by estoppel. In addition, it must be demonstrated that such "acquiescence" was detrimentally relied upon by the other landowner. *Id.*

In the case at hand, the trial court rejected the Lees' claim of boundary by estoppel by determining that insufficient evidence was introduced proving the Lees' detrimental reliance. We agree.

The Lees argued that the construction of a garage and "other improvements" aptly demonstrated their detrimental reliance. However, the Lees failed to particularly specify these "other improvements," the date such improvements were constructed, or the location of such improvements upon the property. As to the garage, the Lees claimed that it was constructed in 2000 and upon property later claimed by Tipton. The evidence demonstrated that Tipton was unaware of the garage before or during its construction; consequently, Tipton could not have acquiesced in the construction of the garage at its present location. The Lees simply failed to prove detrimental reliance, and we view such failure as fatal to their claim of boundary by estoppel. As a result, we hold that the trial court properly concluded that the Lees were not entitled to relief under the boundary by estoppel doctrine and affirm the trial court on this issue.

In summation, we conclude that the trial court erred by interpreting Andrew's will as devising a life estate to Beatrice in Muncy Bottom. On the contrary, we are of the opinion that Beatrice was devised a fee simple subject to executory interest in Muncy Bottom and possessed full authority to alienate same. As Beatrice did not remarry before she died, the executory interest held by Halline's siblings terminated. Consequently, we reverse the trial court's judgment on this issue as Tipton possesses no present or future interest in Muncy Bottom,

and the Lees held fee simple absolute title to Muncy Bottom and properly conveyed same in fee simple in 2005. We also conclude that the trial court erred as to its location of the missing corner post in relation to the parties' boundary line dispute and reverse same. Upon remand, the trial court shall reconsider the evidence and, if possible, determine the proper location of the missing corner post from such evidence. As to the Lees' claim of adverse possession in the boundary line dispute, we determine that the trial court erred by dismissing same, and upon remand, the trial court shall reconsider the Lees' claim of adverse possession in view of the analysis set forth in this Opinion. And, we affirm the trial court's dismissal of the Lees' claim of boundary by estoppel.

For the foregoing reasons, the Order of the Estill Circuit Court is affirmed in part, reversed in part, and this cause is remanded for proceedings consistent with this opinion.

NICKELL, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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