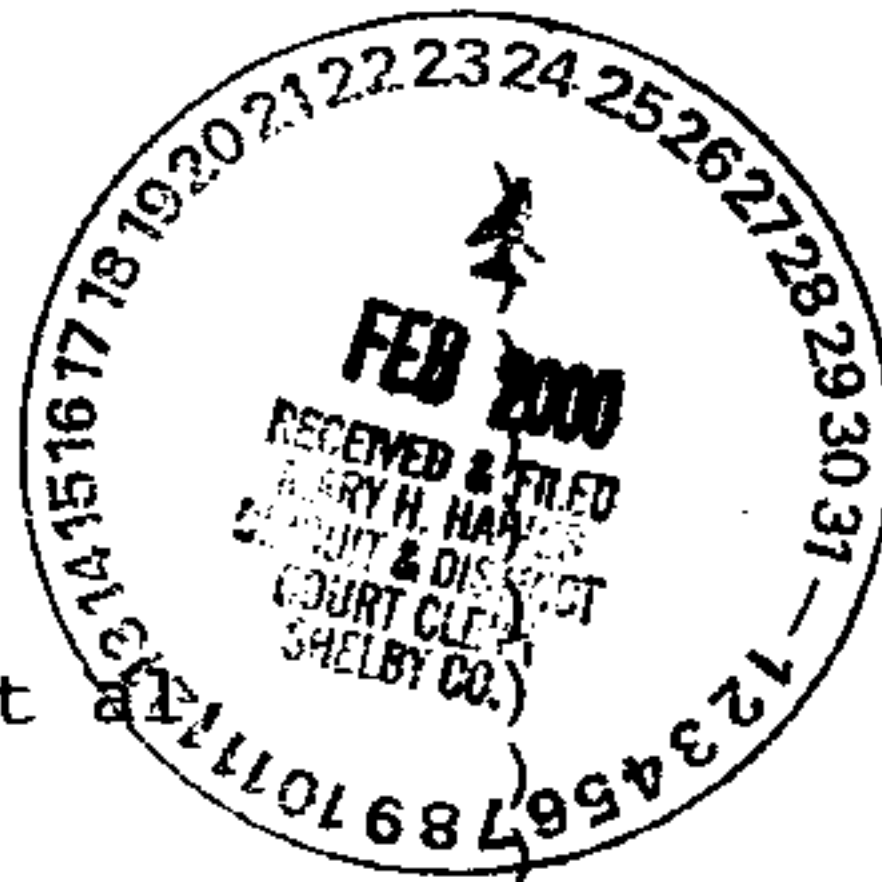


IN THE CIRCUIT COURT FOR SHELBY COUNTY, ALABAMA

ANNE BATES GIBBONS,
Plaintiff,

v.

JOHN BURDETTE BATES, et al
Defendants.



Case No. 97-142

Certified a true and correct copy

Date: May 15, 2000

Mary H. Harris
Mary H. Harris, Clerk Clerk
Shelby County, Alabama

FINAL ORDER

This matter came on for non-jury trial. Hearings were held in 1998 and a final hearing on December 2, 1999. During the course of the trial, the Court heard testimony from Defendant John Burdette Bates, Robert Farmer, a surveyor who had surveyed the property at issue and Grady Gibbons, the husband of Plaintiff Anne Bates Gibbons.

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SHELBY COUNTY JUDGE OF PROBATE
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I. **FACTUAL HISTORY**

On June 30, 1977 Defendants conveyed a 6.5 acre tract (the "Gibbons Property" more particularly described on Exhibit A) to Plaintiff (the "1977 Deed"). Defendant John Burdette Bates, who was at the time a licensed attorney, realtor and appraiser, drafted the 1977 Deed and created the legal description therein. A rectangular parcel measuring approximately 60 feet by 120 feet (the "Rectangle") is the principal issue in this case. The Rectangle is located in the southwest corner of the Gibbons Property, adjoining both Defendants' property and the Option Property (as defined hereinafter); thus, the 1977 Deed effected the transfer of fee simple title of the Rectangle to Plaintiff. The parties, however, did not realize the 1977 Deed effected a conveyance of the Rectangle until they saw the January 14, 1998 Farmer survey of the

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Gibbons Property and the adjoining 25 acres¹ (the "Farmer Survey"). The closing on the sale of the Option Property was to occur on or before April 15, 1998 according to the Mediation Agreement. Plaintiff arrived at the designated closing location, the law offices of Corley, Moncus & Ward, and signed all of the closing documents and tendered a check for the purchase price and closing costs to the closing attorney. At closing, however, Plaintiff was presented with a Quitclaim Deed conveying the Rectangle from her to Defendants (the "Quitclaim Deed"). Defendants required Plaintiff to execute the Quitclaim Deed as a condition of closing the sale of the Option Property. The Quitclaim Deed was drafted by Defendant John Burdette Bates, not the closing attorney. It was on the instruction of John Burdette Bates that the closing attorney presented the Quitclaim Deed to Plaintiff as a condition of closing the sale of the Option Property.

Plaintiff refused to sign the Quitclaim Deed. In turn, Defendants refused to close on the sale of the Option Property.

¹ This 25 acres is hereinafter referred to as the "Option Property." The Option Property is a tract that is contiguous to the easterly border of the Gibbons Property. The original basis of Plaintiff's suit, as more fully set forth in the complaint, was to exercise her right to purchase one-half of Defendants' property adjoining the Gibbons Property pursuant to a recorded option. Defendants disputed her right to exercise this option. The parties mediated the case on December 14, 1997 and entered into a mediation agreement (the "Mediation Agreement") whereby Defendants would sell Plaintiff the Option Property as a resolution of her efforts to exercise her option rights. This Court finds that the Mediation Agreement is a binding and enforceable agreement. It is clear, however, that the parties to the Mediation Agreement contemplated that the Gibbons Property measured close to 10 acres, not the 6.5 acres it actually measures. Further, the parties contemplated that 3½ acres of the Option Property (the "Horse Pasture") were part of the Gibbons Property, and that the Rectangle and other land adjoining it was not part of the Gibbons Property. The Farmer Survey, however, showed that the parties were mistaken as to the actual boundaries. This Court finds that the parties did not, however, deem the mistake to be material as the parties ultimately closed on the sale of the Option Property without any reduction in price for Plaintiff having to purchase the Horse Pasture.

The sale closed approximately fourteen months later, on June 9, 1999. The terms of the sale were the same as if it had closed on April 15, 1998, with no change in the purchase price due to the passage of time.

From June 30, 1977 to date, both Plaintiff and Defendants have exercised some use and dominion over the Rectangle. The testimony was that the parties used all or part of the Rectangle in the various ways listed below and at various times since June 30, 1977:

Plaintiff

- continuously paid for electricity serving the pump house
- shared with Defendants in the replacement costs of some of new pumps installed in pumphouse
- stored materials in tool shed regularly since June 30, 1977
- paid property taxes on Rectangle since 1977
- twice mortgaged Rectangle (early 1980s and 1998)
- insured Rectangle continuously since June 30, 1977
- cultivated garden on part of Rectangle from about 1977 until mid-1980's
- cleared brush from Rectangle with bulldozer
- cut grass in and around Rectangle regularly since June 30, 1977

Defendants

- replaced approximately 4 pumps in pumphouse since June 30, 1977
- stored some building materials in tool shed in last 2 - 3 years
- ran new lines from pumphouse to Defendants' property in 1998
- extracted water from well continuously since June 30, 1977

Grady Gibbons testified that he and Plaintiff regularly conducted physical activity on the Rectangle. He testified that the longest period of time in which they did not conduct physical activity on the Rectangle was one month. Contrastingly, Defendants' most extensive activity on the Rectangle occurred sporadically, when every few years they would replace a pump that failed. Defendants continuously pumped water from the well.

In their October 19, 1998 counterclaim, Defendants claim title to the Rectangle solely by prescription. The counterclaim does not, however, specify during what continuous twenty-year period Defendants claim to have possessed the Rectangle so as to establish a prescriptive claim. John Burdette Bates testified that Defendants are only seeking fee title to the tool shed and well house, as opposed to the entire Rectangle. Defendants' evidence did not establish a twenty-year period or even a ten-year period, over which they adversely possessed the Rectangle by prescription.

II. LEGAL ANALYSIS

At the outset of the second hearing, the parties entered into two stipulations:

1. Plaintiff acknowledged that if she prevailed on the prescription counterclaim, Defendants still had prescriptive rights to use the subject well in amounts consistent with their historic use thereof.
2. Defendants acknowledged that if they prevailed on the prescription counterclaim, there still existed a valid "water rights" easement in favor of the Gibbons property that was created in the June 30, 1977 deed to Plaintiff.

Additionally, the parties acknowledged that there were only two issues remaining for the court to decide: (i) Defendants'

counterclaim for prescription to the Rectangle, and (ii) whether Defendants were entitled to interest on the money Plaintiff tendered to purchase the Option Property from Defendants on April 15, 1998 until the date of closing on June 9, 1999. As set forth hereinafter, Defendants' counterclaim for prescriptive title to the Rectangle and Defendants' claim for interest are DENIED.

A. *The Prescription Claim.*

There are very few material factual disputes between the parties in this case. These factual disputes are not material and are not critical to the resolution of the prescription issue. This Court finds that based on its careful consideration of (i) the testimony at trial, (ii) the submitted evidence, and (iii) its personal viewing of the Rectangle and surrounding property,² Defendants have not shown sufficient evidence that for a consecutive twenty year period after the Rectangle was sold to Plaintiff they exercised dominion and utilized the Rectangle in a manner sufficient to constitute the transfer of title thereto by prescription.

In particular, this Court finds that from the time the Rectangle was conveyed to Plaintiff, she has had the most active and consistent use of the Rectangle. The activities she had on and related to the Rectangle that are described hereinabove far outweigh the activity of Defendants on or about the Rectangle. Viewing the facts in a light most favorable to Defendants, they

² On December 3, 1999, pursuant to Plaintiffs' motion to view, the trial court judge personally viewed the Rectangle and the surrounding property.

merely have had periodic scrambling possession of the Rectangle since it was sold to Plaintiff.

Seemingly, the best argument Defendants could have set forth was that the actions on or about the Rectangle by Plaintiff were permissive and did not contradict Defendants' claim of ownership. This Court does not find that argument persuasive. Other than the dispute about whether the bulldozer work done by Grady Gibbons was done with Defendants' permission, Defendants failed to present any persuasive and credible evidence that Plaintiff's conduct was done with an accompanying intent that she needed or obtained Defendants' consent to do same. As set forth hereinafter, Defendants did not satisfy the requisite legal elements to establish adverse possession by prescription of the Rectangle.

Both in their pleadings and in court, Defendants stated, and in fact were insistent, that the legal basis for their claim for title to the Rectangle was *adverse possession by prescription*. By pursuing this claim, Defendants have assumed the burden of proving that they satisfied the requisite "adverse" elements for a continuous twenty (20) year period. See, EVANS ALABAMA PROPERTY RIGHTS & REMEDIES § 10.3 (2nd ed. 1988) ("Statutory adverse possession requires possession for ten years, whereas adverse possession by *prescription* requires possession for twenty years.") (emphasis added). Defendants did not plead nor request at trial that this

Court adjudge their claim based on any statutory adverse possession basis or the hybrid boundary line basis.³

The necessary elements for a claim of adverse possession by prescription are succinctly set forth by Jesse Evans in his treatise: "[t]he common law rule of prescription requires actual, exclusive, open, notorious and hostile possession under a claim of right for a period of twenty years." *Id.* at § 10.1(b).⁴ Defendants did not satisfy all of these requisite elements.

1. Actual

"The extent of actual possession required is determined by the nature and character of land." Evans at § 10.3(a). Thus, the degree and type of activity necessary to adversely possess property may differ based on the type of land at issue (i.e. the amount of activity needed to adversely possess timber land may be less than that necessary to adversely possess a property with a dwelling thereon). To show actual possession of the Rectangle, one would seemingly have to show actual use and possession of both the

³ See, e.g. *Johnson v. Brewington*, 435 So. 2d 64 (Ala. 1983). Defendants have never pled nor argued that the ten year statute of limitations for boundary disputes between coterminous property owners should apply. Even if they did, this Court's opinion is that their claim is one for adverse possession by prescription and therefore requires a consecutive twenty year period. Even if a ten year period applied, there is no persuasive evidence that Defendants in any way adversely possessed that portion of the Rectangle adjoining their property. Accordingly, Defendants' claims to have adversely possessed the footprint of the buildings on the Rectangle - by far the best facts of their claim for adverse possession by prescription - are for property that is not contiguous to Defendants' property and therefore outside the scope of the applicable law on boundary disputes between coterminous landowners.

⁴ See also, *Sparks v. Byrd*, 562 So. 2d 211, 214 (Ala. 1990) ("A party claiming title to property through adverse possession by prescription must satisfy each of the following element: 1) the party must actually possess the property, 2) the party's possession must be exclusive, 3) the party's possession must be open and notorious, 4) the party's possession must be hostile and under a claim of right, and 5) the party's possession must be continuous for a period of 20 years.").

unimproved and improved portions of the Rectangle. To this end, Defendants have failed woefully to satisfy these burdens. As for the unimproved portion of the Rectangle that abuts Defendants' property, Defendants presented no evidence of any possession they exerted thereover. Rather, John Burdette Bates testified, in response to a question of what Defendants wanted in this case, that they merely sought title to the tool shed and the pumphouse.⁵ When considering what activity would support an argument of actual possession of such improvements - maintenance, repairs, payment of utilities serving same, etc. - Defendants have only four instances of replacing pumps to support their case. As the Court saw firsthand when viewing the improvements on the Rectangle, there is no credible visual evidence that Defendants have performed any ongoing maintenance or repairs to either building that would satisfy the "actual" requirement.

Alabama case law holds that the record owner is deemed to be in constructive possession of the subject land "unless there is an actual possession in someone else."⁶ This Court finds that the evidence before it and the viewing of the Rectangle indicate that Defendants have not sufficiently shown that they have actually

⁵ It is apparent to this Court that the defendants' designation of the Rectangle as the area adversely possessed by prescription is arbitrary. The majority of the Rectangle is undeveloped land and is either part of a hedgerow or an open field. There was virtually no evidence presented by defendants that they exercised any dominion whatsoever over the unimproved portion of the Rectangle. This lack of evidence on the unimproved portion of the Rectangle undermines the limited persuasiveness of the defendants' testimony as to their use of the improved portion of the Rectangle.

⁶ *Southern Ry. Co. v. Hall*, 145 Ala. 227, 41 So. 136.

possessed the Rectangle for any substantial period of time, much less twenty consecutive years.

2. Adverse.

To satisfy the adverse element, "possession must be adverse to the true owner." Evans at § 10.3(b). The testimony at trial and the viewing showed that the only adverse conduct arguably exerted by Defendants is the replacement of several pumps. According to the testimony, such activity occurred over an unspecified time period and during the first few years after Plaintiff was deeded the Rectangle. Plaintiff and her husband assisted in the payment for and installation of one or two replacement pumps. These incidents of activity independent of Grady Gibbons' assistance were spaced years apart and can at best be characterized as "sporadic".⁷ The presumption of possession lies with the record owner.⁸ *Id.* In fact, the nature of the incidents of activity on the Rectangle exhibited by Plaintiff are ones that, if done by Defendants, would have been helpful to their prescription case.⁹ Such conduct by the record owner, however, weighs heavily against Defendants' claim to have adversely possessed the Rectangle.

3. Continuous.

⁷ See *Cockrell v. Kelley*, 428 So. 2d 622, 623-624, (Ala. 1983) (Wherein the Supreme Court of Alabama held that "sporadic" acts of ownership are insufficient to show adverse possession.)

⁸ ("... a use is permissive unless the contrary is proven").

⁹ See e.g. *Lilly v. Palmer*, 495 So. 2d 529 (Ala. 1986) (wherein the Supreme Court of Alabama held the mowing of a lawn and maintenance of a vegetable garden (as done by Plaintiff) is consistent with ownership.).

Defendants have the burden of showing that their alleged adverse use of the Rectangle has been continuous and "substantially without interruption for . . . the prescriptive period of twenty years." Evans at § 10.3(c). Defendants have not pled nor presented testimony of the exact twenty year period they claim to have had continuous use of the Rectangle.¹⁰ Instead, the only testimony as to the continuation of activity on the Rectangle was from Grady Gibbons who testified that since 1977 the longest period of time during which he had no activity on the Rectangle was one month. Indeed, even if Plaintiff conceded (and she did not) that the character of Defendants' conduct on the Rectangle was sufficient to constitute adverse possession by prescription, Defendants failed to present any evidence as to when their twenty year period should start. Presumably, it should either start with the first time they replaced a pump in the pumphouse or the first time they replaced a pump in the pumphouse without Grady Gibbons' assistance. Defendants did not, however, present any evidence as to when those dates were.

4. Hostile.

In order to satisfy the "hostility" element, "the possession must be antagonistic to the interest of the party suffering it or must work injury to his title or interest." Evans at § 10.3(d). The hostility may be implied "from a mistake by the party attempting to set up adverse possession." *Id.* Clearly, this

¹⁰ Defendants' counterclaim is devoid of any allegations that they have had actual, adverse, continuous, hostile, open, notorious and exclusive possession of the Rectangle.

case involves a mistake, as the parties did not know that the Rectangle was included in the Gibbons property until they saw the Farmer Survey. The existence of a mistake, however, is not a *carte blanche* for the adverse claimant to satisfy the hostile element. It is still a necessary requirement that the adverse claimant prove that they intended to possess all of the disputed property (the Rectangle) regardless of whether or not they had fee title to it. *Sparks v. Byrd*, 562 So. 2d 211, 216 (Ala. 1990) ("If one occupies land up to a certain fence, because he believes that to be the line of his land, but not having any intention to claim up to the fence if it should be beyond the line, the intent to claim title does not exist coincident with the possession, and the possession is not, therefore, adverse."). The pleadings and the evidence at trial fail to establish that Defendants had this unequivocal intent to possess the Rectangle. The Defendants failed to satisfy the "hostile" element as set forth in *Sparks*.

5. Open and Notorious.

Alabama "law requires that the acts of dominion by the adverse possessor be of such character and nature as may reasonably be expected to inform the true owner of the fact of the adverse possession and the antagonistic claim." *Evans* at § 10.3(e). This requirement is typically denominated as the "open and notorious" element. Defendants' limited use of the Rectangle, if it had been more frequent and occurred over a consecutive twenty year period, may be sufficient to satisfy the open and notorious element. Due to the very limited "volume" of Defendants' use of the Rectangle,

however, this element cannot be said to have been met. Even if this element was met, it is only one of the elements that are required in order to meet Defendants' claim.

6. Exclusive.

The requirement of exclusivity is the one that is most difficult for Defendants to satisfy. The Supreme Court of Alabama has set forth a definition of "exclusive possession" that states that a "claimant must hold possession of the land for himself, as his own, and not for another, or must maintain exclusive dominion over the property and appropriation of it to his own use and benefit. . . . Exclusiveness of possession is often evidenced by the erection of physical improvements on the property, such as fences, houses or other structures, and, in their absence, substantial activity on the land is required." Evans at § 10.3(f) (quoting *Strickland v. Markos*, 566 So. 2d 229, 235 (Ala. 1990)). Defendants' conduct of replacing the pumps does not constitute "erection of physical improvements" as contemplated by *Strickland*, and Defendants have not satisfied the fallback criteria of having "substantial activity" on the Rectangle. Even if replacing pumps without Grady Gibbons' assistance is sufficient activity to meet the *Strickland* physical improvement standard, it is unclear from the evidence as to when such activity occurred. The inference most favorable to Defendants does not even support the position that such activity occurred more than twenty years before the filing of this case. For these reasons, Defendants completely failed in establishing exclusive possession.

B. Claim for Interest

As discussed in the factual section hereinabove, Defendants never pled any claim for interest. Notwithstanding this procedural shortcoming, Defendants still are not entitled to the interest they claim. The real estate sale scheduled to close on April 15, 1998 was for the Option Property and not for the Rectangle. Accordingly, Defendants' efforts to link the execution of the Quitclaim Deed with the sale of the Option Property is without legitimate basis.

Whether or not title to the Rectangle should rest with Defendants or Plaintiff, the contract between the parties to convey the Option Property was one that should have been honored. The Court FINDS that Plaintiff fulfilled her obligations to close on the Option Property, including tendering the purchase price. John Burdette Bates unilaterally drafted the Quitclaim Deed, presented it (through closing attorney Mac Moncus) to Plaintiff for the first time on April 15, 1998, and insisted on its execution as a condition of closing. Without any just reason, Bates linked the execution of the Quitclaim Deed to the closing of the Option Property. Simply stated, there is no plausible contractual or equitable basis that should allow Defendants to have the interest they seek.

C. Equity

In their counterclaim, Defendants invoke the Equitable jurisdiction of the court in this cause. The appropriate analysis of the equities among the parties is that Plaintiff is deemed the owner of the Rectangle. John Burdette Bates, as the drafter of the

1977 Deed and creator of the legal description therein is the person who created the confusion over the boundary lines. The undisputed testimony at trial showed that prior to reviewing the Farmer Survey, the parties thought that the Gibbons property comprised more than the 6.5 acres it actual measures. This mistaken belief encompassed the parties' considering Plaintiff to be the owner of the Horse Pasture which ultimately became part of the Option Property. The parties did not view this error to be a material mistake that voided the Mediation Agreement in that they closed on the sale of the Option Property pursuant to the terms of the Mediation Agreement. The Horse Pasture is a much larger tract of land than the Rectangle. Therefore, by purchasing the Option Property Plaintiff paid for the land she thought she already owned, but yet Defendants claim land for which Plaintiff is the record owner. For Plaintiff to have to pay for the Horse Pasture as part of the Option Property and lose the Rectangle to Defendants would clearly be an unjust and an inequitable result.

Following the maxim of "he who seeks equity must do equity", Defendants should not be entitled to the ownership of the Rectangle by prescription. Again, applying the basic principals of fairness and equity, to rule against Defendants on the prescription claim will not result in a hardship to them. Plaintiff has stipulated that Defendants have a prescriptive easement for use of water from the well at the level of their historic use thereof. Defendants have also brought city water to the edge of their property so that they may hook up to it at any time.

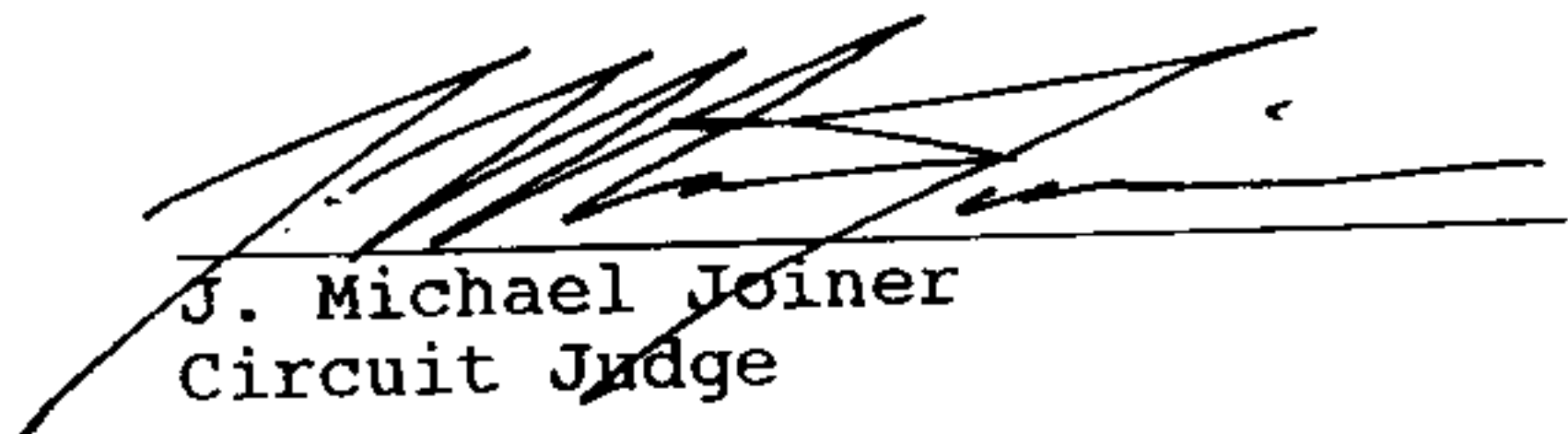
III. CONCLUSION

Whether ~~analyzing~~ the counterclaims solely from a legal perspective or an equitable analysis, Defendants are not due to prevail on their counterclaims. Defendants have failed to meet their burden of proof on the requisite elements to establish adverse possession by prescription. Plaintiff has a far better equitable claim to the Rectangle given (i) the circumstances regarding the conveyance of the 1977 Deed, (ii) Defendants' conduct in delaying the sale of the Option Property, and (iii) the fact that Plaintiff purchased the Horse Pasture as part of the Option Property. Accordingly, this Court finds that Defendants did not adversely possess any part of the Rectangle for the requisite consecutive twenty year period and their claims for adverse possession are DENIED.

As for Defendants' claim for interest, there is no justifiable linkage between the parties' obligation to close the sale of the Option Property and Defendants' desire for Plaintiff to execute the Quitclaim Deed. To allege otherwise is to act with a seeming disregard for the basic principals of contract law. Thus, Defendants' claim for interest is DENIED.

WHEREFORE, based on the foregoing, Defendants' counterclaims are DENIED and this case is dismissed with prejudice. All costs are taxed as paid.

DONE and ORDERED this 23rd day of February, 2000.



J. Michael Joiner
Circuit Judge

EXHIBIT A

A parcel of land located in the NW ¼ of the NW ¼ of Section 18, Township 19 South, Range 3 East Shelby County, Alabama, being more particularly described as follows:

Commence at the SW corner of the SE ¼ of the NW ¼ of said Section 18; thence N 88 deg-02'10" E and along said ¼ - ¼ section a distance of 271.09'; thence N 1 deg-57'50" W a distance of 629.65'; thence N 0 deg-11'27" E a distance of 431.50'; thence N 89 deg-48'33" W a distance of 485.00'; thence N 4 deg-57'00" E a distance of 352.05'; thence N 29 deg-49'11" E a distance of 96.29' to a point on the west bank of the Coosa River; thence N 56 deg-08'03" W and along said west bank a distance of 650.00' to the POINT OF BEGINNING; thence leaving said west bank, S 71 deg-12'34" W along a line parallel to said Railroad ROW a distance of 550.00'; thence N 26 deg-50'39" W a distance of 691.85'; thence N 71 deg-42'34" E along a line parallel to said Railroad ROW a distance of 290.00' to a point on the west bank of the Coosa River; thence S 42 deg-17'17" E along said west bank a distance of 180.45'; thence S 47 deg-25'49" E along said west bank a distance of 594.55' to the POINT OF BEGINNING. Containing 6.5 acres, more or less.

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