that basic loss benefits may not be "stacked." *Id.* at 346. Accordingly, it is clear that Mrs. Spangler may not recover survivor benefits, individually, nor work-loss benefits, in her capacity as executrix of the estate, under more than one policy.

ORDER OF COURT

January 5, 1984, plaintiff's Motion for Summary Judgment is granted. Defendant is directed to pay plaintiff $15,000 plus interest at the rate of 18% per annum payable from January 8, 1983.

Defendant shall pay the costs.

ROBINSON v. TIMMONS, C.P. Franklin County Branch, No. A.D. 1983 - 5

Quiet Title - Actual Possession - Evidence of Title

1. In an action to quiet title, the plaintiff has the burden of proving by a preponderance of the evidence his title to the real estate and that he has actual possession.

2. Where the land in question is unimproved mountain land, proof of title will carry with it proof of possession.

3. Where the plaintiffs proof involves a survey which has a significant course error, he has failed to show title and as mountain land it is generally considered open to the public.

George E. Wenger, Esq., Counsel for Plaintiffs

Deborah K. Hoff, Esq., Counsel for Defendants

ADJUDICATION AND DECREE NISI

KELLER, J., February 6, 1984:

This action to quiet title was commenced by the filing of a complaint in the Office of the Prothonotary on January 7, 1983. A true copy of the complaint was served upon the defendants, Vaughn R. Timmons and Tex S. Shaffer, on January 7, 1983, by personal service and upon the defendant, Harry L. Cosey a/k/a Mike Cosey, by certified mail deliver to address only delivered January 14, 1983. With leave of court the defendants filed an amended answer to the complaint on December 20, 1983. Trial without jury was held on December 29, 1983 and December 30, 1983, and the matter is ripe for disposition.

Preliminarily, it is noted that this is an action to quiet title in which the plaintiffs allege they are the owners and in possession of a certain two tracts of real estate with a combined acreage of 122.76 acres located in Montgomery Township, Franklin County, Pennsylvania and alleging that the defendants' land encroaches entirely upon their land, seek an order under Pa. R.C.P. 1061(b)(1) requiring the defendants to commence an action in ejectment within thirty (30) days of the date of the order or be barred from asserting any right of land title or interest in the land inconsistent with the plaintiffs' interest. The plaintiffs also seek to have the deed by which defendants acquired title to the real estate to be null and void as inconsistent with the ownership interest of the plaintiffs.

FINDINGS OF FACT

1. The plaintiffs are Gervas William Robinson and Soon B. Robinson, his wife, and Florence Marie Robinson Clapper. The plaintiffs immediate predecessor in title was Blanche V. Robinson, widow, who by her deed dated June 18, 1963 and recorded in Franklin County Deed Book Vol. 574, Page 13, conveyed an undivided one-half interest to Gervas William Robinson and Florence Marie Robinson Clapper.

2. The plaintiffs can trace their title to a conveyance on March 27, 1911 recorded in Franklin County Deed Book Vol. 161, Page 435 by Robert Ward Blair, Executor of the Will of Annie Elizabeth Baer.

3. The defendants are the owners of an 18.8 acre tract of real estate located in Montgomery Township, Franklin County, Pa., which they acquired by deed of Harry L. Cosey a/k/a Mike Cosey and Peggy Jane Cosey, his wife, dated May 15, 1979, and recorded in Franklin County Deed Book Vol. 789, Page 228.

4. Lillian Pittenger gave, devised and bequeathed her entire estate real, personal and mixed to L. Josephine Fiery and Harry L. Cosey, "jointly with right of survivorship" in her Last Will and Testament

dated February 11, 1973, and recorded in Washington County, Maryland Will Book No. 32, Page 675. L. Josephine Fiery predeceased Lillian Pittenger by three months, thus vesting the entire estate of Lillian Pittenger in Harry L. Cosey a/k/a Mike Cosey.

5. Harry L. Cosey a/k/a Mike Cosey testified that his foster mother, Lillian Pittenger, told him that her uncle, Preston Beckenbaugh of Illinois had an old deed on a sheepskin but it was burned. There is no record of any deed or other conveyance of the defendant's real estate prior to the May 15, 1979 deed. The Pittenger Will makes no specific reference to the real estate.

6. Harry L. Cosey a/k/a Mike Cosey testified that he had been going on the disputed real estate of the defendants since 1935, when he and his father first commenced hunting on that property and his father would show him where the boundary lines for the property were located. Mr. Cosey has hunted on the real estate every year since 1935.

7. Gervas William Robinson, one of the plaintiffs, testified that he was familiar with the plaintiff's real estate and had been going on it since the 1930's, but conceded he was not altogether familiar with the boundary lines of the property but believed the family owned 110 plus acres. He believed his father, William I. Robinson, had surveyed the property in 1920 but did not have a copy of the survey which was not recorded.

8. The lands of the plaintiffs and the lands claimed by the defendants are mountain lands. The real estate was never used for anything but hunting and was essentially open to the public.

9. On October 31, 1977, the plaintiffs leased their real estate described as "approximately 110 acres of mountain land joining Pine Ridge Hunting Club property and Musselman Brothers property on Kises' Knob" to the Pine Ridge Hunting Club. The lease has been renewed each year since that date.

10. The Pine Ridge Hunting Club originally had ten members but now only nine. They use the land for hunting every Saturday and many other days during small and big game season. They have posted the land they lease with no trespassing and no hunting signs 20 to 30 yards apart with the last posting two years ago.

11. The defendants, Vaughn Timmons and Tex Shaffer, are members of the Kises' Knob Hunting Club. There are eleven members in the Club plus Mr. Cosey. Members of the Kises' Knob Hunting Club, and specifically the defendant, hunt the land they purchased from Mr.

Cosey almost daily during small and big game season. The Club has posted all of the property they purchased with no hunting or trespassing signs 10 to 15 yards apart.

12. The 18.8 acres of disputed real estate purchased by the defendant has been hunted by members of both hunting clubs. No efforts have ever been made by any member to prosecute a member of the other club, and no hunter on the disputed land has ever been asked to leave. Members of the two clubs describe the disputed land as "a neutral zone" or "open ground."

13. No evidence was introduced by witnesses on either side of the controversy that any of the lands had in their memory been farmed, timbered or fenced or in any other way possessed except by use of the land for hunting.

14. The plaintiffs retained the firm of Best-Angle Registered Surveyors to survey their land.

15. The defendant, Harry L. Cosey a/k/a Mike Cosey, retained Thomas Michael Englerth to survey the lands he claimed by inheritance from his foster mother, Lillian Pittenger so that he could convey that real estate to the defendants herein. After the initial survey three parcels were conveyed by Mr. Cosey in 1977. In 1978, Mr. Cosey concluded that the survey had not included all of his real estate and he had not conveyed it all to the defendants. Mr. Cosey showed either Mr. Englerth or his crew chief the additional tract and its boundaries which he claimed belonged to him.

16. Thomas Michael Englerth, hereinafter Englerth surveyed the additional tract on the basis of the information supplied by Mr. Cosey together with information he developed from research he and his crew did in the field and research of deeds of adjoining owners. The survey prepared was of the 18.8 acre tract which was conveyed by Mr. Cosey and his wife to the defendant.

7. The 18.8 acre tract is the real estate claimed by both the plaintiffs and the defendants.

18. The survey of Best-Angle, hereinafter Angle, was prepared on the basis of the prior deed description for Tract 1, adjoining owners for Tract 2, research in the field by Angle and his crew, and by research of the deeds of adjoining and prior owners including early warrants such as the John Beatty warrant dated March 26, 1794. The Angle survey would include the entire 18.8 acres claimed by the defendants and shown on the Englerth survey.

19. The surveyors met and compared information and each concluded his survey was the correct one.

20. The testimony of Mr. Angle, his assistant, Mr. Gladhill, and one member of the Pine Ridge Hunting Club, indicated that they had found old blazes on trees, witness tree and existing stone piles which supported and verified the accuracy of the Angle survey.

21. The testimony of the defendants, Mr. Englerth and his assistant, Mr. Bard, disclosed that they found old blazes on trees, witness trees and existing stone piles which supported and confirmed the Englerth survey.

22. Both surveyors and their assistants are competent professionals in their field.

23. In establishing the eastern line of the disputed property, Mr. Englerth primarily relied upon the descriptions in the original land warrants for the adjoining properties of John Beatty and Robert Johnston, and the physical evidence of existing stone piles and old blazes on trees.

24. They also relied upon descriptions of deeds of adjoining owners where possible.

25. Mr. Angle concluded from his research that at one point in the early 1800's, John Beatty owned real estate by warrant on the east side of the common warrant line and the Johnston real estate on the west side of the warrant line, and thereafter conveyed real estate to Andrew Kline by deed dated September 4, 1819, and recorded in Franklin County Deed Book Vol. 12, Page 368. The Beatty to Kline deed description followed the original warrant lines to an existing stone pile at a point where the original Johnston warrant and Beatty warrant met (and agreed to by both surveyors herein). The description in the Beatty to Kline deeds then veered away from the common warrant line North 40° West 91.5 perches (surveyed and converted by Angle to North 39° 55 minutes 59 seconds West 1509.75 feet).

26. At the northwest end of the 1509.75 foot line Angle set an axle in a stone pile.

27. The next course called for in the Beatty to Kline deed is clearly North 77° West but for reasons unknown Angle believed the course to be North 27° West and plotted a course from the set axle to an existing stone pile (identified by both Angle and Englerth) a course and distance of North 29° 22 minutes 23 seconds West 402.22 feet.

28. Angle testified upon being made aware of the course error that if he had used the North 77° West course, the boundary line would have veered sharply into other lands of the defendants enclosing more of their real estate in that originally of Kline and now of the plaintiffs. However, he did not satisfactorily explain how the line would have closed on the north boundary of the plaintiffs' real estate. Angle's assistant, Mr. Gladhill, also testified that using the North 77° West course would move the plaintiffs' boundary line into defendants' tract No. 1, which is not in dispute.

29. Englerth testified that he refused to accept the 1509.75 foot line espoused by Angle from the Beatty to Kline deed because of the significant course error in the following line, which would create a large closure error.

DISCUSSION

In an action to quiet title the plaintiff has the burden of proving by a preponderance of the evidence his title of the real estate in question, and that he has actual possession of that real estate. Once the plaintiff has sustained that burden, it is not unreasonable to impose upon the defendant who also claims title and a right of possession the burden of initiating an action in ejectment wherein he will be required to prove by the strength of his title his ownership of the real estate and his right to possession thereof. When the case before the court involves improved and cleared real estate there is rarely any difficulty in establishing who has fenced-in the property, who has improved it, who has tended it and been responsible for it, and who has paid taxes upon it. However, when the case involves unimproved mountain land which historically has had no use other than hunting and hiking upon it, it is generally considered open to the public. We perceive the form of requisite possession may differ substantially. In *Irwin v. Patchen,* 164 Pa. 51, the Supreme Court of Pennsylvania held:

> "As to the proposition that plaintiffs had not actual possession of the land and therefore could not maintain trespass for cutting the timber, it is sufficient to say that, under all authorities, they were the owners of the title, the land being unimproved and unoccupied in any way, the title carried with it the possession, and such possession was sufficient to maintain the action." See also *Baker v. King,* 18 Pa. 138, 144; *Cossell v. Rhoades,* 272 Pa. 75, 77, 9 Adams L.J. 164, 18 Cumberland 1 (1967); and *Detwillver v. Geyer,* 39 North Hampton 228 (1970).

Applying the facts as we have found them to the law as above set forth, we conclude that as a result of the significant course error in the Angle survey the plaintiffs have not proven their title to the disputed

real estate, for it cannot be determined from the evidence presented by the plaintiffs whether or where their eastern boundary line would close with their northern boundary line, and whether it would include some or all of the disputed tract and whether it might also include additional real estate of the defendants or other unknown parties. The evidence presented will not support an action to quiet title by the plaintiffs, and the defendants may not in the interest of justice be required to initiate an action of ejectment for an unknown tract.

Parenthetically, we feel it important to note that this decision should not be construed as establishing the boundary lines of the parties on the basis of either survey presented to the Court.

DECREE NISI

NOW, this 6th day of February, 1984, the complaint of Gervas William Robinson and Soon B. Robinson, his wife, and Florence Marie Robinson Clapper, plaintiffs, is dismissed for failure of the plaintiffs to prove their title to the disputed real estate by a preponderance of the evidence.

This Decree Nisi shall become absolute pursuant to the applicable Rules of Civil Procedure unless exceptions are filed within ten (10) days after notice of the filing of the adjudication.

ESTATE OF GEORGE W. GEYER, (NO. 2), C.P. Franklin County Branch, No. 54-1982

Orphans Court - Estate of Decedent - Advance Distribution - Bond

1. The Court has the discretionary authority to make an award for advance distribution from an estate.

2. Where there is the possibility that a claimant may be assessed for counsel fees and costs, the Court may require a bond be posted to ensure the estate is reimbursed should such a contingency arise.

Thomas J. Finucane, Esquire, Counsel for Petitioner

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