



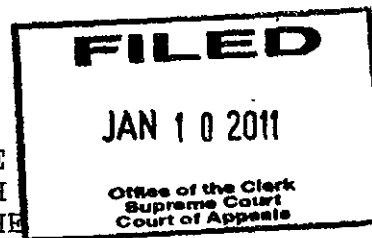
IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KATHERINE GRAHAM ABERCROMBIE
AND I. H. ABERCROMBIE

APPELLANTS

VS.

GRAYLING CARTER AND WIFE,
TAMMY GRAVES CARTER, STANLEY
PARKER, DORIS PARKER, HUGO
WILLIAM (BILL) WALTON, MARY MITTLELEE
WALTON MCCALL, LINDA ANN WALTON SMITH
AND SANDEE JOYCE WALTON HENDRICKS, THE
HEIRS AT LAW OF VONDEE WALTON,
DECEASED, AND LAWRENCE TRIGG AND
ESTER P. TRIGG



APPELLEES

CASE # 2010-CA-00874

BRIEF OF APPELLANTS

FOR APPELLANTS:

HON. MARY K. BURNHAM
ATTORNEY AT LAW
POST OFFICE BOX 683
COLLINS, MISSISSIPPI 39428

Telephone No. 601-517-6006

FOR APPELLEES:

HON. WILLIAM H. JONES
ATTORNEY AT LAW
POST OFFICE BOX 282
PETAL, MISSISSIPPI 39465

Telephone No.

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Certificate of Interested Parties	ii
Statement of Facts	1
Statement of the Issues	7
Argument:	
1. Whether or not the Court should have granted default judgment against Stanley and Doris Parker	8
2. Whether or not the Court should have adjudicated the Appellants to be the owners in fee simple of their property located in the SE 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, by adverse possession	9
3. Whether or not the Court should have accepted the survey of Saul Engineering as the true and accurate description of property owned by the Appellants which was encroached upon by the Carters	10
4. Whether or not the Court should have allowed the survey of Miller Staking dated January 11, 2009, which was submitted after the trial and received into evidence by the court without further testimony	13
Conclusion	16
Certificate of Service	17

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the appellants certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

APPELLANTS: I. H. AND KATHERINE GRAHAM ABERCROMBIE

APPELLEES: GRAYLING AND TAMMY GRAVES CARTER

STANLEY AND DORIS PARKER

LAWRENCE AND ESTER P. TRIGGS

HUGH WILLIAM (BILL) WALTON, MARY

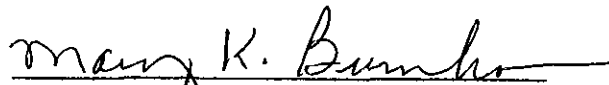
MITTLELEE WALTON MCCALL, LINDA ANN

WALTON SMITH, AND SANDEE JOYCE WALTON

HENDRICKS, HEIRS AT LAW OF VONDEE

WALTON, DECEASED.

THIS 10TH DAY OF JANUARY, 2011.


MARY K. BURNHAM, ATTORNEY
FOR APPELLANTS

STATEMENT OF FACTS

In early 1998, I. H. Abercrombie, appellant, hereinafter referred to as "Hardy", was walking his property located in the SE 1/4, Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, which is the subject of this lawsuit, and discovered that a pipe, cable and sucker rod fence had been constructed in the southwest corner of property owned by him and his wife, Katherine Graham Abercrombie, hereinafter referred to as "Katherine", (Transcript P. 119). After viewing fence corner, Hardy felt the fence was not on the quarter section line between the SE 1/4 and the SW 1/4, Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, and was encroaching over unto his property in the SE 1/4, Section 34, Township 7 North, Range 15 West, Covington County, Mississippi. (Transcript P. 119). Hardy then contacted Jerry Miller, Surveyor, who was surveying to the north and asked him to continue his survey on south to the Southwest Corner of his property. (Transcript P. 120). Miller said he would not be able to do so and on April 29, 2002, Harvey Saul of Saul Engineering made an official on-site survey of all of appellants property located in the NW 1/4 of the SE 1/4, NE 1/4 of SE 1/4, SW 1/4 of SE 1/4, and SE 1/4 of SE 1/4, Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, (Exhibit 11). The survey revealed an encroachment of 110.17 feet

over the quarter section line between the SE 1/4 and SW 1/4 into appellants's property and 21.03 feet on the south township line. The appellants learned that Grayling Carter, hereinafter referred to as "Grayling" had purchased four (4) acres of land from Stanley Parker, hereinafter referred to as "Stanley" on 3-21-1997 (Exhibit 6). and had built a pipe, cable, and sucker rod fence on the appellants's property approximately 110 feet x 461 feet in the southwest corner. (Exhibit 11)

On July 19, 2002 and August 29, 2002, Hon. Henry S. Davis, Jr., Attorney, wrote letters to Grayling, notifying him of the encroachment and asked him to remove his fence from appellants property. (Exhibits 7 and 8). Grayling refused to remove the fence and Hardy and Katherine filed their Complaint to Quiet and Confirm Title and Remove Cloud on June 12, 2003, (Page 8 of record) asking the court to establish the quarter section line between the SE 1/4 and the SW 1/4 in Section 34, Township 7 North Range 15 West, and the township line between Section 34, Township 7 North, Range 15 West, and Section 3, Township 6 North, Range 15 West, Covington County, Mississippi.

Response by Grayling was filed on September 5, 2003, (Record page 17), and Entry of Appearance by A. Reginald Blackledge Attorney, for Lawrence and Ester P. Triggs hereinafter referred to as the "Triggs", on September 16, 2003, (Page 18 Record), followed by Answer filed on October 6, 2003, (Page 20 Record), and Motion to Dismiss on April 19, 2004. (Page 24 Record). Appellants finding

that additional parties needed to be brought into the lawsuit, (Doris Parker and Vondee Walton) filed their Agreed Order of Continuance and Leave to Amend Complaint to Bring in Additional Necessary Parties. (Page 27 Record) On April 29, 2004, the Triggs filed their Amended Answer, Counter Complaint against the Appellants, and Cross Complaint against Grayling Carter and wife, Tammy Graves Carter, Stanley and Doris Parker, and Vondee Walton. (Page 30 Record) Response to Triggs Request for Admissions was filed by appellants on May 19, 2004 (Page 42 of Record). Answer to Appellants lawsuit was filed by Grayling and Tammy on May 19, 2004, and Counter Complaint and Cross Complaint against the Triggs (Page 45 Record) On June 15, 2004, the appellants Amended their complaint to bring in Doris Parker and Vondee Walton (Page 50 Record), and on June 15, 2004, appellants filed their Answer to Countercomplaint filed against them by the Triggs (Page 59 Record). On June 21, 2004, the Triggs filed their Answer, Counter Complaint, and Cross Complaint to the Amended Complaint (Page 61 Record). Hon. A. Reginal Blackledge withdrew from representation of the Triggs on July 19, 2004, (Page 73 Record), and Vondee Walton filed her Answer, Counter-Complaint, and Cross Complaint to appellants's Amended Complaint on November 15, 2004. (Page 76 Record), Appellants filed their Answer to Counter/Cross Complaint for Vondee Walton on December 30, 2004. (Page 84 Record)

Stanley Parker and Doris Parker having failed to respond

to appellants's Complaint and Amended Complaint, appellants applied to the Clerk for Entry of Default on March 22, 2005 and March 24, 2005 (Page 87 and Page 92 Record). Clerk's Docket of Entry of Default was entered on March 22, 2005 (and March 24, 2005 (Page 91 and 96 Record). At trial counsel for appellants moved for default judgment against Stanley and Doris and the Court took the motion under advisement and no ruling was made (Transcript P 10-13).

After reviewing several surveys by Miller Staking, Otis Wolverton, and Saul Engineering, on the 27th day of January, 2005, appellants and Triggs reached an agreement as to the location of the township line between the appellants and the Triggs and the parties agreed to dismiss the complaint filed against the Triggs by the Abercrombies and the counter complaint filed by the Triggs against the Abercrombies. (Record Page 97) These parties agreed that the Saul Survey depicted the correct location of the township line between their properties in the SE 1/4 of Section 34, Township 7 North, Range 15 West and the NE /4 of Section 3, Township 6 North, Range 15 West, Covington County, Mississippi, and Triggs would move his fence from Appellants's property to the court approved surveyed township line.

Vondee Walton having died, appellants moved to add additional parties, Hugo William Walton, Mary Mittele Walton McCall, Linda Ann Walton Smith, and Sandee Joyce Walton Hendricks, (Page 104 Record). The Court having allowed the amendment (Page

107 Record) Amended Complaint was filed on January 26, 2006 by Appellants. (Page 110 Record) and written response by the Waltons was filed. (Record Pages 128, 136, 144, 152).

On January 25, 2006, the court appointed its own surveyor, Jimmy Speights, to make a survey for the court to begin at the common corners of Section 3 and 4, Township 6 North, Range 15 West and Sections 33 and 34, Township 7 North, Range 15 West. (Page 119 Record) Jimmy Speights being unable to perform survey the Court appointed Tim Brewer to make said survey (Page 126 Record) which he did on April 4, 2007. (Exhibit 12)

Answers to Amended Complaint was filed by Grayling and Tammy on March 8, 2006, (Record Page 120) and the Waltons (Record Page 122).

The case proceeded to trial on April 15, 2009, at 9:30 o'clock in the Covington County Courthouse, Collins, Mississippi.

After trial of the case, on April 30, 2009, Grayling filed his Motion to Reopen Record, to Consider Additional Surveys and Testimony (Record Page 160) and his motion to Strike Testimony of Surveyor Saul. (Page 158 Record)

On May 7, 2009, the Waltons filed their Motion to Strike testimony of Surveyor Saul (Page 162 Record) and Motion to Ropen Record to Consider Additional Surveys and Testimony (Page 165 Record) to which the appellants responded on June 30, 2009, citing no authority as a basis for their motion and prejudice to the

appellants to allow the Carters and the Waltons an opportunity to re-try their case. (Page 167 - 180 Record) Both motions were filed out of time, more than ten days after completion of the trial.

The Court issued its Final Judgment on April 28, 2010, overruling the motions to strike the testimony of Surveyor Saul and reopening the matter to accept the survey plat of Miller Staking dated January 11, 2009, (Exhibit A) without testimony, which was used in part by the Court's as basis for his Final Judgment setting the property line between the Carters and the Appellants. (Page 181 Record)

From that Final Judgment the Appellants filed their appeal.

STATEMENT OF THE ISSUES

1. Whether or not the Court should have granted default Judgment against Stanley and Doris Parker.

2. Whether or not the Court should have adjudicated the Appellants to be the owners in fee simple of their property located in the SE 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, as more accurately depicted in the Saul Engineering survey (Exhibit 11) by adverse possession.

3. Whether of not the Court should have accepted the survey of Saul Engineering (Exhibit 11) as the true and accurate description of property owned by the appellants which was encroached upon by the Carters.

4. Whether or not the Court should have allowed the survey of Miller Staking dated January 11, 2009, (Exhibit A) which was submitted after the trial to be received into evidence.

ARGUMENT

1. WHETHER OR NOT THE COURT SHOULD HAVE GRANTED DEFAULT JUDGMENT AGAINST STANLEY AND DORIS PARKER, APPELLEES

Stanley and Doris Parker having been personally served with process on Complaint and Amended Complaint on the 3rd day of September, 2003, and the 23rd day of December, 2004, and the Clerk's Docket of Entry of Default having been entered on Stanley on March 22, 2005 and on Doris on March 24, 2005, and neither party having made any objection to the Complaints, filed an answer, nor made an appearance, Appellants moved for Default Judgment. (Transcript Pages 10-13)

According to testimony of Grayling (Transcript Page 33) Stanley did not claim title to any land located in the SE 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, and Parker's land was located in the SW 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi. Katherine testified that to her knowledge, (Transcript Page 105), Parker never claimed any land in the SE 1/4 of Section 34, and his chain of title, (Exhibits 3, 4, 5, 6), do not reflect any property located in the SE 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi.

The Court took Motion for Default under advisement and did not make a ruling.

2. WHETHER OR NOT THE COURT SHOULD HAVE ADJUDICATED THE APPELLANTS TO BE THE OWNERS IN FEE SIMPLE OF THEIR PROPERTY LOCATED IN THE SE 1/4 OF SECTION 34, TOWNSHIP 7 NORTH, RANGE 15 WEST, COVINGTON COUNTY, MISSISSIPPI, BY ADVERSE POSSESSION.

The Appellants obtained title to the property involved in this lawsuit beginning with Forfeited Land Patent on January 11, 1940, issued to Bob Graham, uncle of Katherine, with land passing to Katherine's father, James Marion Graham, and finally passing to Katherine February 25, 1993, (Cumulative Exhibits 9), and the appellants having been in actual, adverse, peaceable, continuous, uninterrupted, hostile, open and notorious possession for sixty-three (63) years prior to the filing of their lawsuit, Katherine testified that she did not know of anyone else claiming any of her property including Grayling. (Transcript Page 105)

The Judge announced at the beginning of the trial that the case would be tried on adverse possession, however, in his Final Judgment he overruled Defendants's answer and claims of adverse possession stating: "...there is no property in question being adversely possessed by either party." (Record Page 183).

Grayling acquired the four acres in question from Stanley on March 21, 1997 (Exhibit 6), six years before the filing of this lawsuit, less than ten (10) years needed for adverse possession. None of the Stanley Parker deeds (Exhibits

3,4,5, and 6) including the Warranty Deed from Stanley L. Parker and Doris S. Parker dated March 30, 2005, (two years after this lawsuit was filed) conveying all of their property to Tammy D. Carter make any mention of property owned by Stanley and Doris located in the SE 1/4 of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi.

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3. WHEHER OR NOT THE COURT SHOULD HAVE ACCEPTED THE
 SURVEY OF SAUL ENGINEERING AS THE TRUE AND ACCURATE
 DESCRIPTION OF PROPERTY OWNED BY THE APPELLANTS
 WHICH WAS ENCROACHED UPON BY THE CARTERS.

Surveyor Saul made an on-site survey of the Appellllants's property using the original survey and government field notes on file in the Chancery Clerk's office. (Transcript Page 75)
Saul testified at trial that he found good government corners at the NW corner of Section 34 and the SW Corner of Section 34 and that he also found three other corners within Section 34 that agreed with those two corners that marked the west section line. (Transcript Page 74-75)

Saul also testified that when he established the quarter section corner on the south line which is also the SE corner of the SW 1/4 this corner agreed with an iron pipe that had been used by preious surveyors. (Transcript Page 76) Saul referenced other surveys made to the north of Appellants's

property which substantiated his survey for the Appellants.

Saul further testified that he found an iron pipe at the center of Section 34 (which would be the NE corner of Parker's property) and that he matched that corner (Transcript Page 76) and also a property corner that was set on that 40 line south of there when some property was being divided. (Transcript Page 76)

Saul Survey (Exhibit 11) agrees with Exhibits 3, 4, and 5 which show the distance across (e & w) SE 1/4 of SW 1/4 of Section 34 to be 1320 feet and also this survey shows the south line of SE 1/4 of SW 1/4 to be 1320 feet, and also agrees with the Covington County aerial map (Exhibit 1).

Saul survey (Exhibit 11) and Forestry Services survey (Exhibit 12) both show the fence corner with leaning post to be located in the SE 1/4 of Section 34, Township 7 North, Range 15 West on Abercrombie property and both surveys show fence corner located approximately 2750 feet from the SW corner of Section 34, which footage would disagree with Exhibits 3, 4, 5, 15, original survey and field notes.

Saul testified that he found 2 iron pins or iron pipes on the Quarter Section line between the SE 1/4 and SW 1/4 of said Section 34, one being the NE corner of Parker's property which did not match or agree with iron pin set at fence corner by Surveyor Miller on 3-16-97 on survey for Grayling who described that fence corner as being the SEC of SW 1/4 of Section 34. Miller was not present to testify and there was no proof offered as to how he

arrived at his starting point for his 3-16-97 survey and said survey was objected to by the Appellants and is not in evidence.

There was much testimony by Bill Walton pertaining to the fence post which the Chancellor used as his guide for setting the property line between Grayling and the appellants; Walton offered testimony as to the fact that that fence corner had been used by many surveyors, however, none of the surveyors were present to testify and no surveys were offered into evidence. (Transcript Pages 57 - 58) The only survey using that fence post as the SE Corner of Section 34 was dated January 11, 2009, six years after the lawsuit was filed. This was a survey made by Miller Staking for the Walton Estate which the court accepted without testimony and had no relation to property owned by the Appellants in the SE 1/4 of Section 34, Township 7 North, Range 15 West or this lawsuit.

The next question concerns the fences in this particular area. There was no testimony except Grayling that there had ever been a fence going north and south between the Appellants property and Stanley Parker property. Grayling testified that he had taken down an old fence in 1981 and built a new fence, but tore it down when he built his new fence in 1997. (Transcript Page 20) This fence was not shown on Exhibit 1 in 1992 nor Exhibit 10 in 1996, just one year before Grayling acquired the property from Stanley Parker. Katherine testified that she had never seen a fence going north and south between them

and Stanley (Transcript Page 100) and Saul testified that he did not notice any old fence going north and south - just the pipe and cable fence (Transcript Page 78) Both Exhibits 1 and 10 does show a round fence approximately 110 feet west of where Grayling testified he built his fence in 1981 on property he used but did not own and the fence does not protrude across the quarter section line. Grayling denied any knowledge of that fence. (Transcript Page 37)

The Saul Survey (Exhibit 11) and the Forestry Services Survey (Exhibit 12) both began at good governmental corners and basically reached the same conclusion, that Grayling was encroaching over onto Appellants's property. Grayling's attorney, Hon. William Jones stipulated to the Forestry Services Survey (Exhibit 12) and the Appellants accept the Saul Engineering Survey (Exhibit 11).

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4. WHETHER OR NOT THE COURT SHOULD HAVE ALLOWED THE SURVEY OF MILLER STAKING DATED JANUARY 11, 2009, WHICH WAS SUBMITTED AFTER THE TRIAL AND RECEIVED INTO EVIDENCE BY THE COURT WITHOUT FURTHER TESTIMONY

The Court has cited no precedents for its decision to accept the Miller Staking survey (Exhibit A) after the trial and use it to establish the southwest corner o common boundary line of

Appellants and Grayling instead of establishing the quarter section line between the SE 1/4 and the SW 1/4 of Section 34 as prayed for in Appellants's complaint. This survey is dated January 11, 2009, and was available on the day of the trial. No attempt was made to introduce the survey into evidence and it is not a part of the official transcript. Jerry Miller, surveyor, was not called as a witness for the appellees. Two days after the trial, on April 17, 2009, several people representing the appellees went to the site without notice to the appellants in an attempt to prove their case and the survey was altered to reveal information that has not been substantiated by any proof and can only be hearsay. Exhibit A incorrectly describes all corners except the point of beginning.

In the Final Judgment the Court stated, "...the SW corner of the common boundary line of the plaintiffs and defendant is reflected by the fence lines and barbed wire found in the trees as reflected in Exhibit 16 to the trial." First, there are no fence lines going north and south between the parties except the pipe and cable fence built by Grayling in 1997 when he purchased the property. Second, there is no barbed wire found in trees to the north on Exhibit 16 as all of the wires in trees on the property in question in complaint are in trees running east and west between Appellants and Triggs in Section 34 and Section 3. who have agreed on their property lines.

The court further ruled that, "That this corner hereby established that property line between the Abercrombies and

the Carters shall began at this corner and run easterly between said parties, as reflected by the survey of Forestry Services, In. dated April 4, 2007". There is no property running East between the parties. What about the line between the parties running north and south? Where does it begin and end.

Saul testified that it is not proper to begin a survey without establishing a good beginning point. (Transcript Page 94)


Bill Walton testified that this fence corner moved according to the weather (Katrina) or what was going on with the Waltons and the Triggs in their farming operation. (Transcript 50 - 66) The line going to the south between the Triggs and Waltons did not go in a straight line as quarter section lines normally run as shown on both maps Exhibits 1 and 10. The only two surveys available using the fence post as a starting place were made by Miller Staking and the 1/2 rebar he found was the one he placed there on 3-16-97 when he surveyed by Grayling and the big post was placed there by Grayling when he built his fence in 1997, as his fence is attached to that post (Exhibit 2)

There is no proof that this has ever been established to be the NE corner of the NE 1/4 of Section 3, stated in said survey (Exhibit A) and the surveys of Saul and Forestry services surveys disagree with this information as well as Exhibits 1 and 10.

CONCLUSION

Saul and Brewer made surveys on site (Exhibit 11 and 12) and came up with the same conclusion, that is, Grayling is encroaching over onto the appellants's property in the southwest corner. William Jones, attorney for Grayling, stipulated to the Forestry Services survey and the appellants agree that the Saul survey is a true and accurate depiction of their property. Appellants pray that this Honorable Court will assess the facts and evidence presented and will reverse the decision of the Chancellor, find for the Appellants, and assess all costs of this appeal against the Appellees.

Respectfully submitted,



MARY K. BURNHAM, ATTORNEY
FOR THE APPELLANTS

CERTIFICATE OF SERVICE

I, Mary K. Burnham, Attorney for Appellants, certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants to the following named persons at these addresses:

Kathy Gillis
Clerk of the Supreme Court of Mississippi
Post Office Box 249
Jackson, Mississippi 39205-0249

Hon. William H. Jones,
Attorney
P. O. Box 282
Petal, MS 39465
Attorney for Grayling Carter and Tammy Graves Carter
and the Walton heirs.

This 10th day of January, 2011.


MARY K. BURNHAM
ATTORNEY FOR APPELLANTS

MARY K. BURNHAM
ATTORNEY
P. O. BOX 683
COLLINS, MS 39428
601-517-6006
MSB [REDACTED]

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ESTER P. TRIGG

APPELLEES

CASE # 2010-CA-00874

I, Mary K. Burnham, Counsel of Record for the Appellants
do hereby certify that I have this date mailed by United States
Mail, postage prepaid, a true and correct copy of the above and
foregoing BRIEF OF APPELLANTS and RECORD EXCERPTS
to the Honorable Larry Buffington, Chancellor, the presiding Judge
in this case, at Post Office Box 924, Collins, Mississippi 39428.

This ^{12th}~~19th~~ day of ^{February}~~January~~, 2011.


MARY K. BURNHAM, ATTORNEY

MARY K. BURNHAM
ATTORNEY AT LAW
P. O. BOX 683
COLLINS, MS 39428
601-517-6006
MSB 