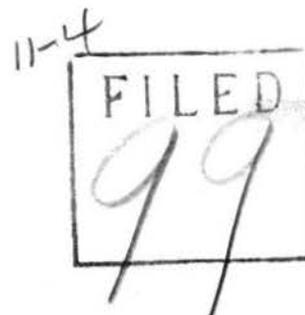


COUNTIES: Disputed ownership and possession of ~~S~~wamp and overflow land is contested by suit to quiet title and ejectment proceedings.

November 1, 1938

Hon. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

We acknowledge receipt of your request for an opinion dated October 12, 1938, which reads as follows:

"There is and has been a dispute between the Counties of Osage and Cole over a parcel of land, situate at the junction of the Osage River with the Missouri River, commonly called Dodd's Island. Osage County has exercised jurisdiction over this parcel for some years. The contention of Cole County is that by the Constitution of 1875 the boundaries between the two Counties was determined as being the mid-channel of the Osage River and that the mid-channel lay to the East and South of said island, and not to the West as contended by Osage County. The island is now connected with Cole County as the old Slough dividing them has filled in.

"I filed an injunction suit against the Collector of Osage County, in the name of a resident living on said parcel, attempting to restrain the collection of personal taxes, in Osage County, but the suit was dismissed upon the sustaining of the demurrer filed.

"I would like to know whether or not the procedure attempted is the correct one to follow, or whether there is another more direct or effective one that may be pursued."

The Congress of the United States in 1850 by Title 43, Section 982, U.S. Code Annotated, donated its proprietary interest in all Federal swamp lands and overflow Federal lands located in the State of Missouri to the State of Missouri.

The State of Missouri in turn on March 27, 1868, donated its proprietary interest in said swamp and overflow lands to the counties in which said land was located, pursuant to the provisions of R.S. Missouri, 1929, Sections 11128, 11156, 11165 and 11168. Construing the above Missouri statutes, the Supreme Court said in Phillips v. Butler County, 187 Mo. 698, 1.c. 711, 86 S.W. 231:

"It may be conceded in the outset that the title to and control of all swamp and overflow lands are vested in the several counties in which located."

In the same act donating title to swamp and overflow lands to Missouri counties, the Legislature provided that county courts could employ surveyors and attorneys when necessary, and Section 11179, R.S. Missouri, 1929, provides:

"The county court may employ surveyors to survey said lands and islands, and attorneys to represent them in any suits pertaining thereto, and shall pay such surveyors and attorneys reasonable compensation for their services, to be paid out of any funds arising out of the sale of such lands and islands, or out of the general revenue fund of the county as may be agreed upon at the time such surveyors and attorneys are employed."

Said act donated title to swamp and overflow lands to counties sanctions ejectment (a legal remedy) where a county as proprietary owner wishes to recover possession of swamp and overflow lands from intruders, and Section 11170, R.S. Missouri, 1929, provides:

"In any action of ejectment brought by any county to recover possession of any of the lands or islands aforesaid upon which improvements have been made,

the owner of such improvements may, if the county be successful, recover compensation therefor in the manner provided for the recovery of compensation for improvements in other actions of ejectment: Provided, such improvements were made prior to the date of the passage of this article; and provided further, that such owner shall not be required to prove that such improvements were made in good faith, nor that they were made by such owner."

The legal representative of a county is also authorized by statute to protect the county's proprietary interest in swamp and overflow land by suit to quiet title (a legal remedy), and Section 11318, R.S. Missouri, 1929, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

After giving title to swamp and overflow lands to the county wherein said land be located, another Legislature by subsequent act bounded Cole and Osage Counties under provisions of R.S. Missouri, 1929, Sections 11946 and 11978. By these sections, the territorial boundary line between Cole and Osage Counties was fixed before 1865 at a point in the middle of the main channel of the Missouri River, thence down the main channel of the Osage River intersecting the main channel of the Missouri River.

The above legislative boundary separating the land in Cole County from the land in Osage County was in effect when the Missouri Constitution was adopted on November 30, 1875. Article IX, Section 1 of said Missouri Constitution provides:

"The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State."

The Missouri Supreme Court construed the above constitutional provision determining disputed territorial boundaries of counties, where title to land was involved, in *Akers v. Stoner*, 7 S.W. (2nd) 695, 319 Mo. 1085, 1.c. 1088. The plaintiff in said suit claimed title by proprietary ownership in Ray County, Missouri, while defendants claimed title by proprietary ownership in Livingston County, Missouri. We quote from the opinion of said case to show that the nature of plaintiff's petition in the trial court was a law suit and not an equity suit, and the appellate court said:

"This land controversy grows out of a sudden shifting of the channel of the Missouri River between Ray and Lafayette counties in one night, in July, 1915. The plaintiffs, named Akers, sue at law in two counts. The first count is to quiet title under Section 1970, Revised Statutes 1919, against a number of named and unknown defendants; the second count is in ejectment against three of the same defendants."

In all of the following cases the plaintiff in the trial court asserted proprietary ownership in land supposedly located in two different Missouri counties and the issue as to which county had jurisdiction over said land for governmental purposes was finally decided pursuant to plaintiff's petitions praying the court to quiet title, and most of said petitions had a second count in ejectment; *Jacobs v. Stoner*, 319 Mo. 1093, 7 S.W. (2nd) 698; *Randolph v. Fricke*, 35 S.W. (2nd) 912, 327 Mo. 130; *Randolph v. Moberly Hunting and Fishing Club*, 15 S.W. (2nd) 834; *Alluvial Realty Co. v. Lumber Co.*, 229 S.W. 757, 287 Mo. 299; *Pemiscot County v. Lumber Co.*, 144 S.W. 857, 240 Mo. 377.

We have found no cases on appeal deciding boundaries between counties pursuant to an injunction suit.

32 Corpus Juris, Page 124, Section 161, reads in part as follows:

"A court of chancery is not the appropriate tribunal for the trial of title to land, and where the main object of a suit asking for relief by injunction is to determine the legal title to property, or to fix the boundaries of land, equity will not interfere by injunction, but will remit the parties to a court of law."

Section 722, R. S. Missouri, 1929, provides:

"Suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon, shall be brought in the county where such real estate, or some part thereof, is situated."

CONCLUSION

We are of the opinion that the suit fixing county boundaries which you suggest involves the title to real estate and it is jurisdictional that it must be brought in the county where said real estate or some part thereof is situated.

November 1, 1938

We are of the further opinion that Cole County's right to exercise governmental control over this disputed land in lieu of the governmental control admittedly now exercised by Osage County depends upon Cole County's proprietary ownership of said land after asserting her title to said land as swamp and overflow land in Cole County and before the Circuit Court of Cole County.

In such disputes involving the title and possession of swamp and overflow lands, the Legislature has expressly sanctioned ejectment and suit to quiet title, both legal remedies according to *Akers v. Stoner, supra*. In our opinion, ejectment and suit to quiet title are adequate and complete legal remedies to determine the disputed boundary between Cole and Osage Counties involving swamp and overflow lands. Injunction being an equitable remedy, is not available as a remedy in your problem.

All of the cases reaching the appellate courts of Missouri which we have been able to discover, wherein county boundaries were an issue in dispute or wherein title to overflow and swamp lands was in dispute, were tried in the lower court pursuant to a petition of plaintiff alleging proprietary ownership. All of said suits were to quiet title and usually had a second count asking ejectment of intruders in possession of said land.

Respectfully submitted,

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APPROVED By:

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