

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001147-MR

HARRIS TERRY AND RODERICK J. TOMPKINS,  
CO-PERSONAL REPRESENTATIVES OF THE  
ESTATE OF KATHERINE H. NISBET, DECEASED;  
NANCY NISBET CIOCCI AND GILBERT CIOCCI,  
HER HUSBAND; FAY NISBET TERRY AND  
PHILLIP H. TERRY, HER HUSBAND;  
GEORGIANNA NISBET EDDINS AND G. CONWAY  
EDDINS II, HER HUSBAND;  
WILDCAT TRUST; AND, RICE WYNN SUTHERLAND,  
WIDOW

APPELLANTS

APPEAL FROM HOPKINS CIRCUIT COURT  
v. HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 03-CI-00326

JAMES FAUNTLEROY SMITH AND ETHEL LOUISE SMITH, HIS WIFE;  
JOE G. MONTGOMERY, JR. AND GERI MONTGOMERY, HIS WIFE;  
MARY JORDAN MORRIS, WIDOW;  
APRIL MONTGOMERY KERR-MILLER, SINGLE;  
JAMES WILSON KERR, IV, SINGLE;  
ANDREW ALEXANDER KERR, SR. AND KATHERINE KERR, HIS WIFE;  
LLOYD STONE AND MARGARET STONE, HIS WIFE;  
BOBBY HARMON AND KIM HARMON, HIS WIFE;  
TOMMY OWENS AND CAROL OWENS, HIS WIFE;  
JAMES RAY OWENS, SINGLE;  
MARY FRANCES OWENS ASHER AND BILL WAYNE ASHER, HER HUSBAND;  
SUSAN M. OWENS, WIDOW;  
HEATHER NICHOLE OWENS, SINGLE;  
JOE OWENS AND CINDY OWENS, HIS WIFE;  
DOTTIE SUE OWENS WALKER AND RICHARD WALKER, HER HUSBAND;  
JIMMY OWENS AND ELAINE OWENS, HIS WIFE;  
WANDA LOU STONE LEMON AND RUSSELL LEMON, HER HUSBAND;  
MARK STONE, SINGLE;  
O.B. STONE AND PAM STONE, HIS WIFE;  
DONNA JO STONE, SINGLE;  
KATHY JEAN STONE GRIMM AND RANDALL GRIMM, HER HUSBAND;

JUDY ANN STONE BROWN, WIDOW;  
KAREN SUE STONE SKAGGS AND DARRELL SKAGGS, HER HUSBAND;  
RUTH ANN CROCKER AND BILLY F. CROCKER, HER HUSBAND;  
JAMES HENRY HART, SINGLE;  
KIMBERLY HART BLALOCK, SINGLE;  
ADA MARIE (HELTON) LEEPER, WIDOW;  
JANICE MARIE (LEEPER) SWIFT AND ROBERT A. SWIFT, HER HUSBAND;  
EVALYN SIMPSON ANDERSON;  
MINNESOTA STATE COMMISSIONER OF PUBLIC  
WELFARE, GUARDIAN OF MARSHA JANE MONTGOMERY;  
UNKNOWN HEIRS AND DEVISEES OF WILLIAM TELL PELPHREY, DECEASED  
AND THEIR GUARDIAN AD LITEM;  
MAYME LEE ANDERSON AND HER GUARDIAN AD LITEM;  
JACK SMITH AND JEANNIE SMITH, HIS WIFE;  
BRENDA SMITH SHELTON AND LEWIS SHELTON, HER HUSBAND;  
RONNIE SMITH AND CLARA SMITH, HIS WIFE;  
SHIRLEY SMITH BAILEY AND WAYNE BAILEY, HER HUSBAND;  
GARY R. SMITH AND SHEILA SMITH, HIS WIFE;  
RAEGINA SMITH SCHULTZ, SINGLE;  
RANDY SMITH AND LOU ANN SMITH, HIS WIFE;  
SANDRA SMITH GUERNSEY AND GREGG GUERNSEY, HER HUSBAND;  
PEGGY SMITH, SINGLE;  
ESTATE OF ROBERTA THOMPSON MONTGOMERY, DECEASED;  
PAMELA KAY MONTGOMERY, SINGLE;  
ROBERT THOMAS MONTGOMERY, SINGLE;  
DENA EZELL CONRAD AND RAYMOND CONRAD, HER HUSBAND;  
AND, TINA EZELL GREEN AND KEITH GREEN, HER HUSBAND            APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

BARBER, JUDGE: Harris Terry and Roderick J. Tompkins, Co-  
Personal representatives of the Estate of Katherine H. Nisbet,  
Deceased, Nancy Nisbet Ciocci and Gilbert Ciocci, her husband,  
Fay Nisbet Terry and Philip H. Terry, her husband, Georgianna

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 23.580.

Nisbet Eddins and G. Conway Eddins II, her husband, Wildcat Trust, and, Rice Wynn Sutherland, Widow (collectively referred to as appellants) contend in this appeal that the circuit court incorrectly ruled that title to "all the coal and mining rights and privileges" in 32 1/8 acres lying in Hopkins County belongs to appellees. We affirm.

The 32 1/8 acres in dispute originates from a deed dated July 10, 1922 (the 1922 deed) and describes the property as follows:

Tract No. 2. A tract of land on the waters of Rose Creek containing 32-1/8 acres and bounded as follows: Beginning at a stone 40 feet north of the center of L. & N. Railroad; thence S. 88 E. 32-1/2 poles to a stone, corner to Winsteads former survey; thence with the line thereof N. 1 E. 41-3/5 poles to a stone instead of an elm; thence with another line thereof N. 87-1/2 E. 66 poles to a stone in the line of W.F. Cox's survey; thence with said cline S. 89 poles to a stone 40 feet N. of center of aforesaid railroad; thence with the right of way of said railroad to the beginning.

Said land was conveyed to W.D. Winstead by Chas. E. Bowers and wife by deed dated Oct. 25, 1892 and recorded in deed book 52 at page 153 of the Hopkins County Court Clerks Office.

This deed also contains the description of another tract of property not in dispute in this appeal.

The 1922 deed severed "all the coal and mining rights and privileges" to the two tracts of land described and conveyed those from W.D. Winstead and his wife to T. J. Montgomery, James

F. Montgomery, Joe G. Montgomery, and Ellis Leeper. T. J. Montgomery and Joe G. Montgomery conveyed their interests to J. E. Leeper and Jas. F. Montgomery.

J. E. Leeper and Jas. F. Montgomery then mortgaged their interest several times. None of the mortgages contained a description of Tract 2 of the property in the 1922 deed. Eventually the mortgages were foreclosed and sold through a judicial sale. The master commissioner issued a deed which also did not contain a description of Tract 2. The purchaser at the sale in 1934 conveyed its interest to J. E. Leeper. That deed, likewise, did not contain a description of Tract 2. Leeper again mortgaged his interest. The mortgages also did not reflect a description of Tract 2. Eventually there was a foreclosure action instituted and the master commissioner issued another deed on February 19, 1944 to William A. Nisbet (the 1944 deed). The 1944 deed does not describe Tract 2 of the property in the 1922 deed.

The 1944 deed is the deed to which the appellants trace their title. The appellees trace their title to the 1922 deed. The issue in this case is whether the language in the 1944 deed that states "being the same property conveyed to Montgomery and Leeper by W. D. Winstead and wife, by deed dated the 10<sup>th</sup> day of July, 1922, recorded in Hopkins County Court Clerk's office in D.B. 111, page 17" operates so as to convey

all the property described in the 1922 deed, and, thus, Tract 2. The circuit court found that it did not.

Appellants first argue that the principle of broadened description should apply to this case. That principle can be stated as, if a current deed recites that the land described is the same as an earlier deed, then the description of the property in the earlier deed will apply and the current deed acts to convey the whole property even if the boundary is larger than that described in the current deed.

In Kentucky it is clear that reference in a current deed to a property description in a prior deed, even if that is the sole description of the property, is sufficient for recordation. KRS 382.110; Glocksens v. Holmes, 299 Ky. 626, 628, 186 S.W.2d 634, 635 (1945)(description of property as "all" property is sufficient to convey interest to grantee); Ky. OAG 81-100, 1981 WL 142374 (Ky.A.G.).

It is also true that reference to property in a prior deed can act to convey the land described in the prior deed, but only if the property in the current deed is not adequately described. In other words, the general rule that courts apply is stated as: Reference in a current deed to property in a prior deed through words such as "being the same as . . ." or other like language, will not act to enlarge or restrict the description of the property in the current deed if the property

is particularly described. Stutts v. Humphries, 408 So.2d 940, 944 (La.App. 2d Cir. 1981); Powell v. Peel, 309 Ky. 380, 382, 217 S.W.2d 959, 960 (1949); Finlay v. Stevens, 93 N.H. 124, 129, 36 A.2d 767, 771 (1944); 23 Am.Jur.2d Deeds §51; 26A CJS Deeds §216; Friedman on Cont. & Conv. Real Prop. §7.6(g), PLIREF-CONREL §7.6(G), 1061-1062.

Like any other rule there are exceptions. For instance, if it appears from the instrument and the circumstances that it was the intent of the parties to give effect to the general description rather than the particular one then the courts will construe the deed consistent with that intent. Combs v. Jones, 244 Ky. 512, 51 S.W.2d 672, 674 (1932). Or, if all that exists is a general description the earlier deed may be referred to in order to determine the land conveyed. Carter's Adm'r v. Quillen, 239 Ky. 583, 39 S.W.2d 1012, 1013 (1931); Taylor & Crate v. Asher, 223 Ky. 574, 4 S.W.2d 385, 387 (1928).

The deed at issue here, the 1944 master commissioner's deed, contains descriptions of 16 different tracts of property some containing more than one parcel. Each tract is specifically described by metes and bounds. The tract the appellants rely on as conveying Tract 2 of the 1922 deed is Tract 10 in the 1944 deed and contains a metes and bounds description of Tract 1 of the 1922 deed followed by the

language, "being the same property . . ." described in the 1922 deed. Tract 2 of the 1922 deed is not evidenced at any point in the 1944 deed.

We think the general rule that "[a] particular description in a deed that is certain and definite will prevail over the identifying reference in a prior deed" is applicable to this case. 23 Am.Jur.2d Deeds §51. The descriptions of property contained in the 1944 deed are all particular metes and bounds descriptions of property. Looking at the deed as a whole and the particular parcel to which the appellants cite, it is plain that the "being" clause is simply meant to make reference to the source of title and not to broaden the description of the property. Thus, the appellants' reliance on Elliott v. Green, 294 Ky. 660, 172 S.W.2d 442 (1943) is misplaced.

The remaining arguments made by appellants go to the intention of the parties to the 1944 deed. Appellants argue: (1) there is no evidence that the parties meant to except Tract 2 of the 1922 deed so that it must be included; (2) that there is no need for the "being" clause to employ particular language in order to incorporate the 1922 deed's description of Tract 2; (3) that there is no necessity to find that an ambiguity exists in the 1944 deed before reference can be made to a prior deed's description; and, (4) that because KRS 382.110, which requires the source of title to be identified in deeds for recordation,

was enacted after the 1922 deed the "being" clause referencing that deed was unnecessary, and, thus, must mean more than just a reference to the source of title.

The fact that there is no evidence that the parties meant to except Tract 2 of the 1922 deed from the mortgages and master commissioner's deeds is not evidence that it was to be included. All of the mortgages and both master commissioner's deeds contain particular descriptions of the properties conveyed. Thus, the general rule discussed above, that reference to a prior deed is not needed when the descriptions of property are sufficiently specific, also answers this contention.

We do agree that there is no need for a "being" clause to employ any particular language in order to incorporate a prior deed's description of property. However, it must be shown that there is a need to refer to the prior deed for a complete description of the property before looking to that deed for guidance in the current deed's construction. Here there is no need to do this since the property intended to be conveyed in the 1944 deed is described with particularity.

In order to construe a deed one must look to the intention of the parties and the surrounding circumstances to be determined from the entire instrument. Combs v. Combs, 292 Ky. 445, 166 S.W.2d 969, 970 (1942); Franklin Fluorspar Co. v.

Hosick, 239 Ky. 454, 39 S.W.2d 665, 666 (1931). The instrument at issue here, the 1944 deed, quite clearly expresses an intent to convey the particular pieces of property identified. Tract 2 is nowhere mentioned or even hinted at in the instrument. Ambiguity or the lack of it simply has no role in determining the intent of the parties in this case.

Finally, appellants' argument that the "being" clauses contained in some of the documents in the chain of title to 1922 were not required must mean that those references were more than an indication of the source of title is not persuasive. Even before the passage of KRS 382.110 requiring the source of title to be identified in a deed it was common to include such a reference without an intention to mean more than a way for another person to trace the title to that piece of property. See e.g. the discussion of such language in Friedman on Cont. & Conv. Real Prop. §7.6(g), PLIREF-CONREL §7.6(G), 1060.

In conclusion, from an examination of the 1944 deed it is apparent that there was no intention to include Tract 2 of the 1922 deed. The judgment of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

M. Kirby Gordon II  
Owensboro, Kentucky

BRIEF FOR APPELLEES:

Harry L. Mathison  
Henderson, Kentucky