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they are not presented by the pleading, and will not for that reason be noticed. The decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

PETERSON v. SKJELVER.

(Supreme Court of Nebraska. Feb. 5, 1895.)

BOUNDARIES — EVIDENCE — MONUMENTS — NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—MISCONDUCT OF JURORS.

1. Where the original mounds or monuments established during a government survey can be identified and ascertained, they will control course and distance.

2. Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is a place different from that given in the field notes and plat. Woods v. West, 58 N. W. 938, 40 Neb. 307, followed.

3. The rulings of the trial court, in admitting and excluding evidence, examined, and *held* not erroneous, or not prejudicial to the rights of the complaining party.

4. The showing filed with motion for new trial, in support of the grounds of newly-discovered evidence and accident and surprise, *held* insufficient.

5. Where it is sought to set aside a verdict for alleged misconduct of jurors, it must appear that the acts upon which the complaint is founded were not known to the party who seeks to take advantage of them, or his counsel, during the progress of the trial, in time to have brought them to the attention of the trial court.

6. Affidavits made by parties which purport to contain statements made by jurors during alleged conversations with them after the close of the trial of a case and their discharge therefrom, in reference to acts and discussions which occurred in the jury room while the jurors were deliberating upon their verdict, and in regard to which the affidavits of the jurors would not be received, are incompetent, and insufficient to —— in impeaching the verdict.

(Syllabus by the Court.)

Error to district court, Webster county; Beall, Judge.

Ejectment by Otto Skjelver against Charles G. Peterson. Judgment for plaintiff. Defendant brings error. Affirmed.

J. R. Wilcox and Chaney & McNitt, for plaintiff in error. J. S. Gilham and James McNeny, for defendant in error.

HARRISON, J. On the 9th day of March, 1891, Otto Skjelver commenced an action in ejectment against Charles Peterson, in the district court of Webster county, in which he filed the following petition: "The plaintiff complains of the defendant, for that said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to wit: The tract of land heretofore supposed to be the eastern side of the southeast quarter of section twenty-eight (28), town three (3), range twelve (12), Webster county, Neb., being the tract included within the north and south lines of said quarter section, and bounded on the east by the center of the highway left between said quarter by plaintiff and the southwest quarter of section 27, in said town and range, by plaintiff and defendant,—said highway having been recognized by plaintiff and defendant, each of them plowing up to it and no further, for the past thirteen years,—and upon the west side by the line of a pretended survey made by W. E. Thorne and —— Folden during the summer of 1890. The said defendant unlawfully withholds possession of said land from plaintiff, and has withheld the same since the 1st day of March, 1891. The defendant, while unlawfully in possession of said premises, has received the rents and profits therefrom from the 15th day of October, 1890, to the commencement of this action, amounting to the sum of one hundred dollars, and has applied the same to his own use, to the plaintiff's damage in the sum of one hundred dollars. The plaintiff therefore prays judgment for the delivery of the possession of said premises to him, and also for said sum of one hundred dollars for said rents and profits and costs of suit."

The answer filed on behalf of Peterson was a general denial. A jury was waived, and the first trial had to the court. There was a finding and judgment in favor of Peterson, which was set aside at his request, and a new trial ordered. At a subsequent term of court the second trial occurred before the court and a jury, and Skjelver was successful, the jury returning a verdict in his favor. A motion for a new trial was filed by Peterson, argued and overruled, and judgment rendered on the verdict, and Peterson has prosecuted error proceedings to this court.

As will be gathered from the petition, the main dispute in this case is in regard to the boundary or division line between the S. E. ¼ of section 28, township 3, range 12, in Webster county, and the S. W. ¼ of section 27, in the same town and range. The first tract described is owned by Skjelver and the second by Peterson. The exact location of the southeast corner of the S. E. ¼ of section 28, or the corner common to sections 28, 27, 33, and 34, was, and now is, the main point to be determined in the controversy; for the ascertainment of its true position will settle the starting point of the division line between the two quarter sections, and effect an adjustment of it and the dispute. Skjelver's right to the land, by virtue of adverse possession for the statutory period, was also put in issue and tried.

The second, third, and fifth assignments of the petition in error are first considered by counsel for petitioner in their brief, and it is there stated: "They present the question whether it was competent for plaintiff below to prove the existence of government corners by parol evidence, without first accounting for the absence of the official record of the

survey;" or, in other words, that the field notes or record of the government survey and the plat are the primary, original, controlling, and conclusive evidence when the location of government corners is in controversy, and must be introduced, and, if not obtainable, then their contents. With this we cannot agree. The field notes and plats are competent testimony where the true position of such a corner is not known or is in doubt, and is sought to be established, but not controlling or conclusive as to such location; and, when the original mounds or monuments established by the government survey can be identified or clearly shown, they will be accepted in preference to what is stated in the field notes, if at variance therewith. Woods v. West, 40 Neb. 307, 58 N. W. 938; Thompson v. Harris, 40 Neb. 230, 58 N. W. 712, and cases cited.

It is further argued, under the third assignment, that George Hutton, a witness for Skjelver, should not have been permitted to answer a question propounded to him, as shown on page 28 of the bill of exceptions, being question 6 on said page. Reference to the page and question designated, discloses that the objection to the question was overruled, and no answer given by the witness; but the evidence which it is argued was objectionable was in answer to the next interrogatory, or No. 7. It may be claimed, however, that question 7 was but a continuation of question 6, and that the objection should be considered as applicable to the question as a whole. If this view is allowed to prevail, it cannot avail plaintiff in error. The objection interposed to the interrogatory was as follows: "Objected to as being hearsay testimony." Ignoring any criticism which might be made to the form or substance of this as an objection, we will say that the question was one to which the objection was properly overruled. It was not open to this objection. It was probably improper, in that it was leading, and called for a conclusion of the witness based upon certain facts, and the acts of other parties, which, if detailed in answer to competent interrogatories, would have been competent. The sixth assignment of error refers to a motion made during the giving of testimony by the witness Nels Sorenson. The motion, as it appears in the record, was interposed after the fifteenth question put to this witness had been asked and answered, and was as follows: "The defense move to strike out the testimony of the witness as irrelevant, incompetent, and hearsay testimony." This was overruled by the court, and, we think, correctly. The motion was evidently intended to apply to all the testimony of the witness given up to that time, and could not be sustained, as the evidence, while a great portion of it was introductory, was competent, and necessary to a full understanding by the court and jury of the evidence of the witness which followed it.

One contention of counsel for plaintiff in error, which we think it best to notice here, is that the verdict was not sustained by the evidence. The testimony develops that the S. E. ¼ of 28, the Skjelver land, was first occupied by Hans Tullifson in 1872 or 1873, who abandoned it very soon, probably a month after settling on it. It was then occupied by one Cunnard, who in 1876, surrendered his claim to Skjelver, who then entered into possession, and by whom it had been retained up to the time of the trial of the case. The adjoining or S. W. ¼ of section 27 was purchased by Peterson during the year 1878, and he then, and has since, occupied it. Tullifson testified that, when he took possession of the S. E. ¼, he found the corners, including the southeast one, and in his search for this particular corner he found a stone which had apparently been placed there to mark the position of the corner; that he threw up a mound where he had found the stone, and put a stick in the mound. The field notes were introduced in evidence on the part of plaintiff in error, and one of the statements therein contained was as follows: "Set a limestone 18x16x4 in. thick, for a corner to sections 27, 28, 33, and 34." This was the disputed corner. When Skjelver entered into possession of this land he found a mound and stick at this corner. Tullifson, it will be remembered, stated that he found a stone monument at the corner, and made a mound, and put the stick in it. Some other persons who had lived in the county testified that they had seen this corner. Peterson, when he occupied the adjoining quarter section, plowed along the line between him and Skjelver, but left a strip about two rods wide, measuring from the land he cultivated to the center of a road along the line between him and Skjelver, and in the center of which road stood the southeast corner as claimed by Skjelver, who did the same on his side of the road. There were other facts and circumstances in the record which tended to show that the corner found by Tullifson and adopted by Skjelver was the government corner. On the other hand, a number of the old settlers of the township and the county testified that no corner has ever been discovered at that particular point in dispute, and some that there had apparently been no corners established in the interior of the township, or none had ever been discovered or discoverable by such search as had been made and assisted in by them, the particulars of such searches being detailed in some instances. There seems to have been two or three surveys made, and in at least two—one in 1884 and one in 1890—the corner on the S. E. ¼ of section 28 was claimed to have been determined to be at a point about 10 rods west of the "Skjelver corner," which would give Peterson the strip of land in controversy. But, without further quoting from or giving a summary of the testimony, we will say that a careful perusal and con-

sideration of all of it convinces us that it was fully sufficient to sustain a verdict founded upon a finding that the corner claimed by the defendant in error was fully indentified by it as the government corner established during the survey made for the government.

The ninth assignment of error is as follows: "The court erred in giving instructions 2 and 3 given on its own motion." Instruction number 2 is a copy of a portion of the syllabus to the case of Coy v. Miller, 31 Neb. 348, 47 N. W. 1046, and was entirely applicable to the facts in the case, and it was not error to give it, and under the rule, where alleged error in giving instructions is stated as it is in this assignment, we need not consider it further. Hewitt v. Banking Co., 40 Neb. 820, 59 N. W. 693.

The assignment of error in relation to the refusal to give instructions offered by plaintiff in error, and in modifying some before reading them, is too general, in that the instructions, the refusal to give or modification of which is complained of, are stated collectively, and an examination convinces us that at least one was properly refused, the grounds sought to be covered by it having been fully embodied in others which were given, and some were not applicable to the evidence; and, having determined that any one of them was properly refused, under the established rule of this court, we need not further consider them. Hewitt v. Banking Co., 40 Neb. 820, 59 N. W. 693. As to those modified, we are unable to perceive wherein such modification was harmful to the rights of plaintiff in error.

Complaint is made in the fourth and seventh assignments of the action of the trial court in sustaining objections to questions propounded to Mr. Campbell, one of the witnesses for defendant in error, and to Skjelver, during cross-examinations, and excluding the testimony sought to be elicited by such questions. To some, if not all, of these interrogatories, these objections were properly sustained, for the reason that they were without the province of a proper cross-examination. To others the answers would have been wholly immaterial, and the same facts had been or were afterwards shown, both on direct and cross examination of other witnesses, and the complaining party was not prejudiced in any degree by the action of the court.

Two of the grounds of the motion for a new trial were as follows: "(3) Newly-discovered evidence material for the defendant, which he could not with reasonable diligence have discovered and produced at trial, as shown by affidavit attached hereto, filed herewith, and marked 'I.'" "(5) Accident and surprise which could not have been prevented by ordinary diligence, as shown by affidavit filed herewith, marked 'H.'" There were two affidavits filed in support of these grounds of the motion, in which it was stated that one Thorne was a material witness for Peterson, and that he, unexpectedly to Peterson and his counsel, left Webster county just prior to the time of trial of the case. It is further stated in one of the affidavits that the jury was impaneled for the trial of the case late on Friday, the 19th of February, 1892, and that some one, on that day,—it does not appear who, whether an officer or not,—was sent to the home of the witness with a subpoena, and Peterson states in his affidavit that he could not with reasonable diligence have procured the evidence of this witness, Thorne, at said trial. This was not sufficient. It was not shown to be newly-discovered evidence. On the contrary, the affidavits filed on behalf of the moving party disclose that both he and his counsel knew of this witness, and to what he would testify, and fail to show any reasonable diligence in obtaining his presence during the trial. The district court was clearly right in its rulings on these grounds of the motion for a new trial.

Accompanying the motion for a new trial were several affidavits tending to show misconduct of jurors during the trial, and also setting forth the influences and reasons as given by jurors after the verdict was returned, which had operated on their minds, and caused them to form the conclusions which were embodied in their verdict rendered. Motions were made by defendant in error to strike these affidavits from the files, and were sustained. This, we think, was error. The motions should have been overruled, and the affidavits retained and considered with the motion for a new trial.

The next inquiry which arises is, if these affidavits had been considered, were the facts stated in them sufficient to call for the setting aside of the verdict and ordering a new trial? If so, the striking from the record was prejudicial error; and if not, the reverse. Such of them as complained of misconduct of jurors were based upon actions of the jury during the progress of the trial, and before verdict was returned; but in none of them is it stated that the complaining party did not know of them before the return of the verdict. If in possession of such knowledge, it should have been brought to the attention of the court, and, if it was not so known, this fact should be shown by the affidavits, and, as it was not, they were insufficient. Two of the affidavits refer to and state the substance of conversations which the affiants claim they had with jurors after the verdict was returned and the jury discharged. In one of these affidavits it is set forth that a juror said certain matters were discussed in the jury room and were urged upon him to influence him in favor of the verdict returned, but it does not appear that he claimed to have been influenced by them to any extent. The other is more specific and direct in its statements, but they are both in regard to

matters in which the affidavits of the jurors themselves would have been incompetent, and would not have been received for the purpose for which the ones under consideration were offered, and clearly not competent when presented, as they were, in the shape of statements of parties other than jurors of what was said by jurors during conversations with them after the trial closed. Lamb v. State (Neb.) 59 N. W. 895. The action of the court in striking the affidavits from the record was not prejudicial to the rights of plaintiff in error. The judgment of the district court is affirmed.

SCOTT et al. v. ROHMAN et al.

(Supreme Court of Nebraska. Feb. 5, 1895.)

ENTRY OF JUDGMENT—GARNISHMENT OF JUDGMENT DEBTOR.

1. It is not essential to the validity of a judgment rendered by a county court that it be entered upon the docket in the judge's own handwriting, or that it be attested by his signature. If the judgment actually rendered is spread upon the county court records under the direction and supervision of the judge, it is sufficient.

2. A judgment debtor is liable to the process of garnishment when the two actions are brought in the same court, but not otherwise.

3. A judgment of the district court of this state cannot be reached by garnishment proceedings before the county court.

(Syllabus by the Court.)

Appeal from district court, Lancaster county; Hall, Judge.

Archie A. Scott and Perry S. Chapman recovered judgment against John Lanham. John Lanham sued and recovered judgment against John Fitzgerald, who was garnished by Scott and Chapman. A bill in equity was then filed by said Scott and Chapman to recover the money which had been paid by Fitzgerald, on said judgment, into court. Charles Rohman and others were made parties. From the judgment, plaintiffs appeal. Affirmed.

A. G. Greenlee and Marquett, Deweese & Hall, for appellants. Webster, Rose & Fisherdick, Dani. F. Osgood, Abbott & Abbott, and Thos. Ryan, for appellees.

NORVAL, C. J. This suit was instituted in the district court of Lancaster county by the appellant to determine the rights of the respective parties to certain moneys which had been paid by John Fitzgerald to the clerk of said court, in satisfaction of a judgment which had theretofore been rendered therein in a cause wherein one John Lanham was plaintiff and said Fitzgerald was defendant. Issues were formed, and upon the trial the court made the following findings of fact: "(1) That in an action then pending in this court between John Lanham, as plaintiff, and John Fitzgerald, as defendant, for recovery of money alleged to be due the plaintiff, Lanham, from defendant, Fitzgerald, on a contract in writing, the jury on the 25th day of February, 1893, returned a verdict in favor of Lanham, and assessing the amount of his recovery at the sum of $1,108.18. To which finding the defendants except. (2) That Fitzgerald filed a motion for a new trial, which was on the 1st day of April, 1893, overruled, and on that day the court entered judgment on said verdict in favor of Lanham for amount therein stated. (3) That on the 1st day of April, 1893, Webster, Rose & Fisherdick, defendants, filed in this court notice of claim of lien on said judgment for $390, their fee as attorneys for Lanham in said suit. (4) That on the 17th day of April, 1893, Abbott & Abbott, defendants, filed in this court their notice of claim of lien on said judgment for $250, their fees as attorneys for Lanham in said court. (5) That on the 10th day of April, 1893, the defendant C. H. Rohman filed in this court an assignment of said judgment by Lanham to him, by its terms, however, subject to the liens of the above-named attorneys in findings three and four. (6) That on the 25th day of February, 1893, in the cases of Archie A. Scott v. John Lanham and Perry S. Chapman v. John Lanham, in the county court of Lancaster county, wherein judgments had theretofore been had, and execution returned unsatisfied, affidavits in garnishment were therein filed, on which issued summons against John Fitzgerald, garnishee, and same were served on him on the 27th day of February, 1893. (7) That Fitzgerald, on March 14, 1893, made answer in said cases as garnishee, setting up the said verdict in Lanham's favor against him; that no judgment had yet been rendered thereon; that if judgment thereon should be entered, and not reversed or otherwise vacated, he would be indebted in some amount to Lanham, and asked that a hearing on his answer be continued until it is determined whether or not he, as garnishee, is indebted to Lanham, whereupon the county judge entered an order continuing the further answer of the garnishee until April 15, 1893. (8) That on the 15th day of April, 1893, Fitzgerald made further answer in said causes in the county court, setting up that judgment in said district court had been rendered in favor of Lanham, for $1,018.18, against him; that it was unpaid, still owed by him, and that it had been stayed for nine months from April 1, 1893; that subsequent to the service of notice of garnishment upon him the said judgment had been assigned to said Rohman, subject to said liens of Webster, Rose & Fisherdick and Abbott & Abbott, and that when said notice was so served, and at the time of his former answer, he had no notice of any attorney's lien on said judgment. (9) That on the 25th day of April, 1893, orders issued on said answers of Fitzgerald from the county court, commanding him to pay into said court on January 1, 1894, to be applied on the judgment of Scott against Lanham, the sum of $314.30, with 7 per cent. interest thereon from the 6th day