

JOHN CLARK, Appellant, v. **A. J. BARBOUR**, Defendant.

1. Courts will only decide upon issues joined between the parties specially set forth in their pleadings.
2. Matter of defense not set up in defendant's plea shall not be allowed.
3. Notice should be given by one party to the other of all matters of fact or law relied upon in prosecuting an action.
4. In an action of trespass it is not error in a court to refuse to determine question of ownership by evidence of a deed which merely proves the title of a privy of one of the parties.
5. Partitioners appointed by the court to apportion certain premises between joint owners, not making return of their doings to court do not defeat individual rights of parties to partition voluntarily by mutual releases and conveyances.

Damages for Trespass. On appeal from the Court of Quarter Sessions and Common Pleas for Sinoe County.

This case comes up on a bill of exceptions to the rulings and final decision of the Court of Quarter Sessions and Common Pleas, Sinoe County.

The appellee or plaintiff below brings action (see complaint) for an alleged trespass upon and damages to her property by the defendant, now the appellant. At the trial below the plaintiff recovered from the defendant the sum of \$10 and all costs. To which judgment the defendant excepted and perfected an appeal to this court of final decision.

During the trial of this case before us, we noticed that there were urged many points not founded in the appellant's plea, and to allow them would mislead the court into deciding upon issues not joined between the parties. The statute requires that a complaint contain a distinct and intelligible statement in writing of a sufficient cause of action within the scope of the form of the action chosen. The statutes also require that an answer, or in other words the plea, of a defendant be a full and sufficient answer or plea to the complaint or to such part of it as it professes to answer. That a *defense* not set up in the defendant's plea, should not be allowed, because the

fundamental principle upon which pleadings are conducted is that of giving notice to parties of all matters of fact or law relied upon in the defense: hence the defendant should plead in such a manner as would present a triable issue, since the dispute between the parties should be set forth in the pleadings.

Carefully examining the pleadings in this case, the defendant below defends the alleged trespass by alleging that he is the owner of lot No. 39 upon which the trespass is said to have been committed, and offered as evidence the deed of his father. The appellant excepted to the court's not giving final judgment in his favor upon the evidence of his ownership to lot No. 39 referred to in the complaint as well as in the deed. This deed has had the careful consideration of this court and we find it only the evidence by which the surviving heirs of the late John Clark, of Sinoe holds lot No. 39. The court did not err when it refused to settle the ownership of the appellant on that evidence.

Before this court, it was strongly urged that there being no evidence of a partition of this lot between the heirs of John Clark, no one of the heirs could recover against another for trespass. Examining the evidence in this case we find that the surviving heirs of the late John Clark, four in number, applied to the Court of Quarter Sessions and Common Pleas, Sinoe County, in the exercise of its equity jurisdiction to appoint partitioners to divide said lot No. 39 between them: this was granted and partitioners appointed. The records show that the partitioners reported to said court that the property was partitioned as per request of the parties. The evidence further shows that the appellee erected a fence separating that which was known as her part of the lot from that of the appellant. Referring to the evidence, witness Lymas states that he saw on the day named in the complaint the appellant Clark, standing on *his part* of the lot sawing on the line fence between himself and appellee. Witness Grisby states as follows : "there is a fence separating the dwellers on this lot." Witness Rose Barbour states as follows : "The fence on lot No. 39 was built by appellee, A. J. Barbour."

This brings us to consider whether or not the sawing of the fence was justifiable, because the record fails to show that the partition of the property was not confirmed by the court.

It is the opinion of this court that the returns of the partitioner not being made to the court below do not defeat the individual rights of parties. (See Bouv. L. D., vol. 1, p. 365.) "Voluntary partition—that made by owners by mutual consent—is effected by mutual conveyance or release to each person which he is to hold." (See U. S. Digest, New Series, vol. 1, p. 42—Partition by act of parties) : "Where a partition of land is

made between tenants in common and each accepts his part, goes into possession and makes improvements, it is a good partition even though it may never have been the judgment of a court." Carefully examining the trial of this case below, this court fails to see that substantial justice has not been done.

Wherefore, the judgment of the court below is confirmed, appellant paying all legal costs and charges. The clerk of this court is hereby ordered to issue a mandate to the court below as to the effect of this judgment.

Given under our hands this 10th day of February, A.D. 1909.

By the Court.