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Conveyances--Validity of Parol Agreements as to Determinable Boundary Lines

Bettie Gilbert
University of Kentucky

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such manner and under such circumstances as that the death of a human being may result therefrom is malice” did not meet the approval of the Court of Appeals. The court there recognized that an act which may result in death to some one cannot form the basis of an inferred malice unless the likelihood of such death resulting is so great that no reasonable man and only one who has a reckless and wanton disregard for the consequences would do it.

It is unfortunate that the decision of the Banks case is couched in such strong inclusive language. The court reached the right result but the idea must not be fostered that every unlawful act resulting in homicide will sustain an inference of malice on which to predicate a verdict of murder.

Whether the defendant in the Cockrell case be regarded as doing an unlawful act or as doing a lawful act in an unlawful manner, he did it in a manner “evincing a heart regardless of social duty” and from that the law will imply malice.

MARVIN TINCHER.

CONVEYANCES—VALIDITY OF PAROL AGREEMENTS AS TO DETERMINABLE BOUNDARY LINES

A and B owned adjoining patents of land granted on the same day and lying between two tracts of land to which A later acquired title. A conveyed to B parts of these two tracts of land, described as being below a certain previously made and partly marked out line which passed over one tract of land, over B’s land, and then over the other tract. It is the space between where this line passed over B’s land and the original dividing line between A’s and B’s patents which is in dispute. Plaintiff derives title from A and seeks to enjoin trespass on the part of the defendants, who hold under B. Plaintiff claims that the boundary line between their lands is not the boundary as set out in the original grants but the line as set out in the conveyance from A to B, which has been agreed upon and recognized for many years. Held: The land in dispute belongs to defendants. Howard v. Howard et al., 271 Ky. 773, 113 S. W. 2d. 434 (1938).

The deed which traced the line claimed by plaintiff as the true line did not purport to establish a divisional line but only to convey certain land in other patents and so the original boundary was not affected. It was contended that the line claimed by plaintiff had long been the agreed line, but the court held that there could have been no valid parol

1238–1243 P. C., and comprehends the doing of an unlawful act, which act the doer may clearly intend to do, yet in charging the jury in such case it would be entirely proper to tell them that one who did by negligence and carelessness cause the death of a human being would be guilty of negligent homicide in the second degree, etc., and this would be true, even though the facts show the wrongful act to have been intentionally done. That the ‘unlawful act’ referred to was done intentionally would not make such homicide one upon malice.”

Supra, paragraph 4.
agreement for the establishment of a boundary line as there could have been no possible dispute as to the true boundary. It enunciated the accepted rule that when there is no dispute or disagreement as to the true boundary, a parol agreement between adjoining owners to establish a different one is within the Statute of Frauds and void.\(^1\) Of course, the location of the boundary claimed was in writing in the deed, but that would not satisfy the Statute of Frauds as the parties did not purport to make an agreement as to the boundary line or convey any of the land belonging to defendants' grantor. The deed did not constitute the agreement, and its writing would not satisfy the Statute of Frauds.

The Kentucky Court has a classification as to boundary line agreements not within the Statute of Frauds which was first advanced in \textit{Amburgy v. Burt & Brabb Lumber Co.},\(^2\) and is repeated in the principal case.\(^3\) The first class includes those cases where the dividing line is in doubt and incapable of certain determination and the owners of the adjoining lands are in dispute as to its exact location, and enter into a parol agreement establishing the true one. This is the holding in most jurisdictions but some are not as strict as the Kentucky Court, in that they hold that the line does not have to be incapable of certain determination.\(^4\) The words "establishing a line as the true dividing line" require some explanation. This must refer to the mental state of the parties to the agreement and they must believe that they are establishing the real boundary.\(^5\) The first class as given in the principal case is not as completely stated as it was in the \textit{Amburgy} case. There is no requirement that the line be actually marked out and established, but this should be understood as it is a universal requirement and one often mentioned by the Kentucky Court.\(^6\) Nothing is said about the parties taking possession, and it should not be involved, because the agreement would be executed by the marking of the line. Possession would follow as a matter of course, depending upon the character of the land. Tiffany's explanation of the doctrine is that

\begin{itemize}
\item \(^1\) Tiffany, Real Property 997, § 294 (2d ed., 1920); note, 69 A. L. R. 1431, 1433.
\item \(^2\) 121 Ky. 650, 89 S. W. 650, 28 K. L. R. 551 (1905).
\item \(^3\) 271 Ky. 773, 776, 113 S. W. 434, 435. It seems that Kentucky has more cases of this type than any other single jurisdiction, so it is quite natural that the Court should have developed a classification. See note, 69 A. L. R. 1433, \textit{et seq.}, where there are more cases cited from Kentucky than any other single jurisdiction.
\item \(^4\) Nusbickell v. Stevens Ranch Co., 187 Cal. 15, 200 Pac. 651 (1921); Engle v. Beatty, 410 Ohio App. 477, 130 N. E. 269 (1931).
\item \(^5\) \textit{Supra}, Note 4.
\item \(^6\) Friedman v. South Cal. Trust Co., 179 Cal. 266, 176 Pac. 442 (1918) (Fact that one of the owners did not believe the line agreed upon to be the real boundary was fatal); Voigt v. Hunt, 167 S. W. 745 (Tex. Civ. App., 1914).
\item \(^7\) Note, 69 A. L. R. 1459.
\item \(^8\) Holliday v. Tennis Coal Co., 215 Ky. 551, 286 S. W. 773 (1926); Smith v. Stewart, 7 K. L. R. 287 (1885); Robinson v. Corn, 5 Ky. (2 Bibb) 124 (1810).
\item \(^9\) Tiffany, \textit{op. cit. supra}, p. 997.
\end{itemize}
the possession constitutes part performance taking the agreement out of the Statute of Frauds, but that could not be the explanation in Kentucky, because Kentucky does not allow part performance to take a contract out of the Statute of Frauds. The most plausible reason for the doctrine is that it is not a transfer of lands but only an identification of lands already owned and the only bearing possession could have been as evidence of the execution of the agreement.

The second class includes those cases in which the dividing line has been established by parol agreement and executed by taking possession and recognized for a long time. Its basis is estoppel. There is no requirement of a doubt or dispute as to the true location. It is stated that each party might have given up part of his land to the other, but that is not essential. This seems to be as near as Kentucky comes to what Tiffany calls the doctrine of implied agreement or acquiescence. The only difference is that in Kentucky the agreement does not have to be implied. The Kentucky Court did not discuss the principal case in connection with this class and it is difficult to see why it did not. The only possible explanation is that actual possession is not shown in the principal case and, since the basis of the doctrine is estoppel, possession even to the extent of positive acts of improvement would be necessary.

The third class might well be included under the first because it does involve a dispute, but a special type of dispute—overlapping title deeds neither of which is superior. There is a difference in that in the first class there is a true dividing line and in coming to an agreement the parties must believe that they have reached it, while in the third class there is actually no true dividing line and the one agreed upon must be a compromise between the two claimed. The dispute in this class would involve the title to a definite strip of land—that included in the overlapping title papers, between the two boundary lines. There is some authority to the effect that an agreement in such a case would involve title, that to the strip of land, and so would be within the Statute of Frauds. This objection could be urged in every case because there is always a strip of land involved, its definiteness depending upon the claims of the parties. There is a requirement in this class that the recognition of the agreed line must be for a "considerable time". It has been expressly stated by the Kentucky Court that possession in such a case does not have to be for the full statutory period.

5 Pomeroy, Equity Jurisprudence and Equitable Remedies 5017, § 2245 (2d ed., 1919).
7 Robards v. Rogers, 20 K. L. R. 1017 (1898).
8 Walden v. McKinnon, 157 Ala. 291, 47 So. 874, 875 (1908).
9 271 Ky. 773, 777, 113 S. W. 434, 436 (1918).
Just exactly what period is necessary cannot be determined. The reason for the time requirement in this class and not in the first may be that the agreement in this class establishes a line which the parties do not even pretend is the true boundary. It is an identification, but not an identification warranted by their title deeds, and so something more than bare execution is necessary to make it binding.

It is submitted that the decision in this case is a correct application of the rule that a parol agreement to change a fixed boundary is within the Statute of Frauds. A different result might have been reached if the court had stressed the length of time, nearly fifty years, that the agreed line had been recognized and discussed the facts in connection with the second class as set out in the opinion.

**Bettie Gilbert.**

**INSURANCE—EFFECT OF DELIVERY OF LIFE INSURANCE POLICY TO AGENT**

"Insured" made only a part payment of the first premium at the time of making an application for life insurance, and received a receipt which, in common with the application itself, provided that if the entire amount of the first premium was not paid at the time of making the application, there should be no liability on the part of the company until the first premium should be actually paid, and the policy manually delivered to the applicant in person. The policy was received by the local agent and he thereupon attempted to deliver it to the "insured" at his place of business, but failed to do so because of "insured's" absence. The "insured" became ill and died soon afterwards. The trial court directed a verdict for the beneficiary-plaintiff on the ground that the failure of the insurer to give the insured an opportunity to make the choice of paying or refusing to pay the remainder of the premium deprived it of the right to claim that its agent was not in law the agent of the insured in the matter of possession of the policy. **Held:** Reversed. There was no delivery. *Monumental Life Ins. Co., of Baltimore v. Borders*, 271 Ky. 294, 111 S. W. (2d) 653 (1937).

The American jurisdictions are not in accord as to the effect of delivery to the agent where the application provides for a "delivery" or "actual delivery" to the insured. Almost every case contains some factual peculiarity by which it may be distinguished from every other case, with the result that in a single jurisdiction there may be two lines of cases opposed in tendency, and yet not directly contra. Ken-

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