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Interpretation of Kentucky Statutes Concerning Division Fences

Harry W. Roberts Jr.
University of Kentucky

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in scope. Here is a practical objection which might be removed by the adoption of a uniform act.

It is submitted, therefore, that the statutes relating to jurisdiction over nonresidents should undergo study and revision by a national committee; that the revised statutes should employ the doing of an act theory as one of the bases upon which nonresidents are to be subjected to the jurisdiction of courts at the *locus* of the wrong, for the reasons previously pointed out; and, finally, that such a model statutory section, thus compiled, should be presented in the form of a uniform act[16] for adoption by all the states.

HOWARD E. TRENT, JR.

INTERPRETATION OF KENTUCKY STATUTES CONCERNING DIVISION FENCES

At common law there was no duty upon the landowner to erect and maintain fences between himself and his neighbor. Each owner was bound at his peril to keep his cattle upon his own lands whether the lands of his neighbors were fenced or unfenced.[1] However where an owner of land and his grantors have for more than twenty years maintained a specific portion of a partition fence a spurious kind of easement may arise by prescription.[2] The easement seems to be founded upon the duty which at common law required the owner of a close at his peril to keep his cattle thereon, and to prevent them from trespassing on an adjoining close; and when the owner of the latter erected a fence for his protection, and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty, and to have become bound to protect his own close.[3]

In Kentucky the matter of division fences, their construction and maintenance is governed by statute. Section 1784 of the Kentucky Statutes applies to improved lands and provides:

> "When a division fence is desirable, or is made necessary by the division of improved or enclosed lands, or no fence or division fence exists between the improved or enclosed lands of adjoining owners . . . either party may after he has built a lawful fence upon his portion of the line require the other to erect a lawful fence . . . upon his portion of the line . . . and if he fails to do so, after three months notice, in writing, may erect such fence, and the cost of erecting such fence shall constitute a lien, superior to all others, upon the land of the recusant in favor of the party erecting such fence, and shall be enforced as other liens."[4]

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[16] For an interesting discussion of uniform acts and their desirability, see Williston, Life and Law (1940) 217-219.

[1] Harper, Torts (1933) sec. 166.

[2] Carter v. Riegel, 54 N. J. L. 498, 24 Atl. 484 (1892).

[3] Carter v. Riegel, 54 N. J. L. 498, 24 Atl. 484 (1892); see note 68 Am. Dec. 626 at 628 (1885).

[4] Carroll's Kentucky Statutes (Baldwin, 1936) sec. 1784.

Section 1786 is limited in application to unimproved lands, and provides:

> "No one shall be compelled to contribute to the erection of a partition fence unless he desires to have his land enclosed; but whenever the owner of unenclosed lands desires to enclose them he shall not be permitted to unite his outside boundary fences to the fences of anyone else, unless he pays to the owner of such fences the fair value of one-half of all fences that would thus become partition or division fences, and consent, in writing to thereafter upkeep and maintain one-half of same. Neither party shall remove same without the consent of the other except between the first of December and the first of March of the ensuing year.[5]

These two sections appear to be inconsistent since a party under the authority of Section 1786 could defeat the operation of Section 1784 by simply stating that he did not desire to have his lands enclosed. The Court of Appeals of Kentucky in *Sturgill* v. *Sturgill*[6] reconciled these sections by finding:

> "Section 1784 clearly applies only to improved or enclosed lands (that is, land suitable for cultivation as distinguished from unimproved or "wild" lands) while Section 1786, except in the last clause at least, can apply only to the reverse, (that is, unimproved, or "wild" lands), if the two sections are to be preserved and harmonized; otherwise they are antagonistic and reduce the whole law to a nullity."[7]

Thus harmonized and reconciled both statutes have an operative and an effective meaning so that the permanent fencing of improved lands is the paramount objective of the entire act. But it will be noted that the dicta of the *Sturgill* case was doubtful of the application of the last clause of Section 1786 to unimproved lands alone. Quite possibly this is due to the interpretation given that clause by the Court of Appeals in *Clemmons* v. *Grow*.

> ". . . The language is comprehensive enough to embrace any one of the partition fences to which we have referred (inclosing unimproved or improved lands). It can not be said that it refers alone to the partition fence for which, in part the owner of unimproved lands is required to pay when he desires to inclose them by uniting his outside boundary fence to the fence of another, by the doing of which his unenclosed lands would thereby become inclosed."[8]

If this interpretation is followed, the law again reverts to a hopeless confusion. Suppose that A and B are adjoining owners. A line fence exists between their two closes. In May, A and B quarrel and A, to spite B gives him notice that under the authority of Section 1786 he will remove his portion of the line fence in January of the following year. After A has removed his portion of the fence, B gives him

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[5] Carroll's Kentucky Statutes (Baldwin, 1936) sec. 1786.
[6] Sturgill v. Sturgill, 180 Ky. 170, 202 S. W. 311 (1918).
[7] Sturgill v. Sturgill, 180 Ky. 170, 202 S. W. 311, 313 (1918).
[8] Clemmons v. Grow, 102 Ky. 499, 43 S. W. 728, 729 (1897).

notice to build that portion of the fence under Section 1784. Upon A's failure to so build the fence, B builds it for him and enforces the lien against A's land as provided for in Section 1784. A again proceeds under Section 1786 to remove this fence, and B, by the authority of Section 1784 rebuilds it for him and enforces his lien. Such a conflict of statutes was obviously not the intention of the legislature, and yet in *Clemmons* v. *Grow*[9] the court recognized that such a situation was possible under its interpretation.

The purpose of the legislature according to the *Sturgill* case is to be found in Section 1784,[10] of the fencing act providing for the fencing of improved lands, that is lands suitable for cultivation. If this be the purpose of the act, then the last clause of Section 1786 as interpreted by the *Clemmons* case defeats that purpose. These two sections must be reexamined in order to reconcile them in that particular.

There can be no doubt as to the meaning of Section 1784. The language used in that section is clear and is without conflict. Consider, then, the language of Section 1786. After discussing the construction and the maintenance of a division fence inclosing unimproved or "wild" lands the first sentence ends, ". . . . and consent in writing, to thereafter upkeep and maintain one-half of same." It is clear that the adjective "same" is being used substantively.[11] Its clear meaning is derived from its antecedent which is in this case a division fence in unimproved lands. The second sentence begins, "neither party shall remove same. . ." Here again "same" is being used substantively as the object of the verb "shall remove." Its antecedent is the subject just referred to which is in this case a division fence in unimproved lands. The meaning of the word which is "not differing in kind," "indistinguishably alike," as well as its use in this particular instance demands that it be used to refer to a division fence inclosing unimproved lands, and contrary to the court in the *Clemmons* case, the language is not comprehensive enough to embrace any partition fence mentioned in the act. "Same" substantively refers to the noun just mentioned. The antecedent of "same" particularly limits that sentence to division fences of unimproved lands.

It seems that the court in the *Clemmons* case was concerned by the fact that when unimproved lands became fenced they thereby

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[9] *Ibid.*

[10] Sturgill v. Sturgill, 180 Ky. 170, 202 S. W. 311, 313 (1918): ". . . but that section (1784) expresses the main purpose of the whole act (i.e., to permit one adjoining landowner to require the other to join in the erection of a division fence under two states of cases: first, where such a fence is desirable or . . . made necessary by the division of "improved or enclosed lands;" or second, "when no fence or division fence exists between such lands."

[11] Webster's New International Dictionary (1927) 1785, "Same (a) . . ." Just mentioned or about to be mentioned.

'Do not think how well the same he spends
Who spends his blood his country to relieve.'

Same is commonly preceded by "the, this, or that, "and is often used substantively as in the citation above."

became inclosed lands and would thereafter be subject to the requirements of Statute 1784.[14] It is true that by fencing these lands they become inclosed but that does not mean that their essential characteristics will be changed. If they are "wild" lands unsuitable for cultivation before they are fenced they remain so after they are inclosed and their classification as unimproved lands is not made more difficult by the fact that they are fenced.

It has been necessary for the legislature to provide for the removal of fences in "wild" lands because in this state there are great tracts of such land which it is neither desirable nor practicable to fence permanently, although a temporary fence might be expedient to serve a particular purpose. But when that purpose is passed the maintenance of such a fence would constitute an unreasonable burden on the land. It was to take care of this situation that the legislature enacted 1786 so as to provide a means by which an owner of unimproved lands might fence temporarily such lands and not be forced to maintain such a fence for an indefinite period of time when it served no beneficial purpose to him.

The intent and the purpose of the legislature as declared by the court in the *Sturgill* case is destroyed and the law pertaining to division fences in Kentucky is reduced to a hopeless confusion if the interpretation of *Clemmons* v. *Grow* of Section 1786 is followed. Both the spirit and the latter of the law shows that such an interpretation of the act is wrong and leads to an absurdity. Therefore the illogical reasoning of *Clemmons* v. *Grow* should be rejected, and as in the *Sturgill case* the two sections should be harmonized and reconciled so as to leave both statutes operative and at the same time give effect to the general purpose of the act.

HARRY W. ROBERTS, JR.

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[14] Clemmons v. Grow, 102 Ky. 499, 43 S. W. 728, 729 (1897).