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Kentucky Law Journal

Volume 28 | Issue 1 Article 12

1939

Right of Vendor to Maintain Action for Injury to Property by a Third Party

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Recommended Citation

Turner, J. Wirt Jr. (1939) "Right of Vendor to Maintain Action for Injury to Property by a Third Party," *Kentucky Law Journal*: Vol. 28 : Iss. 1 , Article 12.
Available at: https://uknowledge.uky.edu/klj/vol28/iss1/12

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CASE COMMENTS

RIGHT OF VENDOR TO MAINTAIN ACTION FOR INJURY TO PROPERTY BY A THIRD PARTY.

The vendor of land made a writing in the form of a deed to the purchaser. There was no certificate of acknowledgment. The last paragraph stated that the vendor would deliver a general warranty deed upon payment of the whole of the purchase price (a part of which had been paid on execution of the instrument) in 1946. The purchaser went into possession immediately. In this action, the vendor sued defendant (a third party) for damages for destruction of a stone wall and underpass on the land. Defendant demurred on the ground that there was a defect in parties plaintiff. The demurrer was sustained, and the vendor appealed. *Held*: Affirmed. The writing conveyed the legal title as between the immediate parties. But even though the writing be considered a mere contract to sell, the vendor nevertheless could not maintain his action without alleging that the security for the remainder of the purchase price was impaired. The purchaser was the real party in interest and a necessary party to the action. *Adams* v. *Boone Fiscal Court*, 271 Ky. 729, 113 S. W. (2d) 1, (1937).

The conclusion that this writing served as a deed conveying legal title as between the parties is based upon *Ferrell et al.* v. *Childress et al.*[1] In the *Ferrell* case, the intention of the parties to convey legal title was clear and definite, and the only discrepancy was the lack of a certificate of acknowledgment.[2] Whether an instrument is a deed or a bond for title must be determined by the party's intention derived from the whole instrument.[3] In the instant case, the fact that the instrument provided for subsequent delivery of the deed upon full payment of the purchase price, tends to show that the intention of the

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[1] 172 Ky. 760, 189 S. W. 1149 (1916).

[2] Here the parties made an ineffectual attempt to convey their respective interests in the property in question. The court said: "If one has made an ineffectual attempt to make a conveyance and has signed an instrument of writing with that purpose, but his effort fails because of the failure of an official to make the proper certificate, the writing signed by him is not void for all purposes." The court held that such an instrument conveys legal title as between the immediate parties. *Id.* at 764.

[3] "This court has held that whether an instrument of writing is a deed or a bond for title must be determined by the intention of the parties derived from the whole instrument." Solomon v. Keesee, 156 Ark. 387, 246 S. W. 469 (1923). "The intent will control technical terms, for the intent and not the words is the essence of every agreement." Chapman v. Glassell, 13 Ala. 50, 48 Am. Dec. 41 (1848). See also: Roberts v. Abbott, 48 Cal. App. 779, 192 Pac. 345 (1920); and Smith v. Bunston, 72 Mont. 535, 234 Pac. 836 (1925).

parties was not to make a present conveyance.[4] Furthermore, an agreement to make a conveyance in the future can be inferred from the granting clause "do hereby sell and *agree* to convey".[5] But even though the granting clause is regular, the courts generally hold that the writing will be construed as an executory contract if it is shown that the parties contemplated subsequent delivery of a deed of conveyance.[6] This instrument, therefore, was intended by the parties to be an executory contract to sell, rather than a present conveyance of the property.

The question remains whether the vendor should be permitted to maintain the action for the injury to the freehold if the instrument has the effect of a title bond only.

The conclusion that the purchaser and not the vendor is the proper party to maintain this action is based upon *Benjamin* v. *Dinwiddie*.[7] This case held merely that the purchaser acquires a vested, equitable title to the real estate as a consequence of the right to specific performance. From this holding the court in the instant case concludes, in effect, that the purchaser, as a consequence of the right to specific performance, is the real party in interest and a necessary party to the action.

No question of possession was involved in reaching this conclusion. The action here, however, was to recover damages for an injury to the freehold, an action of trespass, and was necessarily, therefore, a possessory action.[8] Without possession, constructive possession, or

[4] "If the parties had intended this instrument to operate as a conveyance *in praesenti*, why does the obligor stipulate, at a future day to give, and the obligee to receive, title in fee simple to the land?" Chapman v. Glassell, 13 Ala. 50, 48 Am. Dec. 41 (1848). Accord: Dunaway v. Day, 163 Mo. 415, 63 S. W. 731 (1901); Solomon v. Keesee, 156 Ark. 387, 246 S. W. 469 (1923); Hoffman v. Hoffman, 208 N. Y. S. 734, 212 App. Div. 531 (1927); In re Alshouse's Estate, 304 Pa. 481, 156 Atl. 69, 96 A. L. R. 379 (1931).

[5] "Although the instrument uses the words 'grant, bargain and sell', they are coupled with the added words 'and agree to convey'. When construed with reference to these words and the surrounding circumstances, it would seem to have been their intention to execute an executory instrument." Solomon v. Keesee, 156 Ark. 387, 246 S. W. 469 (1923).

[6] In Hoffman v. Hoffman, 208 N. Y. S. 734, 212 App. Div. 531 (1927), although the instrument recited that "I do hereby sell and convey" certain property at a specified price, the court held that the instrument was not a deed, but merely an agreement to convey, in view of a provision for subsequent delivery of a deed upon payment of the full purchase price. Accord: Dunaway v. Day, 163 Mo. 415, 63 S. W. 731 (1901); Snow v. Prince, 13 S. W. (2d) 342, (Tex. Civ. App.) (1929); McClung v. Sewell Valley R. Co., 110 W. Va. 621, 159 S. E. 521 (1931).

[7] 226 Ky. 106, 10 S. W. (2d) 620 (1928).

[8] The vendor might have maintained an action in the nature of a mortgagor's action to recover damages for injury to the freehold resulting in impairment of his security. The vendor holds the legal title merely as security for payment of the purchase price, and, as in the case of the mortgagor, he must allege that his security is impaired

the right to immediate possession, trespass q.c.f. will not lie.[9] Whether the vendor or the purchaser is entitled to maintain this action should, therefore, be a consequence of the right to immediate possession,[10] rather than a consequence of the right to specific performance.[11] Though there was no express provision in the contract for giving the purchaser possession, such a provision can be implied from the stipulation that the purchaser must keep all improvements insured,[12] the provision that the purchaser should pay all taxes,[13] plus the additional fact that the

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before he may maintain the action. In the instant case, the vendor failed to allege impairment of security and as a consequence was not permitted to recover upon this theory.

[9] Shipman, Common Law Pleading (1923), p. 75, and authorities cited therein.

[10] Generally the right of the purchaser to recover for injury to the freehold is made to depend upon a grant of possessory rights under the contract. In Moyer v. Scott, 30 Mich. 345 (1874), where the contract was silent as to possession, the cause of action (trover) was held to be in the vendor because he had the right to possession, and that the defendant should not be subjected to double liability. The court made the following statement: "Unless they (the purchasers) have acquired possessory rights, the holder of the title must be the only person who can legally complain in a court of law of injuries to the freehold." *Id.* at 347. Accord: Garrett v. Beers, 97 Kans. 525 P. 2 (1916) (purchaser in possession may maintain action for damages to the freehold); Witheral v. Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758 (1888); Ives v. Cress, 5 Pa. St. 118, 47 Am. Dec. 401 (1847) (vendor cannot maintain action for injury to freehold occurring when purchaser was in possession.

[11] However, the consequence of the right to immediate possession does not necessarily determine which of the parties should be entitled, ultimately, to the proceeds derived from this possessory action. The solution to this problem might depend upon who must bear the risk of loss. It is obvious that the party who must bear the loss is the proper party to receive compensation for such loss. Although the cases are not entirely in accord in Kentucky, there is substantial reason and authority for the conclusion that Kentucky follows Lord Eldon's view (that the purchaser bears the risk of loss as a consequence of the right to specific performance, and not as a consequence of possession or the right thereto) in Paine v. Meller, 6 Ves. Jr. 653 (1801). See Note (1935) 24 Ky. L. Jour. 86; Note (1927) 24 Mich. L. Rev. 838; Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225 (1887); Cottingham v. Insurance Co., 90 Ky. 439, 14 S. W. 417 (1890). Cf. Wheeler v. Gahan, 206 Ky. 366, 267 S. W. 227 (1924); Martin Grocery Co. v. Meng Co., 212 Ky. 469, 279 S. W. 661 (1926). Since the loss must, therefore, fall upon the purchaser in the instant case, it would seem that he is the proper person, ultimately, to receive compensation, as a consequence of the right to specific performance.

[12] "The agreement expressly provides that the plaintiff (purchaser) should pay all taxes, * * * and keep up the improvements. * * * It (the contract) did, by necessary implication, vest the right of possession in him (the purchaser)." Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121 (1905). See also: Corning v. Loomis, 111 Mich. 23, 69 N. W. 85 (1896); Olson v. Brooks-Scanlon Lumber Co., 89 Minn. 280, 94 N. W. 871 (1903).

[13] "To be sure, the agreement in terms does not award possession to the vendee, but he was to pay the taxes and did in fact enter in possession immediately, indicating unmistakably that that was the

purchaser entered into immediate possession.[14] The purchaser, not the vendor, had the right to immediate possession, and is therefore the proper party to maintain this possessory action.

J. WIRT TURNER, JR.

CONFLICT OF LAWS—JURISDICTION TO GRANT DIVORCE—DAVIS v. DAVIS.

In 1925 H. was granted a divorce *a mensa et thoro* from W. in the District of Columbia. Subsequently, H. filed a petition in the District of Columbia to have the alimony decree granted in the separation set aside, relying mainly upon a decree of absolute divorce obtained by him in the Circuit Court of Arlington County, Virginia, on grounds which did not constitute grounds for divorce in the District of Columbia. In the Virginia action W. was personally served with process in the District of Columbia. She appeared and filed a plea stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the court." A commissioner in chancery was appointed, and he reported that in his opinion H. was a resident of Arlington County, Virginia, and that the court had jurisdiction to hear and determine the case. After her exceptions to the commissioner's report as contrary to the evidence were overruled, W. did not plead further, and the divorce was granted. *Held:* Decree of the Virginia court must be given full faith and credit by the District of Columbia. *Davis* v. *Davis*. — U. S. —, 59 Sup. Ct. 3 (1938).

If the petitioner was actually domiciled in Virginia for the period required by the statute in that state, the Virginia decree is valid, and this case states the law under the "full faith and credit clause" of the Constitution.[1]

Generally, it may be said that the forum which has jurisdiction to grant divorce is the forum of the matrimonial domicil.[2] However, it is usually held that the matrimonial domicil is separable for the purpose of divorce.[3] The old principle of the law of domestic relations that the

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intention of the parties. Payment of taxes and interest imply that occupancy was expected." Sample v. Lyons, 69 N. Y. S. 378, 59 App. Div. 456 (1901). See Welch v. Hover Schiffner Co., 75 Wash. 130, 134 P. 526 (1913); Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121 (1905).

[14] Krakow v. Wille, *supra*, n. 12. See also: Sample v. Lyons, 69 N. Y. S. 378, 59 App. Div. 456 (1901).

[1] Art. VI, sec. 1.

[2] See *Goodrich on Conflict of Laws* (2d ed.) Discussion sec. 123 on "Basis of Jurisdiction for Divorce", (1938).

[3] Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604 (1869); Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806 (1889); Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335 (1865); Sworski v. Sworski, 75 N. H. 1, 70 A. 119 (1908); Collin v. Reed, 55 Pa. 375 (1867); Craven v. Craven, 27 Wis. 418 (1871).