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# Division Fence--Location by Parol Agreement or Acquiescence

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# STUDENT NOTES

## DIVISION FENCE—LOCATION BY PAROL AGREEMENT OR ACQUIESCENCE.

—In an action of ejectment A sought to recover the possession of a tract of land some 110 yards wide and extending across the entire north side of a forty-acre tract of land. Evidence tended to show that the true boundary was about 100 yards south of an old fence. However, the parties had long acquiesced in the old fence which had been considered the true boundary. It was held that long acquiescence in the division fence constituted a parol agreement fixing the boundary. The court also laid down the rule that where uncertainty or dispute exists concerning a boundary, adjoining landowners, by parol may fix the line binding on them and grantees, although possession thereunder is less than the statutory period. *Robinson v. Gaylord*, 33 S. W. (2d) 710, 182 Ark. 849 (1931).

The principal case in upholding the validity of a parol agreement by adjoining landowners to fix a division fence sets forth the almost unanimous view. The courts differ widely, however, on the basis of such decisions and vary somewhat in their statements concerning the elements which must be present to establish the validity of such agreements. The majority of the courts declare that three elements must be present: (1) Uncertainty (often meaning ambiguity in the deed) or a bona fide dispute concerning the true line; (2) An agreement to settle the dispute; and (3) either actual or constructive possession in pursuance of said agreement. *Jones v. Scott*, 145 N. E. 378, 314 Ill. 118 (1924); *Barfield v. Birrick*, 10 S. E. 43, 151 Ga. 618 (19—).

The question of the validity of parol agreements by adjoining landowners arises in three types of cases, namely:

(1) Where the deed itself is ambiguous, the parol agreement is for the purpose of placing a definite construction on the language of the deed. There is thus no problem involving the Statute of Frauds or varying a written agreement by parol evidence.

(2) Where the terms of the deed are ascertainable, but appear uncertain to the adjoining landowners, the parties often make a parol agreement to set up a certain boundary. The settlement is made in the belief that the true division line has been established. The majority of the courts properly hold that a discovery that a mistake was made re-establishes the true line unless some element of estoppel exists. *Randleman v. Taylor*, 127 S. W. 723, 94 Ark. 511 (1910); *Turner Fall Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896.

(3) The third situation is somewhat similar to the second. The true construction of the deed is ascertainable, but the deed appears ambiguous to the adjoining landowners and in order to erect a satisfactory boundary, the parties make mutual concessions and on the basis of such concessions a division fence is erected. It is in this type of

case that the questions involving the Statute of Frauds, the parol evidence rule, and the position of a bona fide purchaser arise. It is to be admitted that the solution to these problems as set forth in this note is not clearly expressed in the various decisions. The courts speak of "estoppel," acquiescence," "practical location," etc.

The practical solution here given, nevertheless, appears to be the underlying, if not express, basis of the various decisions.

The question of varying a written deed by parol evidence arises first. However, if a contract is within the Statute of Frauds and is in writing or a proper written memorandum has at some time been made, a subsequent oral agreement to rescind or alter the contract is effectual if the oral agreement fulfills the requisites of a contract at common law. (See Williston on Contracts Sections 491-592.) The consideration for the subsequent parol agreement in the present type of division disputes is the giving up of the respective conflicting claims made in the bona fide dispute. *Turner v. Bowen*, 180 Ky. 755, 203 S. W. 749.

The question then arises: Why is the oral agreement not within the Statute of Frauds and thus necessary to be in writing? The answer lies in the requirement that markings must be made or possession be taken by virtue of the oral agreement. The fulfillment of this requirement constitutes part performance which takes the agreement out of the Statute of Frauds.

The oral agreements, resulting from a bona fide dispute, are held binding on all parties, except a bona fide purchaser. *Jones v. Scott*, 145 N. E. 378, 314 Ill. 118 (1924). The agreements are binding even though it is subsequently ascertained that the boundary agreed upon is incorrect. *Silva v. Azevedo*, 173 P. 929, 178 Cal. 495; *Terrill v. Bryson*, 37 S. W. (2d) 84 (1931). The oral agreement, as a practical matter, is in most jurisdictions binding even on the bona fide purchaser as the jurisdictions require possession under the parol agreement, and this gives constructive notice of the agreement. Some jurisdictions go so far as to hold that constructive possession, as a mere blazing of trees along the agreed line, is sufficient.

Acquiescence for a long period in a division fence raises problems similar to the parol agreement difficulties. In fact, it is often declared that such acquiescence may amount to a parol agreement. *Robison v. Gaylor*, 33 S. W. (2d) 710, 182 Ark. 849. There are two main reasons given for such a holding: (1) Some courts hold that recognition of or "acquiescence" in a certain line for a long time is conclusive of an agreement. (2) Other courts regard it as an independent rule of law, dictated by general consideration of justice and expediency, in order that uncertainty and disturbance of boundaries be avoided. See *Tiffany Real Property*, Vol. 1, page 999.

The courts vary as to the time necessary for such acquiescence to amount to a parol agreement. A few cases hold that the acquiescence may be conclusive, although it has not been for the full statutory period. *Wood v. Bepp*, 169 N. W. 518, 41 S. D. 195 (1918); *Keen v. Osborne*, 215 S. W. 798, 185 Ky. 647 (1919). The majority of the courts

more properly declare that acquiescence raises the presumption that the boundary is correct, but only after the full statutory period has passed does the presumption become conclusive.

Kentucky takes a peculiar and apparently indefensible position in regard to the question under consideration. The courts declare: "The parties do not undertake to acquire or transfer land, but merely to make certain that which they regard as uncertain." *Turner v. Bowens*, 203 S. W. 749, 180 Ky. 755 (1918); *Keen v. Osborne*, 215 S. W. 798, 185 Ky. 647 (1919). In short, the courts say that the parties merely give a definite construction to the language of the deed, and take under the written deed. However, if the taking is under such deed (an impossibility in those cases in which the language is not ambiguous and the true construction is thus ascertainable), the parol agreement is alone sufficient. The courts nevertheless uniformly declare that for such parol agreement to be valid, there must be a bona fide dispute and possession taken under such dispute.

It is to be admitted that other states make the same error in this regard. However, the solution, as given supra, that a bona fide dispute plus the possession eliminates the question of the Statute of Frauds and appears the practical and the underlying, though unexpressed, basis of the decisions. In Kentucky there should be no such solution as Kentucky courts do not recognize part performance as taking parol agreements out of the Statute of Frauds in other situations.

The reason for the failure to take note of the lack of logic of her position is not apparent in the decisions. Perhaps, the explanation is the practicability of the holding and thus the practicability of overlooking logical defects. Mississippi courts, likewise barring part performance as taking parol agreements out of the Statute of Frauds, explain their decisions as follows: "An early decision was possibly due to an erroneous impression that their allowance is really a judicially created exception to the Statute of Frauds; nevertheless the decision is still binding on this court." *Archer v. Helm*, 69 Miss. 730, 11 So. 3.

RAWLINGS RAGLAND.

**TORTS—DUTY OF STOREKEEPER TO PROVIDE A SAFE PLACE FOR CUSTOMERS.**—Plaintiff, on entering defendant's store, slipped and fell, injuring herself. The floor of the store had been oiled. In an action for damages for personal injury she was allowed to recover. On appeal the Court of Appeals affirmed the judgment of the circuit court. The court in discussing the duty of the storekeeper said, "Appellant had a right to oil the floor of its store. It was not an insurer of appellee's safety while using its floor. But, it was its duty, after oiling it, to use ordinary care, that is, that degree of care usually exercised by an ordinarily prudent person engaged in the same line of business, to maintain its floor in a reasonably safe condition for the use of its customers while using it when making their purchases of its goods." *Kroger Grocery and Baking Co. v. Monrie*, 34 S. W. (2nd) 929 (1931).

This seems to be the rule, both in Kentucky and generally as to