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NOTES AND COMMENTS

The announcement in the February number of the LAW REVIEW that the address of Judge Meekins before the Wake County Bar Association would appear in the next issue was incorrect. Due to certain difficulties in the set-up of the present issue, it was necessary to leave that address for publication in the June issue of the LAW REVIEW.

SIX YEAR COURSE IN COMMERCE AND LAW—Beginning next year, a six-year combined course between the University Commerce and Law Schools will be offered, leading to the degrees of B.S. in Commerce and L.L.B. Instead of spending four years in the School of Commerce as heretofore, the student may receive the Commerce degree with three years in the Commerce School and two years in the Law School. From the viewpoint of the Commerce School, two years in the study of law by the case method, as it prevails in the Law School, is the equivalent of one year of Commerce, for the

reason that the law student studies many cases based on actual commercial transactions, especially in such subjects as Contracts, Negotiable Instruments, Sales, Agency, Corporations, Insurance, etc. This study of actual commercial and business dealings entitles the student to credit toward the Commerce degree, as well as toward the Law degree. The student will spend three years in the Law School and consequently will receive the Law degree upon the successful completion of his work. There is no change in the requirements for the Law degree. The change consists in giving the Commerce degree for three years in Commerce and two years in Law.

The advantages of this six-year combined course, leading to degrees in Commerce and in Law, should appeal to many students who desire to enter the profession of Law with a thorough grounding in the complex business life of today, as well as with an understanding of the law as it affects modern business.

LOCATION OF BOUNDARIES BY MONUMENTS OR BY COURSES AND DISTANCES—In a dispute over boundaries, arising in the recent Virginia case of *Trimmer* v. *Martin*,[1] the facts were these: Plaintiff and defendant were adjoining landowners, deriving their title by mesne conveyances from the original grantor, through partition proceedings. The title papers clearly described the boundary line which divided the premises, designating the same by courses, i.e., directions, and distances. The evidence showed that both plaintiff and defendant, prior to the trial, were under a mistaken impression or belief as to the proper location of the line, and plaintiff had built a fence along what both parties thought to be the correct boundary. To establish his right to hold his portion of the premises, defendant contended that courses and distances mentioned in the title papers always had to give way to known and reputed monuments, in case of a variance between the two methods of determining the true line. While conceding the truth of this broad proposition set forth by the defendant, the court held that the rule could not apply in this particular case, because the monuments relied upon were not mentioned in the title papers. Said the court,[2] "The established rule that the location on the ground of courses and distances designated in the title papers must give way to known and reputed monuments

[1] *Trimmer* v. *Martin* (1925) 141 Va. 252, 126 S. E. 217.
[2] *Idem*, 126 S. E. 217, 219.

has reference only to monuments which are designated in the title papers. . . . Hence, none of the evidence with respect to the location on the ground of certain corner stakes, or of the oak tree, marked fore and aft, or of other things appearing on the ground, mentioned in the evidence, but *not* designated in the title papers, can have the effect of altering the aforesaid courses and distances as designated in the title papers in the instant case, . . ."

Due, perhaps, to the infinite variety of facts upon which the boundary decisions have been based, the law on the subject, when separated from the facts from which it was drawn, and set forth in abstract rules, appears to be in a state of utmost confusion. There are, of course, a few fundamental principles and basic methods of approach in settling boundary disputes, but beyond those the decisions do not readily lend themselves to classification. The greatest difficulty seems to center around the problem of what weight shall be given to the exact language of the deed, especially when two or more descriptions therein are contradictory, and what, if any, weight shall be given to the acts of the parties *dehors* the deed. There are two situtaions around which any grouping of decisions, to be effectual, must be made: First, where monuments are designated in the deed, but to follow them would conflict with the courses and distances called for by the instrument, and, second, where monuments, not designated in the deed, have been erected pursuant to a survey or other acts showing assent of the parties, and to follow them would establish a line at variance with courses and distances mentioned in the deed.

Where monuments are called for by a description in the instrument itself, and courses and distances are also designated in the same instrument, in case of a conflict between the two methods of describing the boundary, the law seems well settled that the boundary established by the monuments will prevail over that which would be established by the courses and distances.[3] Not only is this principle well settled, but it seems to be based upon sound reasoning. The danger of approximation and of errors in surveying, due to poor instruments, variation of the needle of the compass, or inaccuracy of the person making the survey, all tend to establish the relative weakness of this manner of describing a boundary. Statement of contents, of course, is an even weaker method of description, and

[3] *Whitaker* v. *Cover* (1905) 140 N. C. 280, 52 S. E. 581; *Sherrod* v. *Battle* (1911) 154 N. C. 345, 70 S. E. 834; *Lumber Co.* v. *Bernhardt* (1913) 162 N. C. 460, 78 S. E. 485; *Byrd* v. *Spruce Co.* (1915) 170 N. C. 429, 87 S. E. 241.

cannot be taken seriously in computing boundaries, since a lot containing two and a half acres may be popularly known as the "old three-acre lot." Fixed monuments, however, especially when of a permanent nature, establish a boundary without approximation or danger of error, and leave very little room for dispute. The courts, therefore, prefer to give precedence to monuments over courses, distances, or contents stated in the same deed.[4]

This doctrine of the precedence of monuments has occasionally been carried beyond the situation where existing monuments are referred to in the deed, along with courses and distances which are at variance with the line established by the monuments. For instance, in *Lerned* v. *Morrill*,[5] it was held that monuments referred to in the title papers as existing, control other conflicting descriptions, obtained through courses and distances, even though the monuments are erected by the parties subsequently to the execution of the deed. The facts of that case, of course, raise a rather unusual situation, since non-existant monuments are not commonly referred to in the deed as existing, but it serves to show the marked preference of the courts for definite boundaries, established by monuments, over indefinite or approximated boundaries, established by other means of description. Such a doctrine, however, is not carried to a point of absurdity. Monuments may be ignored, if, to follow other descriptions, would be to reconcile all other parts of the deed,[6] or, if the fact that the other descriptions, in a given situation, are more definite than the monuments removes the reason for the rule as to precedence of monuments.[7]

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[4] *Pernam* v. *Wead* (1809) 6 Mass. 131, 3 Gray's Cases 285; *Newsom* v. *Prior's Lessee*, 7 Wheat. (U. S.) 10, 5 Law Ed. 382; *Riley* v. *Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Johnson* v. *Archibald*, 78 Texas 96, 22 Am. St. Rep. 27; *Fentress* v. *Pocahontas Fowling Club* (1911) 108 Va. 155, 60 S. E. 633.

[5] (1820) 2 N. Hamp. 197, Warren, *Cases on Conveyancing*, 163.

[6] See, for instance, *White* v. *Luning* (1876) 93 U. S. 514, 524, 23 Law Ed. 938, 940, per Davis, J., "This rule (that of monuments prevailing) is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify—the land—it would certainly be absurd to retain the false call and thus defeat the conveyance."

[7] The North Carolina Court apparently treats this as an exception to the rule. See *Lumber Co.* v. *Hutton* (1910) 152 N. C. 537, 68 S. E. 2 (syllabus), "A natural boundary called for in the description of land in a grant controls course and distance, for the reason that it is usually considered more certain; but when the course, distance, number of acres and plat given are more definite, the latter must give way to the former, the reason for the rule ceasing and presenting a case which forms an exception to the rule." Also *Brown* v. *House* (1895) 116 N. C. 859, 21 S. E. 938.

The second situation, that is, where the monuments which are claimed to establish the boundary are not mentioned in the deed, may be considered to better advantage if subdivided into three situations, viz: First, where such monuments are erected prior to; Second, where they are erected contemporaneously with, and Third, where they are erected subsequently to, the execution of the title papers.

I. Where the monuments claimed as the location of the boundary line are not mentioned in the deed, and are erected prior to its execution, there seem to be certain objections to allowing them to prevail over courses and distances mentioned in the instrument. Parol evidence is admittd to vary a written instrument, and, in addition, it may be submitted that the acts of the parties in locating such monuments are not the best evidence of their intention at the later date when the deed is made. Such a doctrine does not allow for a *bona fide* change of mind. For example, the parties, having in contemplation the execution of a deed may go upon the land, make an actual survey and mark the boundaries. Later, before execution of the deed, they may conclude to shorten or lengthen the line, and it might well be argued that the best evidence of their intention at date of the conveyance is the written description of the boundary. However, as the object of recognizing the precedence of monuments over other descriptions is to get definite evidence of the intention of the parties, and to iron out ambiguities in the instrument, the answer to the objections above raised may be found in the theory that the admission of parol evidence is for the purpose of *explaining,* rather than for purpose of varying, the writing. It is, perhaps, on this theory that our courts have allowed prior erected monuments, not mentioned in the title papers, to control contradictory statements of courses and distances.[8]

II. Where the monuments relied upon are not mentioned in the deed, and are erected contemporaneously with the execution of the same, we have the same objections previously noted, i.e., admission of parol evidence, and attendant violation of the Statute of Frauds, though, perhaps, the objections are not, in this second situation, present in such full force, due to the fact that a change of mind between location of the monuments and the execution of the deed is

[8] *Safret* v. *Hartman* (1857) 50 N. C. 185; *Shaffer* v. *Gaynor* (1895) 117 N. C. 15, 23 S. E. 154; *Elliott* v. *Jefferson* (1903) 133 N. C. 207, 45 S. E. 558; *Clark* v. *Aldridge* (1913) 162 N. C. 326, 78 S. E. 216.

not probable. In this second situation, too, our court seems to adopt the view that the monuments so located should prevail over other methods of boundary description. One fairly recent case, *Potter* v. *Bonner*,[9] frankly acknowledges[10] that the application of the doctrine of allowing precedence to monuments not mentioned in the deed is a violation of the Statute of Frauds: "The rule prevails with us . . . that the description of land in a deed may be enlarged or limited by evidence of contemporaneous survey, but the rule has always been applied with caution because, in legal effect, it permits the transfer of title to land by parol, in violation of the Statute of Frauds, and it may frequently result in wrong and injustice. . . . The courts have therefore been careful to define with particularity the circumstances under which such evidence may be received and have only permitted it to control the description in in the deed 'when the parties, with a view to making the deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked and the deed is thereupon made, intending to convey the land which they have surveyed.' "[11]

If justification be needed for the technical violation of the parol evidence rule and the statute of frauds, it is, perhaps, found in the desire of the courts to determine true intention of the conveying parties, and their appreciation of the fact that overt acts are better indicators of intention than written descriptions. Our court, in one instance, made the analogy between this "practical location" of boundary-line monuments and Livery of Seisin at Common Law.[12] While, of course, livery is dispensed with under our recording statute[13] along with other ceremonies of conveyancing, the analogy seems to be an excellent one, justifying a technical breach of the

[9] *Potter* v. *Bonner* (1917) 174 N. C. 20, 93 S. E. 370.

[10] The New Hampshire Court, in *Hitchcock* v. *Libby*, 70 N. H. 399, 402, was not ready to admit the violation of the rule: "The locating of the line by the acts of the parties did not create any new right. It did not transfer title to land from one party to the other, thereby conflicting with the statute of frauds, but simply defined how far title on either side extends."

[11] Double quotes by court, quoting *Clark* v. *Aldridge*, 162 N. C. 330, *supra*, and cases cited.

[12] *Potter* v. *Bonner*, *supra*, n. 9, at page 22: "These requirements are not only for the purpose of having the line definitely marked, but also to give publicity to the acts of the parties, and is analogous to the livery of seisin of the common law, where the lord, without writing, in order to invest the tenant with title, went upon the land, and, in the presence of witnesses delivered a tuft of grass or a twig from the land and declared the tenant to be in possession of the land granted to him."

[13] C. S., sec. 3308.

statute where the facts of the case show that the best evidence would be excluded by avoiding such a breach. It is submitted, however, for obvious reasons that, as the court has said, such a doctrine should be applied "with caution."

III. The third situation, where monuments are not mentioned in the deed and are located by the parties *subsequently* to the execution of the deed, is of course, a rather unusual situation. And yet it has occasionally been held that even in such a case monuments so located will prevail over courses and distances mentioned in the deed, even where no ambiguity arises in connection with the description by course and distance.[14] Against such a holding, all of the objections raised in connection with allowing monuments not mentioned in the title papers to prevail when erected prior to, and contemporaneously with, the execution of the deed, return, and this time, it is submitted, with convincing force. To carry the rule as to the preference of monuments over courses and distances to such an extreme would hardly seem justified by any plea of desirability of determining intention of the parties. Instead of a mere technical violation of the parol evidence rule and the statute of frauds, it encourages a tendency which would render those sound doctrines virtually obsolete. If, after execution of a deed, the line may be changed so as to include ten or twenty feet additional, by subsequently erecting a boundary line with monuments, the natural *quaere* would seem unavoidable: Why, then could not that additional ten or twenty feet be independently conveyed without the formality of a writing or deed? The step between allowing such a doctrine and rendering the Statute of Frauds obsolete would be all too short to be in accord with the basic principles of conveyancing. The court in North Carolina has intimated, on at least two occasions, that it would not follow the doctrine of allowing monuments erected subsequently to the execution of the deed to prevail over descriptions by course and distance in the deed, when the monuments were not described in the title papers.[15] It is submitted that this North Carolina *dicta* is entirely sound in this respect.

D. S. C.

[14] *Knowles v. Toothaker* (1870) 58 Maine 172, 3 Gray's Cas. 297; *Kellog* v. *Smith*, 7 Cushing (Mass.) 375.

[15] *Shaffer* v. *Gaynor, supra*, 117 N. C. bottom page 23: "Hence it is held competent to prove that a contemporaneous, *but not a subsequent survey* located a corner at a place different from that ascertained by following course and distance." Also in *Barker* v. *R. R.* (1899) 125 N. C. 596, 34 S. E. 701, the court places the reason for following monuments in prior or contemporaneous survey

INHERITANCE TAX ON STOCK OWNED BY NON-RESIDENTS IN FOREIGN CORPORATION—On March 1st., the United States Supreme Court handed down its decision in the case of *Rhode Island Hospital Trust Co.* v. *Doughton.*[1] The question involved was the validity of an inheritance tax imposed under the North Carolina statute. In the case in question, a resident of Rhode Island died owning shares of stock in the R. J. Reynolds Tobcaco Company, which has its principal place of business in this state and two-thirds of its tangible property is located here. The corporation is a New Jersey corporation, maintaining a stock transfer office in New York City, and the paper certificates representing the shares of stock owned by the deceased at the time of his death have never been in North Carolina. None of the beneficiaries under the will lived here. The North Carolina Supreme Court held that these shares of stock were subject tc the North Carolina inheritance tax.[2]

Chief Justice Taft, writing for a unanimous court, points out the fundamental defect in the North Carolina holding, as follows:

"It goes without saying that a state may not tax property which is not within its territorial jurisdiction. . . . The tax here is not upon property but upon the right of succession to property; but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a non-resident, unless it has jurisdiction of the property devolved or transferred. . . . In this case the jurisdiction of North Carolina rests on the claim that because the New Jersey corporation has two-thirds of its property in North Carolina, the state may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. *This is on the theory that the stockholder is the owner of the property of the corporation,* and the state which has jurisdiction of any of the corporate property has pro tanto jurisdiction of his shares of stock. We cannot concur in this view. *The*

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on basis of *estoppel,* thereby, it would seem, excluding cases of subsequent location. Also in the very recent case of *Woodard* v. *Harrell* (1926) 191 N. C. 173, 131 S. E. ...., Clarkson J., in dealing with facts where monuments were referred to in the deed, and the parties subsequently located a different line, said, (191 N. C. at p. 176) "Pinner and Combs, in 1907, compromised and attempted to make a new line between them. This was not done in writing, but by parol. If Combs and Pinner were *locating* the *true dividing line,* the evidence is admissible, but if they were changing the *true dividing line,* the evidence was not admissible. There is no ambiguity in the calls of the deeds introduced by the plaintiffs . . ." (Italics by the court).

[1] (1926) 46 Sup. Ct. Reporter 256.

[2] *Trust Co.* v. *Doughton* (1924) 187 N. C. 263, 121 S. E. 741.

owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his aliquot share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property. . . . North Carolina cannot control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. . . .[3]

It was therefore held that the imposition of the tax was a deprivation of property without due process of law in violation of the Fourteenth Amendment and that the North Carolina statute is to that extent invalid.

The soundness of Chief Justice Taft's opinion is beyond question. The decision of the North Carolina Supreme Court was discussed in the June, 1925, issue of the LAW REVIEW, where the author presented the issue and argued for the position now taken by the United States Supreme Court.[4]

In the same issue of the LAW REVIEW, there was a discussion of the North Carolina case of *Parks* v. *Express Co.*,[5] where shares of stock in a Delaware corporation were held subject to attachment in North Carolina, although the owner was a Georgia corporation and the certificates of stock were not in North Carolina. This case seems to proceed on the theory that the shares of stock in the foreign corporation, doing business and having property in North Carolina, are property here. In the language of the court, "The shares of stock held by the defendant (the Georgia corporation) in that company (the Delaware corporation) was an obligation of the company doing business here due to its stockholder. It was the 'property of the stockholder in the hands of the company doing business here.' "[6] This language, and conception of the nature of corporate stock which it sets forth, is the basis of the subsequent North Carolina decision

[3] *Trust Co. v. Doughton* (1926) 46 Sup. Ct. Reporter 256, 258-9, italics by author.

[4] See *Inheritance Tax on Stock Owned by Non-resident in Foreign Corporation*, 3 N. C. Law Rev. 107.

[5] *Parks* v. *Express Co.* (1923) 185 N. C. 428, 117 S. E. 505, discussed in *Attachment of Stock in Foreign Corporation*, 3 N. C. Law Rev. 103.

[6] *Parks* v. *Express Co.* (1923) 185 N. C. 428, 433, parenthesis by author.

in the *Rhode Island Trust Company case.*[7] If that conception of corporate stock is wrong in the subsequent case, as indicated by the present decision of the United States Supreme Court reversing it, there is considerable ground for believing that it was wrong in the previous case of *Parks* v. *Express Co.*, and that, if that case had been appealed to the United States Supreme Court, it would also have been reversed.

R. H. W.

[7] In *Trust Co.* v. *Doughton* (1924) 187 N. C. 263, at page 279, there is a paraphrase of the above-quoted language from *Parks* v. *Express Co.*, making the language applicable to the *Rhode Island Trust Company case.*