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Deeds -- Priority of Description -- Practical Location

Hal W. Broadfoot

Deeds—Priority of Description—Practical Location

In the recent North Carolina case of *Brown v. Hodges*,[1] plaintiff and defendant were adjoining landowners, deriving their respective titles from a common source. A dispute arose as to the boundary line between them.[2] The pertinent call in the deed under which defendant claims was, "thence . . . west with the highway 50 poles to a stake at the highway." The pertinent call in plaintiff's deed was the reverse of this call, but identical with it. Plaintiff alleged that the true line ran with the original *survey* of the highway, and not with the *highway* as it existed at the time of the execution of the deeds, and as it now exists. He was permitted to show by parol evidence, over defendant's objection, that a surveyor for plaintiff's predecessors in title had found "stakes for a road" along the line as contended for by plaintiff. There was no evidence that this surveyor marked the line or marked a corner at the end of the line as run by him. No road was ever constructed on the site of the original survey.

At trial defendant requested peremptory instruction in his favor; the request was denied, and verdict was rendered for plaintiff. On appeal the court held that the trial court erred in admitting parol testimony tending to vary the calls in the deeds, and granted a new trial.

The volume of litigation involving questions relative to boundaries of land has resulted in some well established principles as to priority of descriptions in deeds.

Practical location by the parties.[3] When it can be proved that the parties grantor and grantee went upon the land and made a physical survey thereof, giving it a boundary that was actually run and marked, and a corner made,[4] the party claiming under the deed shall hold accordingly, notwithstanding a variant description on the face of the instrument.[5] The act of practical location, however, does not, *ipso facto*, admit parol testimony. It must be shown that the boundary monuments were erected prior to, or contemporaneously with, the execution of the deed, before such evidence is admissible.[6] A definite minority of juris-

[1] 232 N. C. 537, 61 S. E. 2d 603 (1950), rehearing denied, 233 N. C. 617, 65 S. E. 2d 144 (1951). The case was heard on a prior occasion and reported in 230 N. C. 746, 55 S. E. 2d 498 (1949).

[2] Title to the respective tracts was not in dispute.

[3] "Practical location" as here treated involves grantor and grantee. For discussion of "practical location," *i.e.*, settlement of boundary dispute between adjoining land owners by location and acquiescence, see Comment, 21 YALE L. J. 509 (1912).

[4] Brown v. Hodges, 233 N. C. 617, 65 S. E. 2d 144 (1951) (Giving to a line a permanent location and to a corner a permanent position).

[5] The practical location rule in North Carolina is treated as an exception to the general rule that monuments mentioned in a deed are to be accorded first preference. Yopp v. Aman, 212 N. C. 479, 193 S. E. 822 (1937); Dudley v. Jeffress, 178 N. C. 111, 100 S. E. 253 (1919); Clarke v. Aldridge, 162 N. C. 326, 78 S. E. 216 (1913); Cherry v. Slade, 7 N. C. 82 (1819).

[6] Yopp v. Aman, 212 N. C. 479, 193 S. E. 822 (1937); Watford v. Pierce, 188

dictions give effect to monuments designated *after* execution of the deed.[7]

It is a patent violation of the parol evidence rule to allow oral testimony of practical location to contradict and control the written description in a deed. The North Carolina court has recognized it as such, and has on occasion lamented the fact as leading to fraud and to insecurity of titles;[8] its application continues, nevertheless.

Monuments. Calls in a deed for monuments, natural[9] or artificial,[10] control calls for course and distance, and the lines terminate at the former, regardless of the distance specified.[11] The rationale for this is that for any number of reasons course and distance may be incorrect, but monuments, being objects of immutability, are more likely to conform to grantor's intention. A *stake* has never been accorded the dignity of a monument in North Carolina, and consequently, for purposes of practical location, has never been the basis for varying the construction of a written deed.[12] Justice Hall, concurring in *Reed v. Shenck,*[13] speaking of stakes, said, "they bespeak more of locality, to be sure, than floating feathers on the water, but they are as unfit to be boundaries of

N. C. 430, 124 S. E. 838 (1924); Ritter Lumber Co. v. Montvale Lumber Co., 169 N. C. 80, 85 S. E. 438 (1915); Clarke v. Aldridge, 162 N. C. 326, 78 S. E. 216 (1913); Higdon v. Rice, 119 N. C. 623, 26 S. E. 256 (1896); Reed v. Shenck, 13 N. C. 415 (1830); Bradford v. Hill, 2 N. C. 22 (1793).

[7] Bemis v. Bradley, 126 Me. 462, 139 Atl. 593 (1927); In Manchester v. Hodge, 74 N. H. 468, 69 Atl. 527 (1908), the court followed the minority view, but intimated it believed the monument had been erected prior to the execution of the deed.

[8] "But it must be confessed, however much to be lamented, that our courts have permitted parol evidence to contradict a deed. . . ." Slade v. Green, 9 N. C. 218, 224 (1822); Potter v. Bonner, 174 N. C. 20, 93 S. E. 370 (1917); Allison v. Kenion, 163 N. C. 582, 79 S. E. 1110 (1913).

[9] The following, but not by way of limitation, have been held to be natural monuments: Byrd v. Spruce Co., 170 N. C. 429, 87 S. E. 241 (1915) (creek); Lumber Co. v. Bernhardt, 162 N. C. 460, 78 S. E. 485 (1913) (established line of adjacent tract); Plemmons v. Cutshell, 234 N. C. 506, —— S. E. 2d —— (1951) (same); Sherrod v. Battle, 154 N. C. 345, 70 S. E. 834 (1911) (ditch, drain and water course); McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908) (tree); Clark v. Moore, 126 N. C. 1, 35 S. E. 125 (1900) (fort entrenchment and marl pit); Clarke v. Wagner, 76 N. C. 463 (1877) (island); Literary Fund v. Clark, 31 N. C. 58 (1848) (lake and mountains); Hough v. Horne, 20 N. C. 369 (1839) (highway); Reed v. Shenck, 13 N. C. 415 (1830) (rocks); Pollock v. Harris, 2 N. C. 252 (1796) (marsh, pocosin and swamp); Sandifer v. Foster, 2 N. C. 237 (1795) (river).

[10] Reed v. Shenck, 14 N. C. 65 (1831) (Some permanent monument, which will endure for years, placed by the hand of man).

[11] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Nelson v. Lineker, 172 N. C. 279, 90 S. E. 251 (1916); Cherry v. Slade, 7 N. C. 82 (1819); *accord,* Schultz v. Maxey, 307 Ky. 325, 210 S. W. 2d 950 (1948); TIFFANY, THE MODERN LAW OF REAL PROPERTY, §673 (1940). *But cf.* White v. Luning, 93 U. S. 514 (1876), for "absurdity theory," holding that monuments may yield to course and distance if to follow the former would defeat the conveyance, whereby adherence to the latter would effectuate all other parts of the description.

[12] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Tate v. Johnson, 148 N. C. 267, 61 S. E. 741 (1908); Clark v. Moore, 126 N. C. 1, 35 S. E. 125 (1900); Reed v. Shenck, 14 N. C. 65 (1831).

[13] 14 N. C. 65, 75 (1831).

land." A few states, however, with regard to the sufficiency of a stake for such purposes, have held otherwise.[14]

Course and distance. Where there has been no practical location by the parties to the instrument, or no monuments are called for in the deed nor can be ascertained by evidence, then course and distance will prevail over less certain descriptive elements.[15] Between the two, course is given priority.[16]

Area. The courts are almost unanimous in holding that area or quantity as an element of description could be significant, but they likewise infer that the possibility is a remote one since area or contents called for is usually only an approximation.[17] Consequently, for all practical purposes, area is virtually disregarded.

In the principal case, then, it is readily apparent that the North Carolina court reached a decision in accord, not only with prior rulings in this jurisdiction, but with the decided weight of authority. Plaintiff's argument, based on the application of the practical location rule, failed when the court declared that *stakes* were not such monuments as to satisfy the requisites of practical location, and therefore oral evidence as to their erection was inadmissible. Defendant's contention, on the other hand, that the highway as it existed at the time the deeds were executed was the true boundary, found support in the fact that the highway, *i.e.,* monument, was called for in the deeds. No call for the "survey of the highway," as contended for by plaintiff, was mentioned.

In light of the fact that application of the practical location doctrine violates the parol evidence rule, it is well that the North Carolina Supreme Court did not permit further laxity in its scope.

HAL W. BROADFOOT.

Evidence—Automobiles—Identification of Driver

In ruling on a motion for judgment of non suit in a criminal case,[1]

[14] Winbourne v. Russell, 50 So. 2d 721 (Ala. 1951) (iron stakes recognized by the parties for 20 years); Arnold v. Hanson, 91 Cal. App. 2d 15, 204 P. 2d 97 (1949) (wood stakes driven by surveyor replaced with iron ones by subdivider); Dean v. Thompson, 213 S. W. 2d 327 (Tex. Civ. App. 1948).

[15] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Cherry v. Slade, 7 N. C. 82 (1819); *accord,* Wagers v. Wagers, 238 S. W. 2d 125 (Ky. 1951); TIFFANY, *op. cit. supra* note 11, §673.

[16] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Forest Preserve District v. Lehmann Estate, 388 Ill. 416, 58 N. E. 2d 538 (1944). See TIFFANY, *op. cit. supra* note 11, §673, where it is stated that between course and distance there is no preference, citing Hall v. Eaton, 139 Mass. 217, 29 N. E. 660 (1885).

[17] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Hollars v. Stephenson, 99 N. E. 2d 258 (Ind. 1951); Askins v. Oil Producing Co., 201 Okla. 209, 203 P. 2d 877 (1949); Parrow v. Proulx, 111 Vt. 274, 15 A. 2d 835 (1940); TIFFANY, *op. cit. supra* note 11, §673.

[1] N. C. GEN. STAT. §15-173 (Supp. 1951) provides for criminal law non suit and serves the same purpose in criminal prosecutions as is accomplished by N. C. GEN. STAT. §1-183 (Supp. 1951) in civil actions. State v. Ormond, 211 N. C. 437,