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The Admissibility of Parol Evidence to Establish Boundaries

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THE ADMISSIBILITY OF PAROL EVIDENCE TO ESTABLISH BOUNDARIES[1]

Reportedly[2] in Virginia it is a common practice to execute deeds of conveyance in which land is described as being bounded by the land of adjoining landowners. In a hypothetical case where A's land is described in the deed as bounded by B's land on the north, C's land on the west, D's land on the south and E's land on the east, the question may arise as to whether parol evidence, in the absence of a claim by adverse possession, would be admissible to establish these boundaries once they are attacked by a purchaser under a subsequent deed describing part of this same land by metes and bounds.

While there has been no case decided in Virginia to support either the admission or the exclusion of the evidence,[3] the dictum in the case of *Bradshaw* v. *Booth*[4] states: "The extent of boundaries of land, and thus the title to land, cannot be established wholly by parol evidence, unsupported by written evidence of title, where title by adverse possession is not involved and where the case is one in which the title claimed is by deed and must have been derived by deed, if derived at all; for to hold otherwise would be

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1. Virginia Code of 1950, Title 8, Article 3, Establishment of Boundaries:
   §8-836 "Any person having a subsisting interest in real estate and a right to its possession of some share, interest or portion thereof, upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, or at rules in the clerk's office thereof, shall have the right to have ascertained and designated by such court the true boundary line or lines to such real estate as to one or more of the coterminous landowners. Petitioner in stating his interest shall conform to the requirements of §8-804. [i.e., state the interest he claims], and shall describe with reasonable certainty such real estate and the boundary line or lines thereof which he seeks to establish. A plat, showing such real estate and boundary line or lines, filed with the petition, may serve the purposes of such description.
   §8-837 "The petitioner shall make defendants to such petition all persons having a present interest in the boundary line or lines sought to be ascertained and designated, and the case shall be commenced by serving a copy of the petition upon the defendant or by giving him notice in writing that such petition has been filed. No formal plea or answer to such petition shall be necessary, but the defendant shall state his grounds of defense in writing, if any he has, and the parties shall be deemed to be at issue, which issue shall be the true boundary line or lines of such real estate.
   §8-838 "The trial shall be conducted as other trials at law, and *the same rules of evidence shall apply* and the same defenses may be made *as in other actions at law.* A trial by jury may be waived by consent of the parties, and the case be tried by the court. Counsel for the petitioner shall have the right to open and conclude the argument. The judge of the court in term time or vacation may direct such surveys to be made as he may deem necessary [Italics added].
   §8-839 "In a proceeding under this article, no claim of the plaintiff for rents, profits or damages shall be considered.
   §8-840 "The judgment of the court shall be recorded in the common law order book, and in the current deed book of the court, and indexed in the names of the parties. The judgment unless reversed shall forever settle, determine, and designate the true boundary line or lines in question, and be binding upon the parties, their heirs, devisees, and assigns. The judgment may be enforced in the same manner as a judgment in an action of ejectment.
   §8-841 "A writ of error from the Supreme Court of Appeals shall lie to such judgment in like manner as in a common law action."
2. Letter to D. W. Woodbridge from Ernest Goodrich, November 19, 1953.
3. *Cf.* Hamman v. Miller, 116 Va. 873, 83 S.E. 382 (1914).
4. 129 Va. 19, 105 S.E. 555 (1921).

to permit parol evidence to become an independent source of title, which by the weight of authority, and certainly in Virginia, is not permissible."[5] The court also said, "But such declaration . . . to be admissable in evidence must have reference to monuments or other delineation on the ground of the extent of the boundaries designated in some evidence of title."[6] This has been interpreted by a lower court in Virginia to mean that without a reference in the deed itself to a particular call, line or monument on the ground to which parol evidence could attach itself, parol evidence is inadmissible to establish the true boundary. If this rule were to be applied to the hypothetical case in question, an obvious injustice would result, for a purchaser, by virtue of a subsequent deed to land encroaching upon A's property but described by metes and bounds, would have the superior title, even though A, claiming under his prior deed, has occupied and cultivated his land and only wishes by parol evidence to prove the extent of his land as described in the deed.

The propriety of applying such a construction of the dictum of *Bradshaw* v. *Booth* to the facts of the present hypothetical situation is seriously questioned, for in that case the issue raised was not the admissibility of the evidence but whether it was error merely to instruct the jury that the boundary should be determined from all the evidence and to refuse an instruction that the plaintiff had the burden of showing complete legal title. In holding it to be erroneous because it left the jury without any standard fixing the sufficiency of evidence of title, the court expressly noted the fact that with respect to that part of the boundary of which there was no mention made in the deed no evidence was admitted even tending to show that the plaintiff was entitled to it. In the light of the injustice which would result from the application of such an interpretation, it is contended here that the court could not have intended that construction to govern.

A broader and more reasonable interpretation of the court's requirement that declarations must have reference to monuments or other delineation on the ground showing the extent of boundaries designated in some evidence of title would be to permit parol evidence to show a monument on the ground, which, though not mentioned in the deed, was nevertheless intended to be determinative of a boundary which was referred to in the deed. Courts of

5. *Id.* at 38, 105 S.E. 555, 561.
6. *Ibid.*

other jurisdictions have held this to be the law. In North Carolina the court when presented with a deed reading, "50 acres of land lying in the county of H. and bounded as follows: by the land of L., L., and S.," held that, since there was nothing in the descriptive clause from which the particular 50 acres of the land mentioned in the deed could be identified, parol evidence was admissible to aid the description.[7] Also, in Massachusetts, where a deed described land as bounded by lands of the grantor on the east and west, the court held that oral evidence was admissible to show that bounds or monuments existed at the date of the deed which were agreed orally by the parties as showing the true lines.[8]

If the Virginia courts should be found unwilling to apply the broader interpretation, there is authority to support the argument that adjoining land on which the boundary line in question is said to abut may be regarded as a monument.[9] In the case of *Smith* v. *Bailey*,[10] where the entire land in the deed was described in relation to the property of H. H. Lavenstein, the court in noting that fact said, "It [Lavenstein line] is both the alpha and the omega of the description, and it was the duty of the court, as it would be of a surveyor, to locate this line and lot, since it was a monument, a call, in the true location of the lot conveyed."[11] The court quoted with approval from a West Virginia case,[12] in which it was said, ". . . a tract of land called for as a monument, in the description of another tract, is to be located in accordance with the true interpretation of its boundaries as of the time at which its description was written, the date of the deed . . ."[13]

Treating the reference to adjoining land as a reference to a monument renders applicable the universal rule that evidence *aliunde* is always admissible where there is a question as to the application of a grant to its proper subject matter and where the problem is one of location.[14] Distinction is made by the courts of Virginia between construction, which is the determination of the real meaning or explanation of obscure or ambiguous terms of a written instrument or oral agreement by calling in the aid of extrinsic evidence, and location, which is the designation of boundaries of a

7. Blow v. Vaughan, 105 N.C. 198, 10 S.E. 891 (1890).
8. Hooven v. Comerford, 152 Mass. 591, 26 N.E. 407 (1891).
9. 4 Tiffany, *Real Property* §993 (3rd ed. 1939).
10. 141 Va. 757, 127 S.E. 89 (1925).
11. *Id.* at 770, 127 S.E. 89, 93.
12. State v. Herold, 76 W.Va. 537, 85 S.E. 733 (1915).
13. 76 W.Va. 537, ___, 85 S.E. 733, 735.
14. New River Mineral Co. v. Painter, 100 Va. 507, 42 S.E. 300 (1902).

particular piece of land either upon the record or on the land itself by extrinsic evidence.[15] When the true location of the land in dispute has been ascertained, parol evidence is admissible to show the proper location of all the descriptive locations and calls in the deed, to the end of determining whether or not the land in dispute passed by it and thus give effect to the true intent of the parties.[16]

The deed in the hypothetical case now under consideration will provide the required written evidence of title if the description meets the tests of certainty; for, if the property is not described with sufficient accuracy to identify it, then it is deemed void for vagueness and indefiniteness, although even in the absence of a precise description the courts are loath to declare a deed invalid.[17] Two general rules applied in construing writings are, "(1), That they shall, if possible, be so interpreted *ut res majis valeat quam pereat,* so that they shall have some effect rather than none; and (2), That such a meaning shall be given to them as may carry out and most fully effectuate the intention of the parties . . ."[18] Under these two rules, the test for certainty in the description of a deed requires language sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.[19]

The expression of the intention of the parties must appear on the deed, and it is the purpose of parol evidence to explain this intention but never to create it.[20] The description must at least furnish the means of identification; and, where the means are thus present, parol or extrinsic evidence may be admitted as an aid to identify the land definitely.[21]

The deed in the hypothetical case clearly manifests the intention of the parties that the adjoining land determine the boundary of the lot in question and thereby furnish the means of identification. Thus the description is sufficiently certain to render the deed valid. Since valid written evidence of title is available to support the introduction of parol evidence, it is submitted that the admissibility of parol evidence would not serve as an *independent*

15. Reusens v. Lawson, 91 Va. 226, 21 S.E. 347 (1895).
16. Baker v. Seekright, 1 Hen. & Mun. (11 Va.) 177 (1806); Pasley v. English, 5 Gratt. (46 Va.) 141 (1848); Elliott v. Horton, 28 Gratt. (69 Va.) 766 (1877); Hunter v. Hume, 88 Va. 24, 13 S.E. 305 (1891). *See* 9 Wigmore, *Evidence,* pp. 187-192 (3rd ed. 1940).
17. 2 Minor, *Real Property* §1072 (2d ed. Ribble, 1928).
18. 2 Minor, *Institutes,* p. 948 (2d ed. 1877).
19. Vanover v. Hollyfield, 145 Va. 749, 134 S.E. 548 (1926).
20. *Ibid.*
21. 2 Minor, *Real Property* §1072 (2d ed. Ribble, 1928).

source of title but would show only the *extent* of A's title. The full import and necessity of applying this broad rule of evidence to a deed of this nature is realized when contrasted with the gravity of the consequences which would follow the application of the narrower rule. Since much of the land in Virginia is described in this general manner and most of the land is uncultivated, thereby increasing the difficulty of claiming title by adverse possession, the adoption of the narrower interpretation would undermine titles to extensive areas throughout the state.

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