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Boundaries -- Parol Boundary Settlements -- Statute of Frauds

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NOTES AND COMMENTS

Boundaries—Parol Boundary Settlements—Statute of Frauds

A and *B*, owners of coterminous tracts of land, are uncertain as to the correct physical location of the boundary line between them. Their uncertainty arises honestly, though it might be resolved by accurate survey related to a demonstrably better record title or by resort to title by adverse possession in either party.[1] Anxious to resolve their honest dispute, the parties orally agree[2] upon the location of a boundary line. This boundary is acquiesced in by both parties and recognized in subsequent use. Thereafter one of the parties or his assign[3] reneges and claims more than the land lying on his side of the orally agreed boundary line. In resulting litigation, will the boundary line orally agreed upon be upheld against the reneging party or his assignee?

A majority of jurisdictions uphold such agreements,[4] even though it is now possible to prove that the reneging party's claim is based on what is demonstrably the true line.[5] In a recent case,[6] the North

[1] This fact situation serves to define the scope of the problem to be dealt with by this note. The treatment of this note, however, does not deal with the established North Carolina law that contemporaneously erected monuments control over actual calls in the deed. *E.g.*, Dudley v. Jeffress, 178 N.C. 111, 100 S.E. 253 (1919); Millikin v. Sessoms, 173 N.C. 723, 92 S.E. 359 (1917).

[2] These parol agreements, like a written agreement to the same effect, must be supported by sufficient consideration. *E.g.*, McGinty v. Interstate Land & Improvement Co., 92 Ga. App. 770, 90 S.E.2d 42 (1955). However, the definite settlement of a previously undefined or doubtful boundary is sufficient consideration to uphold the agreement. *E.g.*, Hotze v. Ring, 273 Ky. 48, 115 S.W.2d 311 (1938).

[3] In the majority of jurisdictions, these parol settlements are binding upon the parties and their successors in title. *E.g.*, Huff v. Holley, 101 Ga. App. 292, 113 S.E.2d 493 (1960); Huffman v. Mills, 131 W. Va. 218, 46 S.E.2d 787 (1948).

[4] *E.g.*, Clements v. Cox, 230 Ark. 818, 327 S.W.2d 83 (1959); Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 336 P.2d 525 (1959); Callaway v. Armour, 207 Ga. 229, 60 S.E.2d 367 (1950); Turner v. Bowens, 180 Ky. 755, 203 S.W. 749 (1918); Schroeder v. Engroff, 52 N.J. Super. 88, 144 A.2d 808 (Super. Ct. 1958); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960); Webb v. Harris, 44 Tenn. App. 492, 315 S.W.2d 274 (1958). See generally 2 TIFFANY, REAL PROPERTY § 653 (3rd ed. 1939); Annot., 69 A.L.R. 1430, 1433 (1930).

[5] *E.g.*, Ernie v. Trinity Lutheran Church, *supra* note 4; Aldrich v. Brownell, 45 R.I. 142, 120 Atl. 582 (1923); Gulf Oil Corp. v. Marathon Oil Co., 137 Tex. 59, 152 S.W.2d 711 (1941). But the agreement will be upheld only in the absence of fraud or concealment by either party.

[6] Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

Carolina Supreme Court reserved decision on the point, raising a query whether statements in prior decisions would preclude adopting the majority rule.[7]

Despite the widespread acceptance of the majority rule as above stated in general form, the decisions[8] and the authorities[9] interpreting them are confusing in their analysis of the problem itself and the rationale of decision. The theories upon which such agreements are sustained are variously stated as being estoppel,[10] practical location,[11] or simply contract by parol agreement.[12] The only real difficulty in sustaining them is of course that provided by the Statute of Frauds.[13] Courts sustaining them surmount this difficulty either head on by saying that there is no conveyance involved,[14] or in side-

[7] In this case the evidence showed that the true boundary line was ascertainable as a matter of law and its location was thus possible by an accurate survey. The court, in reserving decision on the question whether under any circumstances a subsequent parol agreement could fix a boundary line, expressly stated that it can not be utilized where as here, the true boundary line is "certain." Thus, the court has left the question open only with respect to situations where the true boundary is "uncertain" in the objective sense—that is its identity can not be established as a matter of law by reference to paramount title muniments. This puts a more restricted meaning on "uncertain" than do some courts which would find the requisite "uncertainty" possible even in this factual context. *E.g.*, Schneider v. Pascoe, 47 Cal. App. 2d 709, 118 P.2d 860 (Dist. Ct. App. 1941), holding that the requisite "uncertainty" refers simply to the subjective state of mind and that "uncertainty" may exist even though an accurate survey could be made from the calls in the deed.

[8] See, *e.g.*, Callaway v. Armour, 207 Ga. 229, 60 S.E.2d 367 (1950); Fuelling v. Fuesse, 43 Ind. App. 441, 87 N.E. 700 (1909); Winborn v. Alexander, 39 Tenn. App. 1, 279 S.W.2d 718 (1954).

[9] See, *e.g.*, BURBY, REAL PROPERTY § 250 (2d ed. 1954); 6 THOMPSON, REAL PROPERTY § 3299 (perm. ed. 1940); 2 TIFFANY, *op. cit. supra* note 4, at § 653.

[10] *E.g.*, Dunn v. Fletcher, 266 Ala. 273, 96 So. 2d 257 (1957); Johnson v. Smith, 215 Ark. 247, 219 S.W.2d 926 (1949); Thomas v. Harlan, 27 Wash. 2d 512, 178 P.2d 965 (1947).

[11] *E.g.*, Guy v. Lancaster, 250 Ala. 287, 34 So. 2d 499 (1948); Lake v. Crosser, 202 Okla. 582, 216 P.2d 583 (1950).

[12] *E.g.*, Wright v. Anthony, 205 Ga. 47, 52 S.E.2d 316 (1949); Howard v. Howard, 271 Ky. 773, 113 S.W.2d 434 (1938); Webb v. Harris, 44 Tenn. App. 492, 315 S.W.2d 274 (1958); Huffman v. Mills, 131 W. Va. 218, 46 S.E.2d 787 (1948).

[13] The other possible reason for not sustaining these agreements is that it would violate the parol evidence rule. This argument was rejected in Diggs v. Kurtz, 132 Mo. 250, 33 S.W. 815 (1896), and Fehrman v. Bissell Lumber Co., 188 Wis. 82, 205 N.W. 905 (1925), *appeal dismissed*, 274 U.S. 720 (1927). And certainly the parol evidence rule should not operate to destroy the validity of such agreements which change or modify the original instrument. Whitehurst v. FCX Fruit & Vegetable Serv., Inc., 224 N.C. 628, 32 S.E.2d 34 (1944).

[14] *E.g.*, Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960);

stepping fashion, by reliance upon possession and acquiescence.[15] Actually, depending upon the factual context giving rise to the dispute and the resulting agreement, there may well be a conveyance involved, so that the first ground for surmounting the Statute of Frauds in those contexts is certainly questionable. Analysis of these various factual contexts may therefore be helpful in anticipating what course our court will follow when confronted with a proper case.

The dispute uniformly required[16] could and does arise for any one of several reasons: (a) the true boundary line is described by reference to variable geographical feature;[17] (b) the true boundary line is described by a call which is intrinsically ambiguous so that location by accurate survey is impossible;[18] (c) the true boundary line is described solely by reference to monuments which are not now in existence, so that location by accurate survey is impossible;[19] (d) the parties are honestly in dispute by reason of an inartful description of monuments of lost but not indispensable monuments, neither

Jones v. Scott, 314 Ill. 118, 145 N.E. 378 (1924); Turner v. Bowens, 180 Ky. 755, 203 S.W. 749 (1918).

[15] In order for the parol agreement to be valid, many jurisdictions require that the parties assert possession up to the agreed line. *E.g.*, Downing v. Boehringer, *supra* note 14; Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960); Van Deven v. Harvey, 9 Wis. 2d 124, 100 N.W.2d 587 (1960). Why the possession is necessary does not appear from the decisions but in 2 TIFFANY, *op. cit. supra* note 4, at § 653, it is suggested that the taking of possession constitutes part performance and removes the case from the Statute of Frauds. Note, however, that North Carolina has not recognized the doctrine of part performance in other contexts. *E.g.*, Ballard v. Boyette, 171 N.C. 24, 86 S.E. 175 (1915). See generally Notes, 39 N.C.L. REV. 96 (1960); 15 N.C.L. REV. 203 (1937). *But cf.* Herring v. Volume Merchandise, Inc., 249 N.C. 221, 106 S.E.2d 197 (1958), holding that while an oral executory surrender of a lease having more than three years to run must be in writing an actual surrender of such a lease need not be in writing to be enforceable since the Statute of Frauds applies only to executory, as distingiushed from executed, contracts. See also Herring v. Volume Merchandise, 252 N.C. 450, 113 S.E.2d 814 (1960) (same case on later appeal). See generally Annot., 78 A.L.R.2d 933 (1961). It would seem that this same rule would apply to a parol settlement of a boundary dispute where the parties have acquiesced in the settlement and recognized it in subsequent use of the land.

[16] In the absence of even subjective uncertainty or vagueness as to the location of the boundary line, no parol agreement is admissible to alter the true dividing line as this obviously would conflict with the Statute of Frauds. *E.g.*, Gee v. McDowell, 209 Ga. 265, 71 S.E.2d 532 (1952); Carver v. Turner, 310 Ky. 99, 219 S.W.2d 409 (1949); May v. Abernathy, 23 Tenn. App. 236, 130 S.W.2d 135 (1939).

[17] Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 Pac. 803 (1929).

[18] Callaway v. Armour, 207 Ga. 229, 60 S.E.2d 367 (1950).

[19] Engle v. Beatty, 41 Ohio App. 477, 180 N.E. 269 (1931).

of which make location by accurate survey impossible;[20] (e) the parties are honestly in dispute because of conflicting calls in their respective muniments of title, although the true boundary could be established by survey based upon the demonstrably better record title.[21]

Courts sustaining the agreements have not generally discriminated between these contexts. But it seems clear that (a), (b) and (c), where the very identification of the true line as opposed to its location is impossible, present clearer cases for holding no conveyance and hence no violation of the Statute of Frauds, than do (d) and (e). Some courts have tacitly recognized this important line of distinction by saying that (d) and (e) do not involve bona fide disputes,[22] others by pointing out more clearly that in these cases where the true boundary is really ascertainable, *i.e.,* is legally identifiable, parol agreements purporting to vary it violate the Statute of Frauds.[23] The latter reasoning is certainly preferable, since this goes to the heart of the matter, and since even in these cases there may well be a subjectively "honest" or "bona fide" dispute and uncertainty between the parties.

It is believed that in a proper case, one involving an objective uncertainty of the (a), (b), or (c) type situations, nothing in previous North Carolina cases would preclude the court from enforcing a subsequent parol agreement fixing a disputed boundary line. Indeed, it is in these very contexts that the court apparently reserved decision in the *Andrews*[24] case.

The cases cited by the court as containing language which might possibly preclude enforcement of such agreements appear to be those involving no objective uncertainty.[25] In each of the cases the line

[20] Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

[21] This type of situation gives rise to a "lappage." Webb v. Harris, 44 Tenn. App. 492, 315 S.W.2d 274 (1958).

[22] See, *e.g.,* Brock v. Muse, 232 Ky. 293, 22 S.W.2d 1034 (1930).

[23] *E.g.,* Lacy v. Bartlett, 78 S.W.2d 219 (Tex. Civ. App. 1934).

[24] Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

[25] In Woodard v. Harrell, 191 N.C. 194, 132 S.E. 12 (1926), the court found as a matter of law no ambiguity in the calls of the deeds introduced by the plaintiff. Thus while there was subjective uncertainty, objective uncertainty was missing and the subsequent parol agreement was not allowed. In Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917), the court held that the subsequent parol agreement was incompetent to show a line different from the true line. The facts given in the report do not reveal whether the uncertainty was objective in nature, but it probably was not since the established line could not be said to be at variance with the true line unless the latter could be accurately established. Daniel v.

was legally "certain," *i.e.*, it could be made certain by accurate survey based upon the muniments of title. Hence, when the appropriate case of true objective uncertainty does arise,[26] North Carolina counsel would seem to have had the door opened wide enough by the *Andrews*[27] dictum to argue persuasively for outright adoption of the majority rule allowing enforcement of parol agreements in such cases.[28] Such a result would accord with generally accepted public policy considerations.[29]

J. DONNELL LASSITER

Charitable Trusts—Application of Cy Pres to a Discriminatory Trust

In a recent New Jersey decision[1] the *cy pres* doctrine[2] was

Tallassee Power Co., 204 N.C. 274, 168 S.E. 217 (1933), lacked the requisite objective uncertainty as the court found the deeds were not ambiguous and the boundary line could be made certain. Whether the uncertainty present in Kirkpatrick v. McCracken, 161 N.C. 198, 76 S.E. 821 (1912), was objective in nature is inconclusive on the facts and opinion. In any event, evidence of the subsequent parol agreement was admitted, although the court said it felt the trial court had confined the evidence to the restricted purpose of establishing damages.

[26] And when counsel on trial is astute to make the record show that there *is* objective uncertainty involved. It seems at least possible from reading our cases that the absence up to now of clear analysis along the lines suggested may be the result of failure by counsel clearly to develop this critical point for the appellate records.

[27] Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

[28] It is unlikely that any of the parol agreements litigated in the past were the result of specific counsel by lawyers. Of course, in the rare instance where the lawyer's advice is sought ahead of time, the correct counsel is to enter into a written and recorded boundary line agreement, whether the dispute arises out of objective or merely subjective uncertainty.

[29] "These settlements of disputed, conflicting, or doubtful boundaries should be encouraged by the courts as a means of suppressing spiteful and vexatious litigation, and thus banishing from peaceful communities a fruitful source of discord. 'Convenience, policy, necessity, justice—all unite in sustaining such an amicable agreement.'" McArthur v. Henry, 35 Tex. 801, 816 (1869). Quoted with approval in Sobol v. Gulinson, 94 Colo. 92, 95, 28 P.2d 810, 811 (1933).

[1] Howard Sav. Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961).

[2] The *cy pres* doctrine is an equitable doctrine applied to prevent the failure of a charitable trust when the settlor's scheme is, or has become, impractical, impossible, or illegal to carry out. It is based on the presumption that his wishes will more nearly be fulfilled by alteration of the trust and its application to a purpose "as near as possible" to his original intent, rather than declaring a partial intestacy. See, *e.g.*, Petition of Pierce, 153 Me. 180, 188, 136 A.2d 510, 515 (1957). See generally 2A BOGERT, TRUSTS AND TRUSTEES §§ 431-41 (1953); FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950); RESTATEMENT (SECOND), TRUSTS § 399 (1959); 4 SCOTT, TRUSTS §§ 399-.5 (2d ed. 1956); SHERIDAN & DELANY, THE CY-PRES DOCTRINE (1959). The doctrine has gained wide acceptance in the