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Sales - Effect of Ambiguity in Description of Land Excepted from Sale - Admissibility of Parol Evidence

Sidney D. Fazio

SALES — EFFECT OF AMBIGUITY IN DESCRIPTION OF LAND EXCEPTED FROM SALE — ADMISSIBILITY OF PAROL EVIDENCE

Plaintiff brought a petitory action to be recognized as owner of three adjacent tracts of land. Both plaintiff and defendant traced their titles back to a common author. The sale from the common author to defendant's ancestor in title was first in point of time. In it the description of the property intended to be conveyed was so ambiguous as to make it impossible for a surveyor to locate the property. Subsequently the common author sold a large tract to defendant's ancestor in title. Still later the common author and defendant's ancestor in title entered into a correction deed. The testimony of the expert witnesses at the trial indicated that the description in the correction deed could be interpreted as describing one of the tracts or all three. Plaintiff acquired the property subsequent to the correction deed and his deed also excepted the land previously sold to defendant's ancestor in title. Plaintiff contended that the erroneous description in the first deed rendered the exception inoperative; thus plaintiff's ancestor in title took the whole tract. Plaintiff further contended that the correction deed was ineffective to divest plaintiff's ancestor of title to the property since plaintiff's ancestor was not a party to the deed. Defendant corporation contended it should be allowed to use parol evidence to show that the property intended to be conveyed in the original deed and more accurately described in the correction deed was that of the three tracts involved in the suit.[1] The district court gave judgment for the defendant, dismissing the suit. On first hearing the Louisiana Supreme Court decided that the lower court should be reversed on the grounds that: (1) Insufficiency in the description of land to be excepted from operation of a deed makes the exception void, and the deed conveys the entire tract described, including the part intended to be excepted. (2) Parol evidence to establish identity is allowable in aid of a defective or ambiguous description only in cases where there is sufficient

1. Defendant also based his case on two other grounds. He pleaded ten-year acquisitive prescription, which was rejected because the court found the deed was so ambiguous it was not translative of title. He further contended that since this was a petitory action plaintiff had to recover on the strength of his own title and that here plaintiff was attacking defendant's title. The court found the plaintiff was recovering on the strength of his own title. See 235 La. 708, 741, 105 So.2d 392, 405 (1958). However, this was vigorously attacked by the dissenting members of the court who felt that plaintiff was attacking defendant's title. See *id.* at 747, 750, 105 So.2d at 405, 407.

body in the description to leave title substantially resting on writing and not essentially on parol. (3) The subsequent correction deed could have no effect on the title of plaintiff's ancestor, since he was not made a party. On rehearing, *held*, reversed in part. Since the correction deed accurately described one of the three tracts it effectively conveyed that tract to the defendant.[2] Plaintiff is the owner of the other two tracts. While a subsequent correction deed to which an intermediate vendee was not a party cannot affect his title, subsequent purchasers take subject to the correction deed which is part of the public records. Parol evidence was not admissible because the description in the correction deed was not ambiguous. *Blevins v. Manufacturer's Record Publishing Company*, 235 La. 708, 105 So.2d 392 (1958).

Only one case was found where the question of the effect of ambiguity in the description of land intended to be excepted from a sale has reached the appellate courts of Louisiana. In *Harrill v. Pitts*[3] the heirs of the vendor sued to recover the interest of their father in the community property conveyed by the mother. They were met with a plea of ten-year acquisitive prescription. To overcome this plea they contended that the deed to defendant was void and not translative of title in that it contained an ambiguous exception of property reserved by the vendor, which made it impossible to determine what property was to be conveyed. The court rejected the heirs' contention and, relying wholly on common law authorities,[4] said that the exception, not the deed, was void.

It is a well-settled general rule at common law that uncertainty in the description of land which the grantor attempts to except from the operation of a deed affects only the validity of the exception and not the instrument as a whole. If the exception is so uncertain as to be void, it will be ignored and the deed will have the effect of conveying the entire tract described, including the part intended to be excepted.[5] It is said[6] that this

2. Under plaintiff's interpretation of the correction deed it embraced one of the three tracts, a total of 183.51 acres. This was the interpretation used by the Supreme Court. Under defendant's interpretation it embraced all three tracts, a total of 408.91 acres which was the amount called for in the deed. This was the interpretation used by the trial judge.

3. 194 La. 123, 193 So. 562 (1940).

4. The court cited 16 AM. JUR. 619; 18 C.J. 347-348; Southern Iron & Steel Co. v. Stowers, 189 Ala. 314, 66 So. 677 (1914).

5. Alabama: Moss v. Crabtree, 245 Ala. 610, 18 So.2d 467 (1944); Ballentine v. Bradley, 238 Ala. 446, 191 So. 618 (1939); Lauderdale v. Bailey, 236 Ala. 487,

rule is based on two principles: that a deed delivered must have effect, if possible;[7] and that a deed must be construed against the grantor because he must express his intentions clearly.[8] Only one factual situation was found where there was any substantial difference among the common law cases as to the applicability of the general rule.[9] Where in a later deed the vendor excepts property previously sold and a dispute over title to the excepted property arises between the vendees, some courts have held that

183 So. 648 (1938); Mardis v. Burns, 222 Ala. 31, 130 So. 381 (1930); Southern Iron & Steel Co. v. Stowers, 189 Ala. 314, 66 So. 677 (1914); Swindall v. Ford, 184 Ala. 137, 63 So. 651 (1913); Loyd v. Oates, 143 Ala. 231, 38 So. 1022, 111 Am. St. Rep. 39 (1905); Bromberg v. Smee, 130 Ala. 601, 30 So. 483 (1901); Morris v. Giddens, 101 Ala. 571, 14 So. 406 (1893); Frank v. Meyers, 97 Ala. 437, 11 So. 832 (1892); Arizona: Pima Farms Co. v. McDonald, 30 Ariz. 82, 244 Pac. 1022 (1926); Arkansas: Glasscock v. Mallory, 139 Ark. 83, 213 S.W. 8 (1919); Mooney v. Cooledge, 30 Ark. 640 (1875); California: Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207 (1909); Weyse v. Biedebach, 86 Cal. App. 736, 261 Pac. 1092 (1927); Illinois: Higinbotham v. Blair, 308 Ill. 568, 139 N.E. 909 (1923); Atterbery v. Blair, 244 Ill. 363, 91 N.E. 475, 135 Am. St. Rep. 342 (1910); Kentucky: Carr v. Baldwin, 301 Ky. 43, 190 S.W.2d 692, 162 A.L.R. 285 (1945); Stephens v. Terry, 178 Ky. 129, 198 S.W. 768 (1917); Mississippi: Ates v. Ates, 189 Miss. 226, 196 So. 243 (1940); Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937); Nunnery v. Ford, 92 Miss. 263, 45 So. 722 (1908); McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1893); Richardson v. Marqueze, 59 Miss. 80, 42 Am. St. Rep. 353 (1881) (dictum); New Hampshire: Darling v. Crowell, 6 N.H. 421 (1833); New Jersey: Thayer v. Torrey, 37 N.J.L. 339 (1875); New York: Shinnecock Hills & P.B. Realty Co. v. Aldrich, 132 App. Div. 118, 116 N.Y.S. 532 (1909), affirmed without opinion, 200 N.Y. 533, 93 N.E. 1132 (1910); North Carolina: Bartlett v. Roanoke R. & Lumber Co., 168 N.C. 283, 84 S.E. 267 (1915); Den ex dem Waugh v. Richardson, 30 N.C. (8 Ired. L.) 470 (1848); Oregon: Seavey v. Williams, 97 Ore. 310, 191 Pac. 779 (1920); Rhode Island: Sherman v. Arnold's Neck Boat Club, 64 R.I. 485, 13 A.2d 272 (1940); Tennessee: Kobbe v. Harriman Land Co., 139 Tenn. 251, 201 S.W. 762 (1918); Harrison v. Beatty, 24 Tenn. App. 13, 137 S.W.2d 946 (1939); Briar Hill Collieries v. Pile, 4 Tenn. App. 468 (1926); Texas: Waterhouse v. Gallup, 178 S.W. 773 (Tex. Civ. App. 1915); Deroach v. Clardy, 52 Tex. Civ. App. 233, 113 S.W. 22 (1908); Virginia: Butcher v. Creel, 50 Va. (9 Gratt.) 201 (1852); West Virginia: Harding v. Jennings, 68 W.Va. 354, 70 S.E. 1 (1910); *contra*: Pennsylvania: Farrell v. Bowker, 278 Pa. 323, 123 Atl. 305 (1924).

6. Southern Iron & Steel Co. v. Stowers, 189 Ala. 314, 66 So. 677 (1914). See Annot., 162 A.L.R. 285 (1946).

7. *Cf.* LOUISIANA CIVIL CODE art. 2474 (1870): "The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him."

8. *Cf.* Aertker v. Ball, 17 So.2d 309 (La. App. 1944); Wolfson v. Succession of Lisso, 6 So.2d 231 (La. App. 1942). Both recognize the principle that deeds should be liberally construed so as to sustain rather than defeat the conveyance.

9. Some cases recognize an exception to the general rule. It is said that the vendor may, within a reasonable time after the sale, make clear what property he intended to except from the deed. See Loyd v. Oates, 143 Ala. 231, 38 So. 1022, 111 Am. St. Rep. 39 (1905) (correction not void when it could be made certain by evidence *aliunde*); Smith v. Blinn, 221 Ala. 24, 127 So. 155 (1930); Pima Farms Co. v. McDonald, 30 Ariz. 82, 244 Pac. 1022 (1926) (grantor can cure uncertainty by selecting within a reasonable time); Stephens v. Terry, 178 Ky. 129, 198 S.W. 768 (1917) (grantor could cure ambiguities in exceptions by selecting the lands intended to be excepted within a reasonable time); *cf.* Lauderdale v. Bailey, 236 Ala. 487, 183 So. 648 (1938) (equity may allow correction to be given effect).

regardless of the inadequacy of the description in the deed conveying the excepted property, the subsequent vendee does not take the whole.[10] In some of these cases[11] no reason was given for denying application of the general rule under which the exception would have been ineffective. In some others[12] the courts simply said that where a party to a deed takes with knowledge that some property sold to another is excepted, clearly he does not get title to the excepted property, nor can the vendor convey it. Still other cases[13] apply the general rule without questioning its applicability.

The instant case seems to make it clear that in *Harrill v. Pitts*[14] the common law general rule was adopted in Louisiana. On the first hearing of the instant case the court based its holding on an application of the common law general rule, thus holding the exception ineffective. The rehearing affirmed the correctness of the rule, although its application was considered unnecessary to decide the case. It is submitted that the common law general rule should not be applied in a situation such as that in the instant case for two reasons: (1) The principles on which the common law general rule is based work against its application to a dispute between a prior vendee of property and the vendee in a subsequent sale of a larger tract from which the property previously sold is excepted. (2) The problem could be resolved by the use of recognized principles of Louisiana law, without resorting to common law doctrine. These will be discussed in that order.

As pointed out above, the general rule that a deed containing an inadequate exception of property reserved by the grantor will operate to convey the whole is based on two principles: that a

10. Sanford v. Stilwell, 101 Me. 466, 64 Atl. 843 (1906); Wilson v. Gerard, 213 Miss. 177, 56 So.2d 471 (1952); Oldham v. Fortner, 221 Miss. 732, 74 So.2d 824 (1954); Bartell v. Kelsey, 59 S.W. 631 (Tex. Civ. App. 1900); *cf.* Georgia Vitrified Brick & Clay Co. v. Georgia R. & Banking Co., 148 Ga. 650, 98 S.E. 77 (1919).

11. See Georgia Vitrified Brick & Clay Co. v. Georgia R. & Banking Co., 148 Ga. 650, 98 S.E. 77 (1919); Bartell v. Kelsey, 59 S.W. 631 (Tex. Civ. App. 1900).

12. See Sanford v. Stilwell, 101 Me. 466, 64 Atl. 843 (1906); Oldham v. Fortner, 221 Miss. 732, 74 So.2d 824 (1954); Wilson v. Gerard, 213 Miss. 177, 56 So.2d 471 (1952).

13. See Southern Iron & Steel Co. v. Stowers, 189 Ala. 314, 66 So. 677 (1914); Stephens v. Terry, 178 Ky. 129, 198 S.W. 768 (1917).

14. 194 La. 123, 193 So. 562 (1940). Prior to the instant case it could have been argued that the language in *Harrill v. Pitts* was mere dictum and did not have the effect of adopting the common law general rule in Louisiana. The instant case seems to make it clear the general rule has been adopted.

deed delivered must be given effect if possible; and that it will be construed against the vendor. In a dispute over title to excepted property between a prior vendee and the vendee in the deed containing the exception, an application of the first principle mentioned above would sustain the original deed. The usual situation[15] calling for the application of the general rule arises when it is claimed that the deed containing the exception is ineffective because of the ambiguity in the description of the property the grantor is seeking to reserve. In this situation, to give effect to the delivered deed, the court must hold the exception void rather than the deed. However, where the dispute is between a prior vendee of the excepted property and the vendee in the deed containing the exception, the validity of the deed containing the exception is not at issue. The question really is one of the validity of the prior deed. The principle that a deed delivered must be given effect if possible would require that effect be given to it as well as to the later deed. This is especially true since the subsequent vendee takes with knowledge of the fact that there has been a prior conveyance of the property sought to be excepted and is seeking to avoid its effect for his own gain.

The second principle on which the general rule is based, *i.e.*, that a deed must be construed against the grantor, also is inapplicable to a situation such as that in the instant case. When one sells a tract of land but retains a portion thereof, he must adequately describe the excepted property.[16] If he fails the exception will be ineffective. Where the rights of a prior vendee, rather than the vendor are at issue, the question is not one of construing a deed against the grantor, but of construing it against the prior vendee of the excepted property. It thus appears that the general rule holding an ambiguous exception void, with title to the excepted property passing to the vendee, has no application to a dispute between the prior vendee of the excepted property and the vendee in the sale containing the exception, when title to the excepted property is in dispute.

As stated above, it is felt that the instant case could have

15. See, e.g., Loyd v. Oates, 143 Ala. 231, 38 So. 1022, 111 Am. St. Rep. 39 (1905); Darling v. Crowell, 6 N.H. 421 (1833); Thayer v. Torrey, 37 N.J.L. 339 (1875); Bartlett v. Roanoke R. & Lumber Co., 168 N.C. 283, 84 S.E. 267 (1915). By far the majority of the cases cited in note 5 *supra* deal with this kind of factual situation.

16. See, e.g., Mooney v. Cooledge, 30 Ark. 640 (1875); Carr v. Baldwin, 301 Ky. 43, 190 S.W.2d 692, 162 A.L.R. 285 (1945); Nunnery v. Ford, 92 Miss. 263, 45 So. 722 (1908); Butcher v. Creel, 50 Va. (9 Gratt.) 201 (1852).

been decided on recognized principles of Louisiana law which would have permitted the use of parol evidence. A brief review of these principles might be helpful. An act of sale containing a description which fails to describe any property or makes it unidentifiable, does not put third parties on notice of the conveyance.[17] This result is achieved because the act of sale to any subsequent vendee purports to transfer the property to him, and there is nothing of record to show the previous sale. Parol evidence may not be used to prejudice the subsequent vendee's rights in the matter.[18] As between the parties to a deed, reformation of an erroneous or ambiguous description is always allowed.[19] This is true whether the deed fails to describe adequately any property or correctly describes the wrong piece of property.[20] However, where the rights of third parties who are in a position to claim reliance on the public records have intervened, reformation will not be allowed to their prejudice.[21]

In the instant case the deed to plaintiff's ancestor in title specifically provided that the property sold to defendant's ancestor in title was excepted.[22] Thus plaintiff's ancestor in title had notice from his own deed that a tract of land had been previously conveyed.[23] At the time he acquired he was in a position

17. Cupples v. Harris, 202 La. 336, 11 So.2d 609 (1942); Daigle v. Calcasieu Nat. Bank, 200 La. 1006, 9 So.2d 394 (1942); Baldwin v. Arkansas-Louisiana Pipe Line Co., 185 La. 1051, 171 So. 442 (1936); Wilfert v. Duson, 131 La. 21, 58 So. 1019 (1912); Hargrove v. Hodge, 121 So. 224 (La. App. 1928).

18. Myers v. Dawson, 158 La. 753, 104 So. 704 (1925); Lattimer's Heirs v. Gulf Refining Co., 146 La. 249, 83 So. 543 (1919); Bender v. Chew, 129 La. 849, 56 So. 1023 (1912); Adams v. Drews, 110 La. 456, 34 So. 602 (1903); Sentell v. Randolph, 52 La. Ann. 52, 26 So. 797 (1899); see W. B. Thompson & Co. v. McNair, 199 La. 918, 7 So.2d 184 (1942).

19. Broussard v. Succession of Broussard, 164 La. 913, 114 So. 834 (1927); Giovanovich v. Breda's Widow and Heirs, 149 La. 402, 89 So. 251 (1921); Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 648 (1920); Lattimer's Heirs v. Gulf Refining Co., 146 La. 249, 83 So. 543 (1919); Frantom v. Nelson, 142 La. 850, 77 So. 767 (1918); Coleman v. Thibodaux, 119 La. 474, 44 So. 269 (1907); Penn v. Rodriguez, 115 La. 174, 38 So. 955 (1905).

20. See Waller v. Colvin, 151 La. 765, 92 So. 328 (1922); Sims v. Jeter, 129 La. 262, 55 So. 877 (1911).

21. W. B. Thompson & Co. v. McNair, 199 La. 918, 7 So.2d 184 (1942); Myers v. Dawson, 158 La. 753, 104 So. 704 (1925); Bender v. Chew, 129 La. 849, 56 So. 1023 (1912); Adams v. Drews, 110 La. 456, 34 So. 602 (1903); Sentell v. Randolph, 52 La. Ann. 52, 26 So. 797 (1899). See Lattimer's Heirs v. Gulf Refining Co., 146 La. 249, 83 So. 543 (1919); Waller v. Colvin, 151 La. 765, 92 So. 328 (1922) (dictum). *Cf.* Reitzell v. Louisiana Central Lumber Co., 12 La. App. 464, 125 So. 307 (1929); Central Manufacturing & Lumber Co. v. Darcantel, 2 Orl. App. 444 (1905).

22. *Cf.* Tennent v. Caffery, 170 La. 680, 129 So. 128 (1930), wherein the court said that when a description referred to an earlier deed for a more particular description of the property intended to be conveyed, both deeds must be considered together and purchasers must take with notice and be bound by both deeds.

23. The exact wording was: "There is also excepted from Sections 39 and 40

to demand a clarification of any ambiguity in the description of the excepted property. Consequently as against the prior vendee he should have been in no better position than the vendor himself. He was in the position of one who takes with notice, since it was contained in his own act of sale. Thus parol evidence could have been admitted to show what property was intended to be excepted from his deed.

In its opinion on rehearing the court refused to admit parol evidence because it felt that the description in the correction deed was unambiguous. The question of whether or not a description is ambiguous is, of course, a question of fact and as such is beyond the purview of this Note. However it may be pointed out that the trial judge reached the opposite conclusion as to what property the description described,[24] and the expert witnesses were unable to agree on the matter. If the court had found the description ambiguous, it is possible that parol evidence would have been admissible under the above analysis.

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approximately 440 acres previously sold to Albert Phenis, as per private act passed before William Renaudin, Notary Public, and recorded in Conveyance Records of St. Charles Parish, in Book ..... Page ....."

24. The trial judge also thought that the description in the correction was *unambiguous*. However, he concluded it described *all three* tracts in dispute.