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Validity of an Area Description in a Deed Which Purports to Convey Part of a Larger Known Tract - Mcdonough v. Roland Park Co.

Casenotes

VALIDITY OF AN AREA DESCRIPTION IN A DEED WHICH PURPORTS TO CONVEY PART OF A LARGER KNOWN TRACT

McDonough v. Roland Park Co.[1]

This was a bill in equity to quiet title. In 1849 Jacob Mason conveyed a 30 acre tract of land to George Smith with the following reservation: "Reserving therefrom the graveyard situated upon said above described premises the same to be fifty feet square and to be used only as a burial place by the said Jacob Mason and his heirs, with free ingress and egress thereto at all times hereafter by said Jacob Mason and his heirs."[1a] Mason died in 1876 and was buried in Mount Olivet cemetery. By mesne conveyences the property came to plaintiff in 1946. In no instrument in the chain of title was the graveyard again mentioned. Engineers of plaintiff made very extensive and exhaustive efforts to locate the graveyard, but no indication of any grave anywhere on the premises was found. A seventy-seven year old witness who lived within two blocks of the land all his life testified that he had heard that a graveyard was supposed to be located upon the land, but that he had never seen it, and had never heard of anyone ever being buried there, and that had there been a burial he would have had knowledge of it. Through newspaper advertising and other diligent efforts plaintiff located the defendants as the persons claiming to be the heirs of Jacob Mason.

The opinion of the Court, in affirming a decree for the plaintiff, declared that since it was never established that the graveyard existed at any time, and there was not a sufficient description in the reservation to identify the intended graveyard with reasonable certainty, the reservation must be declared inoperative and void. As authority for the decision they cited the Maryland case of *Neel v. Hughes*[2] and the Arkansas case of *Mooney v. Cooledge*.[3] The facts in the former case are in no way analogous to the facts in the present case except as to an insufficiency of description of the land conveyed. The deed purported to

[1] 57 A. 2d 279 (Md.) (1948).
[1a] *Ibid*, 280.
[2] 10 Gill & J. 7 (Md.) (1838).
[3] 30 Ark. 640 (1875).

convey all the right, title, and interest which the grantor had in a named estate in a certain county, and that constituted the only description. The Court there stated, and the statement was quoted: "Every conveyence must either on its face, or by words of reference, give to the subject intended to be conveyed, such a description as to identify it. If it be land, it must be such as to afford a means of locating it."[4] The Arkansas case is more directly in point. There the deed conveyed 147 acres reserving one acre as a family burial ground, many family relatives already having been buried there. The Court held that there was no question of the intent to convey only 146 acres and reserve the one acre as a burial plot, but since there was nothing whatever in the deed to locate the one acre, the reservation must be declared inoperative. In view of later decisions and the strengthening factor in this case that the burial ground was physically located upon the ground, it is certainly difficult to justify today this early decision of the Arkansas Court.

With regard to land descriptions and the problem involved here, the factual situations can be divided into three classes: (1) Where the parcel to be conveyed or reserved is a part of a larger known tract, and the deed designates the known tract and also designates a specific point located within the parcel to be conveyed. Such a situation was involved in the case of *Honey v. Gambriel*,[5] where the grantor conveyed the south-east quarter of the south-west quarter of a certain section "except one-half acre where the graveyard is now situate and a passway from the road thereto." A small graveyard already had been laid out on the ground and several persons buried there. The Court held that where reference is made in a deed to a certain point, such as graves or the like, for the purpose of identifying the land conveyed or reserved, such point is to be taken as the common center of the land conveyed or reserved. In such case the land would be laid off as a square with the graveyard as near center as possible. This doctrine was also recognized in *Hodge v. Blanton*.[6]

(2) The second type situation is where the parcel to be conveyed or reserved is a part of a larger designated tract, but there is no description of the conveyed or reserved parcel, and no known point is designated around which to locate it. This is the situation involved in the present case. It is thoroughly discussed in an annotation to the case of

[4] *Supra*, n. 2, 10.
[5] 303 Ill. 74, 135 N. E. 25 (1922).
[6] 38 Tenn. 560 (1858).

Turner v. Hunt[7] in the American Law Reports, Annotated.[8] It is brought out there that according to the majority of the cases the question of whether the grant or reservation is operative should be determined by ascertaining the intent of the parties as shown by the language of the instrument construed with regard to the rule that a conveyence should be held to pass some interest if such effect may be given to it consistently with the law and the terms of the deed. If the intent was to convey a *specific portion* of the larger tract, which specific portion was at the time within the contemplation of the parties, but because of insufficient description or latent ambiguities the parcel cannot be determined to adequately locate it on the ground, the conveyence or reservation must be held to be inoperative.

But if the grantor intended to convey or reserve, *not a specific tract* out of the larger area, but merely a quantity of acres to be taken from it, the instrument can be held effective to pass an undivided interest in the whole area measured by the proportion which the number of acres conveyed to the grantee bears to the total area of the entire tract. In the first instance the deed is inoperative because to allow an undivided interest in the whole tract to pass would be clearly contrary to the intent of the parties, as evidenced by the attempt in the description to designate a specific portion. But in the latter instance, passing of an undivided interest is logically the intent of the parties. The case of *Turner v. Hunt,* and the numerous other cases collected in the annotation clearly establish this theory as the weight of authority. They further bring out the fact that often the deed expressly gives the grantee the right to choose later the particular acres he wants out of the total tract, and that the right to select may arise by implication where not directly expressed.[9] If not made express or raised by implication, the grantee's portion can be set off in proper partition proceedings, just as in the case of any other tenants in common.

It must not be assumed from this discussion that any deed purporting to convey or reserve a stated acreage, not described by a specific description, out of a larger tract which is described, will in every case pass a proportionate undivided interest in the larger tract. Such a construction can only be made where it does not appear to be contrary to the true intent of the deed. Thus where a void attempt

[7] 131 Tex. 492, 116 S. W. 2d 688 (1938).
[8] 117 A. L. R. 1066, 1071 (1938).
[9] *Ibid,* 1086; Smith v. Furbish, 68 N. H. 123, 44 A. 398 (1894).

is made to reserve or convey a *specific portion* of a larger tract, it cannot, because of the absence of sufficient description, be construed to pass an undivided interest.

Under the facts of the present case, it is difficult to discern why it should not fall within this class and be decided upon this theory. The deed made no attempt to describe the boundaries of the graveyard, and since it was not physically laid out on the ground at the time, it could hardly have been a specific portion of the larger tract, the location of which was within the contemplation of the parties at the time of the conveyence. Therefore, it would not appear to be contrary to the intent of the parties to construe the reservation as being of an undivided interest in the thirty-acre tract. It also seems quite plausible to raise by implication from the words of the deed a right in Mason to select the location on which to situate the graveyard. It may be possible to justify the Court's decision on some other grounds, but in view of the support given to this theory by courts of other states, the argument that the reservation did not contain a sufficient description seems weak.

(3) The third type situation is where the parcel to be conveyed is not sufficiently described, and there is no known point designated within the parcel, and it is not part of a larger described tract. In such case the conveyence is clearly void, the proposition being so well established that it is unnecessary to cite authority to support it. This is the type situation in which *Neel v. Hughes*[10] falls, in which the Court made the general statement that every conveyence must describe the subject sufficiently to identify it in order to be operative. Apparently the Court in the present case accepted this general rule without considering the possible exceptions. A search of the cases discloses no previous Maryland decision on the precise point as to whether a conveyence or reservation of an undesignated portion of a larger designated tract would be operative to pass an undivided interest. It is questionable that the present case will be taken as authority to hold that it does not, in view of the well considered authority *contra* from other jurisdictions, and the fact that the precise problem actually was not considered in this case. The two early cases mentioned were the only authority given to justify the Court's decision.

[10] *Supra*, n. 2.