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Deeds--Recital of Consideration--Applicable Statute

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cite the Pierce case, and the authorities it did cite for its holding were not actions by assignees.

Even if the principal case was correctly decided on the rules of common law pleading as modified in West Virginia, the principal case illustrates the superfluous technicality in the present system and the need for further reform. Under the Federal Rules the amendment here considered would be unnecessary as the issue would be treated as if it had been raised by the pleadings. Fed. R. Civ. P. 15(b); cf. Pearl Assur. Co. v. First Liberty Nat'l Bank, 140 F.2d 200 (5th Cir. 1944); see Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 53 W. VA. L. REV. 27 (1950).

C. M. H.

**Deeds—Recital of Consideration—Applicable Statute.**—P brought suit against D to set aside a deed by which an elderly widow shortly before her death had conveyed her home and other realty to D. The consideration stated in the deed was, "... the sum of One ($1.00) Dollar, cash in hand paid by the party of the second part ...", and in further consideration of the said party of the second part agreeing to make the necessary repairs upon the real estate of the said party of the first part hereinafter described, and other considerations hereinafter mentioned, ... ." The issues pertained to the mental competency of the widow when the deed was executed, undue influence by the grantee, and sufficiency of consideration for the deed. The circuit court set the deed aside because of a lack of consideration and undue influence. Held, on appeal, that the lack of consideration, together with other evidence, shows the presence of undue influence such as to invalidate the deed. Judgment affirmed. *Kadogan v. Booker*, 66 S.E.2d 297 (W. Va. 1951).

An historical approach is necessary to understand the reason for the recital of consideration in deeds. Prior to the statute of uses no consideration was necessary in any conveyance of land. The ceremony of enfeoffment gave validity to the transfer. After the statute of uses a conveyance operating under the statute had to be supported by consideration to prevent the creation of a resulting use in the grantor. It became customary to state a consideration, usually a nominal sum, and acknowledge its receipt,
in order to rebut any implication of a use or resulting trust in
the grantor. This statement of consideration and its receipt was
conclusive on the parties to the deed as to the payment of consider-
ation. This statement, however, did not prevent third-party cred-
itors from showing that the conveyance was made without con-
sideration, or as a fraud against their rights. In other words, the
grantor could give his land away if he so desired, and the only
persons who could complain were creditors who would lose the
means of satisfying their claims when the donor stripped himself
of ownership.

In its decision the court quotes from Corpus Juris as follows:
"Inadequacy of consideration is persuasive, although not con-
clusive, evidence of mental incapacity, and where mental weakness
and inadequacy of consideration co-exist they may together furnish
ground for invalidating a deed." 26 C.J.S. 268.

A West Virginia statute provides: "If a deed of real property
is in other respects valid, it shall not fail for want of a payment
of consideration, or the recital of a consideration in the deed.
No resulting or other trust in favor of the grantor in such deed
shall arise from the mere fact that no consideration was paid or
recited, if no trust was in fact intended. The foregoing provisions
of this section shall not affect in any manner the right of any party
to the deed, or any other person, to have such conveyance set aside
for fraud, or because of any other circumstance which would ren-
der such conveyance invalid as to such person." W. Va. Code
c. 36, art. 3, § 6 (Michie, 1949).

Since the appellate court's decision was based entirely upon
the finding that the grantor lacked sufficient mental competency
to execute a deed, this code section would not, in all probability,
have affected the outcome of the case. However, since the ques-
tion of adequacy of consideration was raised and argued, the
statute seems applicable but was not mentioned by the court. This
section has been cited, but only incidentally, in several cases. It
has not as yet been construed.

Winfree v. Dearth, 118 W. Va. 71, 188 S.E. 880 (1936), and
Hoglund v. Curtis, 61 S.E.2d 642 (W. Va. 1950), were suits to
enforce oral trusts in which the statute was cited, but in both in-
stances this code section was not necessary to the decision and it
was not construed. The provisions of this statute were directly
applicable in Oates v. Oates, 127 W. Va. 469, 33 S.E.2d 457
(1945), but, as in the principal case, it was not even cited. The Oates case dealt with the adequacy of consideration for a deed and the court found that there was an adequate consideration. If the statute had been applied, argument and decision on the point in question would have been unnecessary.

The code section under discussion not only did away with the necessity of stating a consideration, it also eliminated the necessity for any consideration. Herein lies a tacit recognition that a landowner may give his land to another as a gift without complying with requirements which are only hangovers from a previous period.

It is undoubtedly true that a deed can still be set aside where fraud, duress, mental incompetency, etc., in its procurement is shown. The last sentence of the code section seems to preserve this power in the court. However, under the statute, no doubt should exist as to the validity of a deed merely from lack of consideration or recital thereof.

C. H. B.

INFANTS—En Ventre Sa Mere—As Tort Plaintiffs.—P, by next of friend, sued D to recover for prenatal injuries suffered in an automobile accident. P, a viable infant, was born prematurely and suffered permanent injuries which caused the loss of sight in both eyes. The trial court gave judgment for D. Held, on appeal, that an infant en ventre sa mere is a person with a locus standi in court. Judgment reversed. Damasiewicz v. Gorsuch, 79 A.2d 550 (Md. 1951).

There is a conflict of authority among the various states as to whether an infant may recover for otherwise actionable injuries suffered en ventre sa mere.

No court, in England or the United States, was required to decide whether an infant could recover for prenatal injuries until Dietrich v. Northampton, 138 Mass. 14 (1884). In that case the infant sustained its injuries when the mother slipped because of a defect in the highway from which a miscarriage resulted. The infant, a foetus of five months, was unable to survive. In an action by a special administrator for the benefit of the infant's estate, the court held that the plaintiff was not a person and that to permit such recoveries would require action by the legislature since no case at common law permitted such actions.