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Equity--Parol Gifts of Land--Specific Performance--Statue of Frauds--Doctrine of Consideration

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STUDENT NOTES

EQUITY — PAROL GIFTS OF LAND — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — DOCTRINE OF CONSIDERATION. — Section 4 of English Statute of Frauds,[1] providing in part that no *contract for the sale of land*[2] should be enforceable unless evidenced by a writing signed by the party to be charged thereby or his agent, has been re-enacted in Virginia and West Virginia.[3] Since an agreement without legal consideration is *nudum pactum* in any event,[4] two normal attributes of an agreement enforceable at *law* may thus be said to be a *legal consideration* and a *writing*. Yet *equity*, burdened with a conscience, almost everywhere seizes upon certain other facts as an adequate substitute for a writing.[5] Strict adherence to the statute, it is said, would often promote instead of suppress fraud.[6] Thus in West Virginia verbal contracts are specifically enforced where the vendee has received exclusive possession of the land and made part payment of the purchase price or expenditures for valuable improvements. There are numerous *dicta* that exclusive possession alone will sustain the bill, that valuable improvements will cure a defective possession, but that part payment alone is insufficient.[7]

But this doctrine of part performance has also embraced a

[1] 29 Car. II, c. 3 (1677); see 6 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1924) 379-97, for historical background of statute.

[2] Italics here and following are ours.

[3] VA. REV. CODE (1930) c. 232, § 5561; W. VA. REV. CODE (1931) c. 36, art. 1, § 3.

[4] 3 HOLDSWORTH, *op. cit. supra* n. 1, 412-13; 5 *ibid.* 296, 321-22; 6 *ibid.* 397; 8 *ibid.* 34-42; Rann v. Hughes, 7 T. R. 350 n. a (1778), 101 Eng. Rep. 1014 (circum 1775); Eastwood v. Kenyon, 11 Ad. and E. 447, 113 Eng. Rep. 482 (1840).

[5] 6 HOLDSWORTH, *op. cit. supra* n. 1, 393, 658-9; Butcher v. Stapeley, 1 Vern. 363, 23 Eng. Rep. 524 (1685). But see WALSH, TREATISE ON EQUITY (1930) 403-4, citing Albea v. Griffin, 2 Dev. & B. 9 (N. C. 1838); 1 Ames Cas. Eq. 288, and cases cited, 289 n. from South Carolina, North Carolina, Kentucky, Tennessee and Mississippi, "in several southern states the entire doctrine of enforcement of parol land contracts because of 'part performance' is rejected . . . . equitable relief is given, however, by requiring the vendor to pay the increased value of the land due to the purchaser's improvements, plus payments of purchase money less rental value during the purchaser's occupation".

[6] 6 HOLDSWORTH, *loc. cit. supra* n. 5.

[7] Note (1924) 31 W. VA. L. Q. 58, 63; see Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391 (1894) (exclusive possession sufficient); Gibson v. Stalnaker, 87 W. Va. 710, 106 S. E. 243 (1921) (defective possession cured by valuable improvements).

limited class of cases where there is not even a legal consideration; namely, parol gifts of land.[8] Our court has repeatedly said that specific performance of such gifts would be decreed when supported by a meritorious consideration and when the donee has entered into possession and made valuable improvements on faith of the gift.[9] The language of the cases indicates the strictness of proof required. Thus, it is said, whereas in a contract on valuable consideration mere delivery of actual possession would be sufficient part performance,[10] in a gift there must be what takes the place of valuable consideration—an expenditure of money or labor in valuable improvements.[11] The permanent improvements are such as an owner would under the circumstances be likely to make on his own estate, as contradistinguished from improvements made by a tenant incident to occupation of the premises.[12] Possession and inexpensive improvements do not raise the inference of a gift to the son. Neither are loose declarations of a father, without explanation, sufficient evidence of a gift. A contract[13] between parent and child, from the nature of the relation, must be proved by stronger evidence than that which might suffice between strangers; it should be direct, positive, express and unambiguous, and the terms clearly defined.[14] There must be identification of the subject matter as to location and quantity.[15] But Virginia long ago simplified the matter and abolished the doctrine of part performance as to parol gifts of land. Specific performance of such gifts

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[8] WALSH, *op. cit. supra* n. 5, 406-8; BROWNE, STATUTE OF FRAUDS (5th ed. 1895) § 491a.

[9] Sponaugle v. Warner, 98 W. Va. 532, 127 S. E. 403 (1925) (relationship of putative father and illegitimate children as basis for meritorious consideration); Farrar v. Goodwin, 98 W. Va. 215, 126 S. E. 922 (1925) (uncle and niece relationship); Berry v. Berry, 83 W. Va. 763, 99 S. E. 79 (1919) (father-in-law and daughter-in-law); Crim v. England, 46 W. Va. 480, 33 S. E. 310 (1899) (father and son); see Moss v. Moss, 88 W. Va. 135, 106 S. E. 429 (1921) (father-son); Short v. Patton, 79 W. Va. 179, 90 S. E. 598 (1916) (father-son); White v. White, 64 W. Va. 30, 60 S. E. 885 (1908) (father-son); Meadows v. Meadows, 60 W. Va. 34, 53 S. E. 718 (1906) (father-son); Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404 (1904) (father-son); Stone v. Hill, 52 W. Va. 63, 43 S. E. 92 (1902) (father-daughter); Harrison v. Harrison, 36 W. Va. 556, 15 S. E. 87 (1892) (father-son); Frame v. Frame, 32 W. Va. 463, 9 S. E. 901 (1889) (father-son).

[10] But this is only *dictum*, see *supra* n. 7.

[11] Crim v. England, *supra* n. 9, at 487.

[12] Farrar v. Goodwin, *supra* n. 9, at 218.

[13] From the whole context the court is apparently applying the term "contract" loosely to a gift.

[14] Harrison v. Harrison, *supra* n. 9, at 560-1.

[15] Short v. Patton, *supra* n. 9, at 182.

is prohibited by statute unless evidenced by a writing even when followed by possession and improvements.[16]

The treatment of parol gifts is often subordinated to that of contracts as if the latter were a broader inclusive term. Such confusion and vague differentiation is unwarranted when the present doctrine of consideration furnishes a basis for a sharp distinction. In *Frame v. Frame*[17] the court is apparently consoled that "in some cases it is difficult, if not impossible, in principle to distinguish gifts and sales." Equity has, nevertheless, gone far afield in gift cases in dispensing both with a legal consideration and a writing. Whether valuable improvements were a part of the agreement so as to constitute a legal consideration for a father's promise to convey land, or were simply made by a donee-son afterwards may involve a difficult interpretation of facts but there should be no trouble in differentiating in principle. Again the court said:[18]

> "When the son enters and makes improvements by expenditures of money or labor, these acts change the situation and fix the gift. Why? Because valuable consideration has now entered into the transaction. The agreement of gift has been partly performed by acts which can not be undone. A valuable consideration may be a detriment to the promisee or a benefit to the promisor. What was in its inception—promise sustained only by a good consideration—has by such acts become in effect a promise sustained by a valuable consideration."

Obviously the court could not mean legal consideration when the improvements were not a stipulation in the agreement; besides, to speak of legal consideration in connection with gift is inaccurate.[19] And if the court meant to conjure up a new concept of

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[16] "Nor shall any right to a conveyance of any such estate or term in land (estate of inheritance or freehold, or for term of more than five years) accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him", VA. REV. CODE (1930) c. 208, § 5141. It was intended by this section to require some evidence other than parol evidence of a gift of land; it need not be under seal but only in writing. Creed v. Goodson, 153 Va. 98, 149 S. E. 509 (1929); Brooks v. Clintsman, 124 Va. 736, 98 S. E. 742 (1919); Wohlford v. Wohlford, 121 Va. 699, 93 S. E. 629 (1917).

[17] *Supra* n. 9, at 473.

[18] Frame v. Frame, *supra* n. 9, at 476; John W. Daniel, *Verbal Sales and Gifts of Real Estate* (1883) 7 VA. L. J. 193, 202.

[19] Likewise "contract of gift" is loose terminology, Meadows v. Meadows, *supra* n. 9, syllabus 1.

equitable consideration, what of the idea that equity follows the law and in decreeing specific performance presupposes a legally binding contract, that is, one based on legal consideration.[20] The fact that equity will look behind a seal for valuable consideration (in the common law sense) further illustrates the inconsistency.[21] Finally, when the court says that the statute of frauds has no application to a gift when the donee has taken possession and made valuable improvements it necessarily implies that gifts are within the statute when these special circumstances are not present.[22] This must proceed on the mistaken notion that "contract" as used in the statute broadly includes "gift;" hence, the want of a writing is no insuperable obstacle to specific performance in either case when the special circumstances exist. But the absence of *legal* consideration is overlooked in the gift case.[23]

The Virginia court seems correct both in principle and historically in saying that the statute of frauds has no bearing on parol gifts of land founded on meritorious considerations.[24] The probable intention of the original authors of that statute can best be surmised by referring to the state of the law in the seventeenth century.[25] The doctrine of consideration had just assumed the procedural nucleus of its present-day form and denoted the sum of conditions under which the action of assumpsit could be maintained, that is, for a wrong or deceit founded on a detriment to the promisee.[26] That it did not include other elements was not yet

[20] Pound, *Consideration in Equity* (1918) 13 ILL. L. REV. 667-8, 679; BROWNE, *op. cit. supra* n. 8, § 115a.

[21] Pound, *loc. cit. supra* n. 20, citing Jefferys v. Jefferys, Cr. & P. 138, 41 Eng. Rep. 443 (1841); also Pound, *Progress of the Law* (1920) 33 HARV. L. REV. 834-5; JENKS, SHORT HISTORY OF ENGLISH LAW (1913) 216-18.

[22] Frame v. Frame, *supra* n. 9, at 475. In Farrar v. Goodwin, *supra* n. 9, at 217-18, counsel contended that certain improvements by an alleged donee were not sufficiently extensive "to take the gift out of the statute of frauds". The court, following this language, said that the improvements did "constitute proof of the alleged gift which satisfies the statute of frauds". In Sponaugle v. Warner, *supra* n. 9, at 538, a case clearly involving an alleged gift to children, the court used "contract" and "gift" as if they were interchangable terms, saying that the writing involved might be "viewed either as written evidence of an oral gift or as a memorandum in writing taking the sale of realty out of the statute of frauds, and if supported by a meritorious consideration, it might be specifically enforced".

[23] Pound, *op. cit. supra* n. 20, at 672, "for the most part they (courts of equity) speak as if the whole question were one of the Statute of Frauds . . . . ignoring the more serious question whether there is any contract at all"; *ibid.* 674.

[24] Halsey v. Peters, 79 Va. 60, 69 (1884); 6 HOLDSWORTH, *loc. cit. supra* n. 4.

[25] 6 HOLDSWORTH, *op. cit. supra* n. 1, at 387-88.

[26] *Supra* n. 4.

clear, but it had already been decided that a meritorious consideration would not support an assumpsit.[27] It would have been superfluous to provide an evidentiary requirement for gifts in the statute when they were unenforceable in any event for want of legal consideration.[28] The doctrine had yet to withstand the onslaught of Lord Mansfield who attempted to broaden it to include moral obligation and motive and to distort the meaning of the statute to reinforce his own theory of consideration. He maintained without success that the statute of frauds proceeded on the principle that a writing sufficiently identified the contract so that no consideration was necessary, which would have reduced the latter to a mere evidentiary requirement.[29]

That the requirements for the enforcement of parol gifts of land in West Virginia are meritorious consideration, possession and valuable improvements, seems clear and apparently well settled.[30] As already intimated, the opinions are often quite confusing in language as to whether contracts or gifts are involved, but this has no essential bearing on the merits of the problem of enforcing such gifts. The Virginia statutory provision still remains to be considered.[31] Should gifts be enforceable only when in writing and supported by a so-called meritorious and equitable consideration?

Judge E. C. Burks, one of the revisers of the Virginia Code of 1887, which first required a writing for parol gifts,[32] said that their enforcement on oral testimany alone had been a most prolific source of fraud.[33] But one need not go outside West Virginia to illustrate the inherent possibilities for fraud. In *Holsberry v. Harris*[34] an alleged donee-son failed to establish an oral gift from his father as against his two sisters. The case went off on the ground of insufficient possession. He had made valuable improvements, but after his father had distinctly told him not to put them on the land now claimed. Apparently the son was awaiting his father's death to rely on these improvements to establish a gift.

[27] 8 HOLDSWORTH, *op. cit. supra* n. 1, at 18, n. 2 and 3.
[28] *Supra* n. 4 and 23.
[29] 8 HOLDSWORTH, *op. cit. supra* n. 1, at 29-42; Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Reprint 1035 (1765).
[30] *Supra* n. 9.
[31] *Supra* n. 16.
[32] VA. CODE (1887) § 2413, effective May 1, 1888.
[33] Burks' Address, 4 VA. BAR ASSOCIATION REPORTS 117-18; Wohlford v. Wohlford, *supra* n. 16, at 704, 93 S. E. at 630.
[34] *Supra* n. 9.

In *Meadows v. Meadows*[35] the father was a very poor old man with a large family of twelve and a small tract of land barely enough for their support. He had magnanimously permitted his married sons to move upon parts of the land. Such patriarchal settlements are common in strictly rural districts. The plaintiff had built himself a worthless log cabin, and after an argument brought this bill to deprive the father of ownership of his part. He had always refused to contribute his share of the taxes. Two other sons testified that the father had no intention to make gifts *inter vivos* to them although they were to have it afterwards. The bill was dismissed because of insufficient improvements. In the similar case of *Moss v. Moss*[36] the court said:

> "Where the proof tends to disclose an intention not to vest title in the son by deed but by a devise in his will, operative after his death, and in the meantime to permit concurrent use and enjoyment of the land by both, and it is so used in common for residence, agriculture, *etc.* and the father grants oil and gas leases, pipe line easements, collects and appropriates the compensation therefor, pays all the taxes, equity will not compel a conveyance."

In *White v. White*[37] one son of a large family remained on the home place with his father and made valuable improvements. After the father's death, he claimed it as a gift to the exclusion of the other heirs. Bill dismissed because the possession was not exclusive. In the similar case of *Short v. Patton*[38] sister and brother were arrayed against each other. The brother failed to establish his claim to all the land because of insufficient possession. The court distinguished the contract case of *Bryson v. McShane*[39] as an exception to the rule of exclusive possession because there personal services, peculiar in nature and under extraordinary circumstances, were performed in consideration of a promise to convey property. *Duncan v. Duncan*[40] is interesting. The plaintiff had a deed to her step-children canceled which she had executed under duress during the days of her husband's last illness. He had bought the property, now worth $2,500, in her name. The children admitted that the $1.00 recited consideration had never passed and that nothing was said

[35] *Supra* n. 9.
[36] *Supra* n. 9.
[37] *Supra* n. 9.
[38] *Supra* n. 9.
[39] 48 W. Va. 126, 35 S. E. 348 (1901).
[40] 104 W. Va. 600, 140 S. E. 689 (1927).

at the time of the execution of the papers that they would take care of her the rest of her life, as they now alleged.

In all the above cases the donees were unsuccessful, no doubt rightly so, but why not stop all this litigation at the source by the simple expedient of requiring executory gifts to be in writing? That Virginia has done so without any apparent injurious effect affirms the truth of remarks made long ago with reference to the whole policy of the statute of frauds—that if it had been rigorously enforced, the result would probably have been that few instances of parol agreements would have occurred; and agreements would, from the necessity of the case, have been reduced to writing.[41] Even in cases where the court felt that the intention of the donor to make an oral gift was sufficiently proved, one cannot help but feel that such a donor would have been quite willing to execute a writing had a statute so required.[42] Cases like *Sponaugle v. Warner* (West Virginia)[43] and *Creed v. Goodson* (Virginia)[44] are a pleasant relief because the problem is so simplified. In each there was an informal writing signed by the donor; the donees were in possession and had made valuable improvements.

It is submitted that West Virginia should abolish oral gifts of real estate in as strict language as that now in force in Virginia,[45] and, whereas our provision as to contracts merely renders them unenforceable at law,[46] the provision as to gifts should read "no right shall accrue to the donee, *etc.*" thus making oral gifts absolutely void both at law and in equity. An additional requirement of a writing is thus added to those already necessary; namely, meritorious consideration, possession and improvements.[47] The enactment of such a statute would apparently leave oral contracts in a preferred position, since they would still be enforceable in equity. Still even there by the better and stricter view, a concurrence of possession, part payment and valuable improvements is essential.[48] An alleged vendee, who has made no payment or only part payment of the purchase price, must tender the balance due in bringing

[41] BROWNE, *op. cit. supra* n. 8, § 492, quoting Lord Redesdale.
[42] Crim v. England; Farrar v. Goodwin, *supra* n. 9.
[43] *Supra* n. 9.
[44] *Supra* n. 16.
[45] *Supra* n. 16.
[46] *Supra* n. 3.
[47] *Supra* n. 9. The French law similarly requires all contracts which involve more than a certain sum of money to be in writing; the French, German and Italian Codes likewise require that promises to give shall be authenticated by a judge or notary. Lorenzen, *Causa and Consideration in Contracts* (1919) 28 YALE L. J. 642-43.
[48] WALSH, *op. cit. supra* n. 5, 399-401.

his bill; hence, there is always a consideration actually passing which is a helpful, if not a conclusive, factor. Whether or not the statute of frauds ought to be strictly enforced as to contracts is a question outside the purview of this note;[49] it is simply asserted that verbal gifts should be void, for without a writing there are at most but conflicting inferences from the evidence of the intention of the parties to affect their legal relations.

No good reason can be perceived for not enforcing *written* gifts from a father to a son who enters into possession and makes improvements.[50] It seems only a short jump to enforce a similar gift to a stranger;[51] and to those vigorous critics of the doctrine of consideration[52] who believe that a deliberate intention to affect ones legal relations should be the only requisite for a binding agreement —a written gift would be valid whether or not followed by the additional circumstances of possession and improvements. The writer believes that all gifts of land under all circumstances should be void unless in writing. How far one ought to go after that is another question![53]

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[49] See Note (1924) 31 W. VA. L. Q. 58, adopting the view that it was unfortunate that the statute of frauds was ever relaxed as to contracts; and, since the doctrine of part performance is apparently so well embedded, its application should be curtailed by requiring very strict acts of part performance. "Its (referring to the statute of frauds) evidential policy is sound", 3 WIGMORE, EVIDENCE (1904) 2091. But see 6 HOLDSWORTH, *loc. cit. supra* n. 1, noting adverse criticism of the statute particularly as to § 4 dealing with contracts and prophesying its repeal; also 8 *ibid.* 48, advocating the repeal of § 4.

[50] The present law only achieves a limited breakdown of the doctrine of consideration in cases involving a family relationship. In Sponaugle v. Warner, *supra* n. 9, a gift to illegitimate children was enforced.

[51] One's viewpoint on this question will be influenced by the attitude towards the whole doctrine of consideration. A made a gift to B, a child whom he mistakenly assumed had been adopted by himself; later A conveyed all his property to his wife, C. *Held,* specific performance decreed for B against the heirs of C. McCrilles v. Sutton, 173 N. W. (Mich.) 333 (1919); Pound, *loc. cit. supra* n. 21.

[52] Pound, *op. cit. supra* n. 20, 667-92; Lorenzen, *loc. cit. supra* n. 47, 621-46; 8 HOLDSWORTH, *loc. cit. supra* n. 49. Holdsworth criticizes both the statute of frauds and the present doctrine of consideration and advocates the repeal of § 4 of the statute and the enactment of a provision that all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into a writing signed by all the parties thereto.

[53] West Virginia has already potentially broken down the doctrine of consideration in one instance. It is provided in the Uniform Stock Transfer Act with reference to the delivery of a certificate with intent to transfer but without an indorsement that the transferee may specifically enforce the obligation of the transferor to make the necessary indorsement. W. VA. REV. CODE (1931) c. 31, art. 1, § 49. A similar provision in New York has been construed to apply to a donee although nothing is said as to gifts. Reinhard v. Roby Co., 179 N. Y. S. 781, 110 Misc. Rep. 152 (1920).