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DEEDS-INSTRUMENT IN FORM OF CONTRACT FOR SALE OF LAND AS GIFT

DEEDS—INSTRUMENT IN FORM OF CONTRACT FOR SALE OF LAND AS GIFT—Decedent executed and delivered to his sister, the petitioner, in a sealed envelope an instrument in the form of an executory contract for the sale of land by the terms of which the decedent promised to convey to the petitioner his undivided two-thirds interest in a certain building and lot. The execution of the instrument was not the result of any agreement and no consideration was paid, although receipt of payment in full was endorsed on the back of the instrument. After decedent's death the envelope was produced and the probate court under a statutory authority ordered a conveyance to the petitioner in performance of the contract.[1] Certain of the heirs secured a reversal in the district court, and petitioner appealed. *Held*, that although there was not a valid contract which could be specifically enforced, the evidence showed that there was a completed gift, and unless on reference back to the district court this conclusion was rebutted by other evidence, the decree of the probate court should stand. *Wilson v. Fackrell*, 54 Idaho 515, 34 Pac. (2d) 409 (1934).

From an early date the courts of the United States have been liberal in the construction of instruments of conveyance.[2] It is a judicial commonplace that no particular form of words of conveyance is necessary but that the instrument will, if possible, be interpreted as a whole to give effect to the intention of the grantor.[3] There is ample proof of this general statement in numerous cases where informal writings have been held to be valid instruments of conveyance, either as meeting the requirements of a common law conveyance [4] or the rather simple ones of modern statutes.[5] To achieve this result it is frequently said that extrinsic evidence is admissible to explain uncertain or ambiguous language of the grantor.[6] But a valid instrument of conveyance, however liberally construed, must show

[1] "When a person who is bound by a contract in writing to convey any real estate, dies before making the conveyance, where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto." Idaho Code Ann., sec. 15-1001 (1932).

[2] Jackson ex dem. Bond v. Root, 18 Johns. (N. Y.) 60 (1820); Howe v. Warnack, 4 Bibb. (7 Ky.) 234 (1815); see generally comment, 35 YALE L. J. 732 (1926).

[3] 2 TIFFANY, REAL PROPERTY, sec. 432 (1920). Thus an instrument may be upheld as one kind of conveyance though the words may indicate another. Roe ex dem. Wilkinson v. Tranmarr, Willes 682, 125 Eng. Rep. 1383 (1757).

[4] In addition to cases in note 2, supra, see Lynch v. Livingston, 6 N. Y. (2 Selden) 422 (1852) ("remise, release, and quitclaim"); Hutchins v. Carleton, 19 N. H. 487 (1849) ("assign and make over"); Gordon v. Haywood, 2 N. H. 402 (1821) ("quit"); Perry v. Price, 1 Mo. 553 (1825).

[5] Hanks v. Folsom, 11 Lea (79 Tenn.) 555 (1883); Metzger v. Miller, (D. C. N. D. Cal. 1923) 291 Fed. 780 (series of letters held good conveyance).

[6] Metzger v. Miller, (D. C. N. D. Cal. 1923) 291 Fed. 780; Peters v. McClaren, 218 Fed. 410 (1914) ("remising, releasing, relinquishing, and forever quitclaiming"); Brusseau v. Hill, 201 Cal. 225, 256 Pac. 419, 55 A. L. R. 157 (1927) ("this is my gift of deed all is in my possession"); McGarrigle v. Roman Catholic Orphan Asylum of San Francisco, 145 Cal. 694, 79 Pac. 447, 1 L. R. A. (N. S.) 315 (1904); Barbour v. Finke, 52 S. D. 11, 216 N. W. 592 (1927).

a present intention to transfer the property.[7] Thus, an entire omission of words purporting to convey, even though through inadvertence or ignorance, has been fatal.[8] To base the operation of a conveyance upon parol evidence of extrinsic circumstances where words of conveyance are lacking is to ignore the statutory requirement that the evidence of the transfer must be in writing.[9] Nor is this judicial legislation justified by calling the transaction an "executed contract" or a "gift," as did the Idaho court in the principal case. Whatever the transaction may be called [10] and whether there is a consideration paid or not,[11] in absence of an estoppel a valid transfer of land may be accomplished only in the way the legislature or the common law prescribed.[12] It would seem that there is a particular need for caution in alleged transfers by way of gift, because of the greater danger of fraud, and especially where the alleged donee asserts his claim after the death of his alleged donor.[13] The decision in the principal case seems to have been due to a desire on the part of the court to reach an equitable result on the particular facts before it. But without questioning the decision on the merits of the claim before the court, it is submitted that the court might well have considered more fully the larger questions of policy involved, instead of summarily disposing of the case without hearing argument of counsel on the question of gift.[14]

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[7] McKinney v. Settles, 31 Mo. 541 (1862) ("do hereby sign over"); Johnson v. Bantock, 38 Ill. 112 (1865) (instrument executed by sheriff at execution sale stating that sheriff had sold to grantee certain land and that grantee was entitled to deed therefor, and containing an *habendum* clause).

[8] Webb v. Mullins, 78 Ala. 111 (1884); Brown v. Manter, 21 N. H. 528 (1850). *Contra*, Bridge v. Wellington, 1 Mass. 219 (1804), with which note the comment of the editor at p. 226, n. 1(a), "*quod voluit non dixit.* The deed was clearly void."

[9] Idaho Code Ann., sec. 16-503 (1932).

[10] That a conveyance is not a contract see 1 WILLISTON, CONTRACTS, sec. 487 (1931); 2 TIFFANY, REAL PROPERTY, sec. 438 (1920).

[11] As between the parties and those claiming under them consideration is not essential to the validity of a conveyance. 2 TIFFANY, REAL PROPERTY, sec. 438 (1920).

[12] The court in the principal case did not seem to regard a conveyance as necessary to a valid gift of the land. But a promise or declaration of intent to make a gift is not sufficient for a valid gift. Richards v. Dellbridge, L. R. 18 Eq. 11 (1874); Pound, "Consideration in Equity," 13 ILL. L. REV. 667 at 687 (original paging, 435 at 455) (1919). If the court meant that the instrument amounted to a good conveyance, it is difficult to see why the decree ordering a conveyance was upheld, unless the decision can be said to amount to a reformation of the instrument. Is this consistent with the maxim that "Equity will not aid a volunteer"? See 2 TIFFANY, REAL PROPERTY, sec. 439 (1920), and Pound, supra.

[13] *Cf.* the rather strict requirements of delivery or deed of gift in the case of chattels. For a discussion of the policy governing these chattel decisions see Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments," 21 ILL. L. REV. 341, 457, 568 (1926).

[14] It is perhaps significant that the gift question was not argued at any point in the proceedings but was raised and decided by the supreme court. The vigorous dissenting opinion of Justice Wernette was based upon this point.