Michigan Law Review

Volume 46 | Issue 3

1948

REAL PROPERTY-TENANCY BY ENTIRETIES-ESTATE CREATED BY PAROL GIFT FOLLOWED BY A VOLUNTARY SETTLEMENT

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REAL PROPERTY—TENANCY BY ENTIRETIES—ESTATE CREATED BY PAROL GIFT FOLLOWED BY A VOLUNTARY SETTLEMENT—Prior to his death in 1892, *X* made a parol gift of 60 acres in a 360 acre tract to his daughter, *W*, or to *W* and her husband, *H*,[1] and put them into actual possession but gave them no deed to the land. No evidence was shown to indicate that either *W* or *H* had paid the taxes or made any improvements on the land during *X*'s lifetime. *X* died intestate and left surviving him five children, including *W*. All the heirs, except *W*, conveyed the 60 acre tract to *W* and *H* in consideration of a deed releasing all claims that *W* and *H* had in the remaining 300 acres. *W* died intestate in 1917, and in 1939 *H* executed a deed to defendants conveying a one-fourth royalty interest in the minerals in the 60 acre tract. Plaintiffs, the surviving children of *W* and *H*, brought this action in chancery, in 1943, to determine their right to said lands and royalties. *Held*, for the defendants, one judge dissenting.[2] The parol gift followed by the exchange of deeds constituted a voluntary settlement which created a tenancy by entireties in *W* and *H*, so that upon *W*'s death, *H* obtained full title by right of survivorship and therefore was able to convey the royalty interest to defendants. *Rowland v. McAlester Fuel Co.*, (Ark. 1947) 201 S. W. (2d) 742.

The general rule is that a parol gift of land is invalid and ineffective to pass title to the donee; and this is true even where the gift is accompanied by possession.[3] Upon the intestate death of the donor, the several heirs inherit as tenants in common, in proportion to their respective shares or rights.[4] When the wife is a tenant in common, and there is a voluntary partition [5] of the common estate, a deed made to the husband and wife as tenants by the entireties, conveys no estate to the husband, but vests the entire estate in the wife, even though the

[1] Principal case at 742. The report of the case does not clearly indicate whether the parol gift was made to joint donees.

[2] Dissenting opinion, (Ark. 1947) 202 S.W. (2d) 204.

[3] 38 C.J.S., Gifts, p. 843. Of course, if the donee makes valuable improvements the gift will be enforced when revocation would be inequitable. See Pound, "Consideration in Equity," 13 ILL. L. REV. 667 at 672 (1919); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed., 332 (1926); Floyd v. Floyd, 97 Ga. 124, 24 S.E. 451 (1895).

[4] Ark. Stat. (Pope, 1937) c. 47, § 4352.

[5] "Partition . . . is voluntary when it is made among all the co-heirs present and of age, and by their mutual consent." BLACK, LAW DICTIONARY, 3d ed., 1330 (1933).

wife directed the deed to be made to her husband and herself jointly.[6] The deed confers no new title or additional estate in the land, but merely destroys the unity of possession among the tenants in common, and henceforth each holds his share in severalty. Despite these considerations, the court here reasons that if the deed had been made to the wife alone and had she conveyed to a third party who then conveyed back to her and her husband jointly, there could be no question that they would have held by the entireties. Instead of doing that, she had the deed made to them both, and this fact, coupled with the parol gift, took the transaction out of the rule of the voluntary partition cases, and thereby constituted a voluntary settlement.[7] Considering the obvious intent of the parties to the deeds made after the death of X, together with long continued possession by the husband and his payment of taxes under color of title for many years, one may feel a considerable measure of sympathy for the court's result. Yet any justification for the court's decision on the basis of an equitable settlement seems dubious. The express language of the deed of release [8] from the husband and wife is strong evidence indicating a belief that they took the 60 acres as her share of her father's estate by mutual consent of the other heirs. Since the parol gift is ineffective to create any title and since the wife takes by virtue of her right as one of the heirs, it seems difficult to escape the conclusion that, despite the efforts of the parties to carry out the intention of their father, all that was really accomplished was a voluntary partition of the estate, giving the sister her proportionate share of the land, and creating no new title in her husband.

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[6] McGraw v. Berry, 152 Ark. 452, 238 S. W. 618 (1922); Wood v. Wilder, 222 N.C. 622, 24 S. E. (2d) 474 (1942).

[7] As authority for the proposition that the transaction created a voluntary settlement, the court cited Evans v. Wells, 138 Ark. 454, 212 S.W. 328 (1919) and Hannaford v. Dowdle, 75 Ark. 127,, 86 S.W. 818 (1905). In the former case, the deceased deposited money in the bank in the names of herself and her husband jointly. The husband withdrew the funds with his wife's knowledge and before her death, later purchasing lands therewith. Deceased's collateral heirs sought to have a trust declared upon the land in their favor. Held, the deceased had made a valid gift of the money to her husband during her lifetime. In the Hannaford case, the wife deeded her land to a creditor of her husband. The next day, in accordance with the wife's wishes, the creditor deeded the land back to the husband subject to a vendor's lien for the amount of the debt. Heirs of wife brought action to have the deeds declared mortgages, subject to redemption. Held, the wife intended the title to vest in her husband, and he took title subject to the vendor's lien.

[8] Dissenting opinion, (Ark. 1947) 202 S.W. (2d) 204. "Witnesseth that said parties of the first part, for, and in consideration of the sum of 60 acres of land as their part of said estate by said parties of the second part."