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Recent Cases

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RECENT CASES

EQUITY—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE OF ORAL CONTRACTS FOR THE SALE OF LAND.

(*Mezza v. Beiletti* 161 Pa. Super. Court 213 (1947))

This case involved an action for specific performance of a parol contract for the sale of real estate. The existence of the parol contract was admitted by the pleadings of the defendant. Possession of the property by the plaintiff was also admitted. The case turned on the issue of the payment of the purchase money. The failure of the plaintiff to prove adequately that the entire consideration was paid in full, caused the court to reverse the decree for specific performance and remand the case to the lower court for further testimony to clarify that issue. The defendant placed the question of improvements in issue, but the lower court determined this in favor of the plaintiff. The Superior Court in commenting on this phase of the action stated, "It has long been held that a vendee who has paid the purchase price and is in possession is entitled to specific performance of a parol contract even though he has made no improvements."

The question immediately raised is how long has this been held. True, there is authority for this proposition, but it is far from uncontroversial. The court cited *Jamison v. Dunok* (95 Pa. 52 (1880)) to sustain this rule. In the *Jamison* case, Justice Sterrett said that there was no error in refusing to hold that a parol contract of sale cannot be specifically enforced unless the vendee can show that he has made improvements for which he cannot be compensat-

ed in damages. There are undoubtedly cases in accord; viz. *Tressler's Estate*, 66 Pa. Super. Court 547, (1917); *Tetlow's Estate*, 321 Pa. 305 (1936) 184 A. 129.

However there is much Pennsylvania authority to the contrary. In *Fay's Estate*, 213 Pa. 428 (1906), 62 A. 991, the Supreme Court held that if the loss which arises out of a breach of a parol contract can be compensated in damages the case ordinarily is not taken out of the Statute of Frauds and Perjuries. The Superior Court in *Johnson and Johnson v. Schrowder*, 80 Pa. Super. Court 120 (1922) indicated that improvements uncompensatable at law are necessary before the court will decree specific performance of a parol contract for the sale of land. In *Weller v. Potts*, 230 Pa. 6 (1911) 79 A. 782 the Supreme Court again held that in order to take a parol contract for the sale of land out of the operation of the Statute of Frauds, it is essential that possession should be taken in pursuance of the contract or immediately after it was made, that the change in possession should be continuous, exclusive and maintained and that there should have been such performance of the contract by the vendee as would make rescission inequitable.

The Supreme Court in *Sample v. Herlocker*, 177 Pa. 247 (1897) 35 A. 615, said that to take a parol contract for the sale of lands out of the operation of the Statute of Frauds, performance or part performance must be shown by the vendee which could not be compensated in damages and such would make rescission inequitable and unjust.

The above cases are but a few of a long line which hold that in addition to possession there must be improvements or a change of position such as cannot be readily compensated in damages. (See *Pa. Annotations to Restatement of Contracts*, Section 179.) It appears, therefore, that the better statement would have been that it has sometimes been held that improvements are unnecessary in order to take a case out of the Statute of Frauds.

The question now arises as to when improvements will be necessary and when unnecessary in order to remove these cases from the Statute of Frauds. It can be said with certainty that where there is a parol agreement to give land, there must be improvements or a change of position by the vendee which cannot be adequately compensated in damages; viz. *Morrish v. Price*, 293 Pa. 169 (1928); *Byrne's Estate*, 122 Pa. Supr. Court 410 (1936) 142 A. 137; *Koyscia v. Lessig*, 122 Pa. Supr. Court 413 (1936) 186 A. 187. But where there is a parol contract for the sale of land, it appears that the court will weigh the equities and render the decree in favor of the party having the greater equity. In *Byrne's Estate*, *supra*, the court stated that specific performance is not a matter of right but of grace. An examination of the cases seems to buttress this doctrine. This case has added little to the clarification of the required elements for the specific performance of a parol contract for the sale of real estate in Pennsylvania.

R. W. Hopkins.

DOMESTIC RELATIONS: DIVORCE—CONSTRUCTIVE DESERTION

In the recent case of *Heimovitz v. Heimovitz*, 161 Pa. Super. 522 (1947), 55 A. 2d.—, the problem of "constructive desertion" again came before the appellate courts of Pennsylvania. In this case the libellant-husband alleged desertion and indignities to the person as grounds for divorce. The respondent-wife had exercised a "belligerent attitude" towards the libellant for several months prior to the separation. Finally, in September 1940, she chased the libellant down the stairs of the apartment house in which they were living, threw a burlap bag containing his clothes after him and said, "Take your clothes and get out; I don't want you any more." Respondent remained in the home, and after five years of separation libellant brought this suit for divorce alleging desertion and indignities. The court disposed of the case as follows:

"It will not be necessary to determine whether libellant has made out a case of indignities, since from an independent consideration of the testimony we find ourselves in agreement with both the master and the lower court that *desertion* was established by clear and satisfactory evidence sufficient in law. Desertion does not consist exclusively in a wilful and malicious abandonment of the common home. Desertion results also where one is excluded from the home by the other spouse, wilfully and without justification. Such exclusion is *not* "constructive" *desertion merely* (though loosely so-called in isolated cases e.g., *Sowers Appeal*, 89 Pa. 173) *it is actual desertion and grounds for divorce as such.*" (*Italics supplied*)

Without so mentioning, the court is by this decision making a startling change in the Pennsylvania law. In an early case, *Howe v. Howe*, 16 Pa. Super 193 (1901) the doctrine of constructive desertion was announced as follows:

"If the husband by cruel and barbarous treatment renders it impossible for her to continue to live with him with safety, her act in leaving is not desertion by her. The desertion in such case is upon his part. He as completely commits desertion when by his conduct he compels her for her safety to leave him as when he wilfully and without cause abandons her."

This doctrine, however, was repudiated by the later case of *Young v. Young*, 82 Pa. Super. 492 (1924). In that case the libellant-husband left his wife because of alleged indignities to the person. He sued for desertion, as the court said, ". . . on grounds of what is called constructive desertion." The court refused to grant the divorce and held:

"We cannot regard evidence of cruelty or indignities practiced by the wife as sufficient to establish a desertion of her husband by her. The law provides a specific remedy for a husband injured by cruelty of his wife, or by her conduct amounting to indignities to his person, and to this the injured party must appeal if he would

have relief. As long as the wife remains at the habitation and keeps the domestic flag flying, she is not subject to charge of desertion whatever other adequate provocation she may have given to sustain the libel."

Ever since this decision it has been the law of Pennsylvania that constructive desertion was NOT grounds for divorce, but that the injured spouse had to sue on the grounds which caused the separation.

Krebs v. Krebs, 109 Pa. Super. 175 (1933) was distinguished from the *Young* case, in that if the husband orders his wife out of the house and she leaves, the subsequent act of the husband in removing the furniture and abandoning the home so that she has no place to return, constitutes desertion on his part.

The court in the *Heimovitz* case relies largely on the case of *Reiter v. Reiter*, 159 Pa. Super. 344 (1946) to support its position. In that case, by way of dicta, the court laid down three conclusions on the constructive desertion question:

"1. Where a husband purposely locks out, or bars, his wife from the common habitation, her habitation is no longer his home, but is the street or place to which she goes, and the husband has deserted her and absented himself from her habitation which he forced her to obtain by destroying for her the common abode. If wilful and malicious, and without reasonable cause, and persisted in for two years, it is a desertion in the words of the statute.

"2. So, too, where a husband physically ejects his wife from the common home.

"3. So, also, where a husband threatens immediately to inflict bodily harm on his wife unless she leaves, and she departs against her will, and because of justifiable harm of physical injury."

The court in the *Reiter* case then went on to say:

"In the type of desertion now discussed the libellant must be wilfully and maliciously put out by force or justifiable fear of immediate bodily harm, or locked out against the will and without consent of the innocent spouse."

In the actual decision of the case, the decree of the lower court granting the divorce on grounds of constructive desertion was reversed, because the lower court in the charge to the jury said it was constructive desertion if the libellant was "compelled" to leave. This, said the court, was not strong enough. However, is there more than mere "compelling" to leave in the *Heimovitz* case?

The analysis of these cases leaves the question of constructive desertion in somewhat an uncertain state. The *Young* case has not been expressly overruled. The *Reiter* case cited it without comment, but it was not even mentioned in the *Heimovitz* case. Dicta in the *Reiter* case indicates that constructive desertion is grounds for divorce if "the libellant be wilfully and maliciously put out by force

or fear of immediate bodily harm, or locked out against the will." Mere compelling to leave is NOT enough. The *Heimovitz* case, the latest authority on point, expressly holds that constructive desertion is ACTUAL desertion, hence grounds for divorce, even though the libellant is evicted from the common home NOT by force or fear of immediate bodily harm. In fact, it is not even necessary for the libellant to make out a case of indignities.

The conclusion reached from the holding of the *Heimovitz* case, is that today in Pennsylvania whenever one spouse is excluded from the common home by the other spouse, wilfully and without justification, persisted in for two years, such exclusion is actual desertion by the spouse so excluding and as such is grounds for divorce.

John R. Miller, Jr.