Marquette Law Review

Volume 17
Issue 2 *February 1933*

Article 11

Contracts - Statute of Frauds - Moral Consideration

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Repository Citation

John A. Berland, *Contracts - Statute of Frauds - Moral Consideration*, 17 Marq. L. Rev. 156 (1933).
Available at: http://scholarship.law.marquette.edu/mulr/vol17/iss2/11

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gifts to take effect at or after death. A gift made within the statutory period in contemplation of death will be taxable[1] and will not be discussed here. Our question is to determine the effect of reserving the right to income from or use of property transferred directly to the donee.

In order to evade the payment of an inheritance tax the donor of the property reserves the right to enjoyment, profits, and all benefits to himself, giving the title to such property immediately to the donee. Clearly the above is an evasion of the inheritance statute. "The policy of the law will not permit the defeat of the provisions of the inheritance laws by such reservations; in order that such conveyance be non-taxable there must be such conveyance as parts with possession, title and enjoyment in the grantors lifetime.[2] A pure and simple gift inter vivos giving up all right to the property is non-taxable but if within the statutory period a presumption is raised unless the contrary is shown. (72.01 [3].)

The law interpreting the statutes is well settled in the United States, holding that a transfer or conveyance directly to the intended donee but reserving some control over the property in the form of possession, profits and enjoyment during his life falls within the meaning of transfers "intended to take effect in possession and enjoyment" at or after death of the grantor; such transfer is beyond doubt the very type of transfer the statute intended to reach and therefor taxable.[3]

In conclusion citing from 14 Minn. Law Review at 461, "Summing up briefly the factors involved in this type of problem, there can be no taxable interest if the right to enjoyment to profits and possession have been given up immediately to the donee and the donor has retained no beneficial interest for himself and also in general, there is no taxable interest if the donor vests the benefits and profits in a third person to take effect immediately."

LESTER WOGAHN

CONTRACTS—STATUTE OF FRAUDS—MORAL CONSIDERATION—*Elbinger* v. *Capitol and Teutonia Co.* ____Wis.____, 242 NW 568. The plaintiff, Elbinger, and his associate, being real estate brokers, orally

[1] 72.01 (3) Transfers in contemplation of death. Every gift made within two years (amended to 6 years, 1931 Stats.) prior to the death of the grantor of a material part of his estate and without adequate consideration, shall, unless shown to the contrary, be deemed to be made in contemplation of death.

[2] *Reish* v. *Tax Comm.* (1884) 106 Pa. 521.

[3] *In re Potter* (1922) 188 Cal. 55, 204 Pac. 826; *Harber* v. *Whelchel* (1923) 156 Ga. 601, 119 S.E. 695; See also article by Prof. Fottschaeffer in 14 Minn. Law Rev. 453.

agreed with the defendant company to negotiate a lease of certain premises owned by the defendant for a commission. This oral agreemnet was in violation of section 240.10 of the Wisconsin Statutes of Frauds. Nevertheless, the defendant voluntarily (after the plaintiff had secured a tenant and the transaction was completed) gave the plaintiff $200 in cash and promisory notes to the sum of $146 as their commission. This action is brought to recover on the notes pursuant to defendant's refusal to pay. The defense put up is that the brokers, plaintiffs, could not recover on the original contract because of the statutory violation, therefore the defendant's voluntary promise to pay is without consideration and consequently unenforceable.

The question before the court was, "Is the full performance of an oral contract which results in material or pecuniary benefit to a person, a moral consideration, good and sufficient in law for such person's subsequent executory promise, e.g., the promisory note in this case?" The Wisconsin court answers, "yes," and thereby follows the rule laid down in Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516. In that case the rule that a mere moral consideration will not support a promise is held inapplicable to executed promises between natural persons. And to reconcile the holding in that case with the law expressed in previous Wisconsin cases, the language of Frey v. Fon du Lac, 24 Wis. 204, reading, "A promise to pay for a past consideration, for which there is not and never has been any legal liability on part of promisor, does not make a contract binding in law," is expressly limited to that case. Also, the rule employed in Wisconsin decisions that in order to be legally sufficient, a moral consideration had to have a pre-existing legal obligation to do the thing promised is repudiated in Park Falls State Bank v. Fordyce, supra, as being too narrow. Now, as shown by the case under review, not even a pre-existing legal obligation is necessary for an executory promise, so long as the promisor has received value, material or pecuniary benefit from the promisee. The moral consideration may arise from any act done to the benefit of the promisor, at the promisor's request and where promisor gave promisee to understand that he would receive something of value in return.

The Wisconsin Supreme Court, it can therefore be noted, has fostered, cautiously at first, the doctrine of moral consideration until this case where the broadest possible interpretation is placed upon it. The court's liberal view is stated in the Park Falls Bank case, supra, in these words, "One ought, in morals, to make return for things of value not intended as a gift that he has accepted, and he ought, in morals, to do what he knowingly and advisedly gave one acting for his benefit and to his own hurt to understand he would do."

A true conception of the purpose, limits and proper application of the statute involved in this case is given by the court in Muir v. Kane, 55 Wash. 131, 104 Pac. 153. The state of Washington has a similar statute and the case is listed in the opinion. The statement read, "There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for, because the statute says the promise must be in writing, not because it is illegal in itself. It is not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries." The statute accomplishes its its purpose when it relieves the owner of legal liability under a contract resting in parol. When the broker's services are completed, the owner may pay cash or settle with a promisory note and, the Wisconsin court holds that the moral obligation resting upon him to pay for that which he has received is sufficient legal consideration for his promise to pay. Other decisions from other jurisdictions involving identical transactions under a similar statute in accordance with the Wisconsin ruling include Bagaeff v. Jrokapih, 212 Mich. 265, 18 N.W. 427; Mohr v. Rickgauer, 82 Neb. 398, 117 N.W. 950, 26 LRA (NS) 533; Muir v. Kane, supra; Coulter v. Howard, 203 Cal. 17, 262 Py. 751.

It cannot be denied that Lord Mansfield's doctrine of moral consideration is rooted in a natural human desire to afford relief to a deserving plaintiff rather than founded on strict legal reasoning, regardless of the attempts of various judicial bodies to reconcile and incorporate the doctrine into the general principles of consideration. The doctrine of moral consideration seeks to bind man's conscience by force of law where the accepted rules of law have, after an attempt, been found inadequate for the dispensation of justice. Law could be tyranny and justice would be more often miscarried if human sympathy were not moulded into the formation of certain "safety valve" doctrines of which moral consideration is an excellent example.

JOHN A. BERLAND.