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DEEDS FOR MAINTENANCE AND SUPPORT.

Deeds based upon considerations of maintenance and support are quite common, and litigation frequently arises involving the rights of the parties under such deeds.

A question sometimes arises as to *where* the maintenance and support, provided for in such a conveyance, are to be furnished. As a general rule, where no place for performance of an obligation is mentioned, it is to be performed to the obligee in person, who may designate any reasonable place of performance; and the rule has been held applicable to contracts for support.[1]

Of course, if the instrument providing for support stipulates that it is to be furnished at a particular place, or, though there is no express agreement that support shall be furnished at a particular place, yet, if the circumstances of the case and language of the instrument indicate an intention that support shall be furnished at a particular place or manner, or by particular persons, it will be construed in accordance with such intention.[2]

A provision for maintenance and support in a deed will be construed as a trust or charge on the land conveyed; or as a condition subsequent; or as a mere personal covenant of the grantee, or statement of the consideration, according to the language used and intention of the parties.

To constitute a trust or charge for support, there must be either an explicit declaration of a trust or charge, or facts which show beyond a reasonable doubt that a trust or charge was intended to be created in favor of the grantor.[3]

Where the instrument is sufficient in form and substance to constitute a declaration of trust in favor of the grantor, for his maintenance

[1] McArthur *v.* Gordon, 126 N. Y. 597; Tuttle *v.* Burgett, 53 Ohio St. 498, 53 Am. St. Rep. 649; Parker *v.* Parker, 126 Mass. 433.

[2] McArthur *v.* Gordon, 126 N. Y. 597; Korn *v.* Korn, 30 W. Va. 1; Parker *v.* Parker, 126 Mass. 433.

[3] Beach's Eq. Jurisp. sec. 161; Beaver *v.* Beaver, 117 N. Y. 421, 428.

and support, a court of equity will carry it out by creating an equitable charge in the nature of a trust on the property conveyed.[1]

In *McClure* v. *Cook*,[2] the Supreme Court of West Virginia decided that where land was conveyed on consideration that the son would support his father and mother for life, and the deed taken as a whole showed an intention to create a trust and to make the support a charge upon the land, that it was not necessary that a lien on the land for such support be expressly reserved on the face of the conveyance; the court holding that such a trust or charge was not within either the letter or reason of the statute abolishing the vendor's lien in the absence of an express reservation of the lien.

The question in cases of this kind, where there is a provision requiring the grantee to furnish support to the grantor, is, whether the *covenant* is the consideration for which the grantor contracted, and the covenant, with the legal right to damages on breach, is taken as *payment*, or whether a charge or trust was intended on the land conveyed.[3]

A stipulation for maintenance and support will not be construed as a *condition subsequent* unless created by express terms or clear implication.[4]

It has been held that specific performance of a contract to care for and support another will not be decreed, because it involves services of such a character that in order to its proper execution relations of confidence and esteem should prevail between the parties; and to attempt to enforce such a contract, where relations of distrust existed between the parties, would be productive of mischief and confusion.[5]

Deeds providing for maintenance and support as the consideration for property conveyed are frequently drawn by persons unlearned in the law, in which no lien is created, and no condition subsequent provided, but which simply impose a personal obligation upon the grantee to furnish such support.

Where this is true, and the grantee fails and refuses to comply with

[1] 1 Perry on Trusts, sec. 576; Johnson *v.* Billups, 23 W. Va. 685; Vanmeter *v.* Vanmeter, 3 Gratt. 142; Smith *v.* Smith, 125 N. Y. 224; McClure *v.* Cook, 39 W. Va. 599; Brown *v.* Knapp, 79 N. Y. 136; 3 Pom. Eq. Jurisp. sec. 1244.

[2] *Supra.*

[3] McKandish *v.* Keen, 13 Gratt. 615; Beach, Mod. Eq. Jurisp. sec. 303.

[4] Lowman *v.* Crawford, 7 Va. Law Reg. 553; Dembitz on Land Titles, 958 *et seq.* See numerous cases cited in note to Ecroyd *v.* Coggeshall (R. I.), 79 Am. St. Rep. 763.

[5] Mowers *v.* Fogg, 45 N. J. 120; Ikerd *v.* Beavers, 106 Ind. 483; Beach, Mod. Eq. Jurisp. 671.

his covenant or obligation, as is frequently the case, an important and serious question arises as to the rights of the grantor.

Where no lien has been fastened upon the land conveyed, where no condition subsequent is created, and where no fraud is practised by the grantee, can the grantor in such case, for the mere refusal or neglect of the grantee to comply with the stipulation for support, successfully invoke the aid of a court of equity, and have the deed rescinded and annulled?

A failure to pay the consideration moving a deed, where a *money consideration* is provided, certainly affords no sufficient reason for rescinding the deed. Does a deed providing for the support of the grantor stand upon a different footing?

Where the contract is still executory, the way is clear for rescission in such cases; and it has been held in several cases, in Virginia and elsewhere, that even where a deed in consideration of support and maintenance has been executed, a court of equity will set it aside for the failure of the grantee to furnish the support stipulated for.[1]

It is rather difficult to point to any well defined principle of equity jurisprudence upon which such decisions can rest; perhaps, however, they were justified by the particular facts and circumstances of each case. Sometimes courts of equity administer stern justice in hard cases without a critical examination of the law, or troubling much about reasons. It is said that Chief Justice Marshall, when confronted with such cases, used to say, 'so and so is justice'—"Now, Brother Story, go and find the law to fit it."

In the case of *Walfong* v. *Johnson*,[2] the Supreme Court of West Virginia decided that a deed based upon a consideration of maintenance and support was properly set aside for a total failure to perform his undertaking on the part of the grantee, who had conveyed away the land at once to avoid his obligation. It seems that, under the facts and circumstances as they appeared in that case, the court might very properly have placed its decision on the ground of fraud.

In *Lowman* v. *Crawford*,[3] while the decision of the court was put upon the ground of the inadequacy of the remedy at law, yet, as it was made an express exception in the deed that in the event of the grantee's death before the grantor, and his inability to comply with the terms of

[1] Lowman *v.* Crawford, 7 Va. Law Reg. 551; Wampler *v.* Wampler, 30 Gratt. 454; Walfong *v.* Johnson, 41 W. Va. 283; Blake *v.* Blake (Wis.), 12 N. W. 173.

[2] *Supra.*

[3] 7 Va. Law Reg. 551.

the deed, the grantor reserved the right to revoke the deed, the remedy by rescission, it would seem, was within the spirit, if not the letter, of the exception, and was properly exercised. But are we to conclude that every case of mere failure by a grantor to furnish support and maintenance, where such is the consideration moving the conveyance, constitutes a sufficient ground for rescinding it in equity? The equity justifying rescission in such cases is based upon the inadequacy of the remedy at law, and the hardship attending this slow process.

In *Wampler* v. *Wampler*[1] and *Lowman* v. *Crawford*[2] the Virginia court said:

"The obligation to maintain and support was a continuing one on the part of the grantee. It was to continue during the lives of the grantors and each of them. At the end of the first year, or sooner, the grantors had the right of action, if the covenant for support was not complied with, for a breach of the covenant. In such action, damages could be recovered only for the refusal of the grantee to perform his covenant *up to the time of the commencement of the suit.* . . . . . Must the grantors bring suit every six months or twelve months for a failure on the part of the grantee to supply food and clothing? And, in the meantime, having conveyed their all to the grantee, having deprived themselves of the means of support, must they suffer and starve until, by suits at law and executions, they could compel the grantee to supply them with the means of support?"

If the grantor has conveyed his all in such a deed, it may be said that "courts do not provide means to pay debts, but only the means of enforcing their payment."

The decision of the court in *Wampler* v. *Wampler* and *Lowman* v. *Crawford*[3] is based on the idea that damages can only be recovered in such cases *up to the time of the commencement of the suit*, and, therefore, the grantor had no adequate and complete remedy at law. Is this a correct proposition as applied to such cases? If not, the conclusion reached by the court would seem to be faulty.

In *Parker* v. *Russell*,[4] the defendant, in consideration of the conveyance by the plaintiff to the defendant of certain real estate, promised and agreed to support and maintain the plaintiff during his natural life. The defendant neglected and refused to perform the agreement. Upon a trial of an action instituted by the plaintiff for the breach of the agreement, the defendant requested the lower court to rule that damages could only be recovered in the action, for failure to furnish support to the plaintiff *prior to the date of the writ;* and that damages since the writ must be sought in another action. The court refused to

[1] 30 Gratt. 454.
[2] *Supra.*
[3] Both *supra.*
[4] 133 Mass. 74.

so rule, and instructed the jury that if the defendant neglected and refused to furnish support to the plaintiff, without any fault on his part, he might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support.

The case was appealed and the Supreme Court affirmed the ruling of the lower court.

Fields, J., delivering the opinion of the court, said:

"In an action for the breach of a contract to support the plaintiff during life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract.

"Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract, they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite, because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of life has not, since the adoption of life-tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract by its terms to continue during life." [1]

Whether the law invoked to sustain the Virginia cases of *Wampler* v. *Wampler* and *Lowman* v. *Crawford*, before cited, is sound or not sound, those decisions unquestionably reflected the dictates of a righteous conscience, and meted out even-handed justice to the parties litigant, and we are not prepared to dissent from the editor of the REGISTER in saying that "even if there be no well-defined principle authorizing rescission in such a case, we are glad to see the principle now firmly established."

We think, however, that the principle of these cases ought to be sparingly invoked and carefully guarded in its application, and ought not to be extended to every case in which there has been a mere failure to furnish maintenance and support where such is the consideration moving the conveyance.

There may be, and doubtless have been, cases of this kind in which

[1] Citing Amos v. Oakley, 131 Mass. 413; Fay v. Guyan, 131 Mass. 31; Shell v. Plumb, 55 N. Y. 592, and other cases. See also Pierce v. Tenn. Coal etc. Co., 173 U. S. 591; Vicksburg R. R. Co. v. Putnam, 118 U. S. 545.

the services to be rendered are of such a peculiar character that it is impossible to estimate the value of their loss by any pecuniary standard, and where it may be evident that they were not intended to be so measured. In such cases rescission is the only remedy.[1]

In *Henderson* v. *Hunton*[2] is discussed the somewhat interesting question of the validity of a deed made in consideration of the support and maintenance of the grantor, as against the latter's creditors.

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THE SITUS OF DEBTS FOR PURPOSE OF TAXATION.

In treating of the situs of personal property no great difficulty is encountered as long as tangible personal property alone is considered. The law has fixed its situs by declaring in the maxim, "*mobilia personam sequuntur*," that personalty follows the domicile (not person) of the owner. But when the property is intangible, as debts and choses in action, more difficulty is encountered because of the failure to assign to this species of property a definite situs.

The question where choses in action shall be taxed has furnished the theme for much litigation. When the creditor resides in one State and the debtor in another, the right of each State to tax comes into question. Is the debt taxable at the debtor's residence, at the creditor's residence, or at the residences of both?

Debts and choses in action may be either negotiable or non-negotiable, and, for convenience, we may treat them under separate heads.

I. *Debts and Choses in Action non-negotiable.*

The general practice is to treat debts as located, for the purpose of taxation, at the *creditor's* domicile, and there is no doubt that they may have their situs there for that purpose.[3]

The creditor, it is conceded, is a permanent resident of the State imposing the tax. The debt is property in his hands, constituting a portion of his wealth, from which he is under the highest obligation,

[1] See Browne on Stat. Frauds, 593, and cases cited; Brown v. Sutton, 129 U. S. 238 Slanahan v. Swan (Ohio), 29 Am. St. Rep. 517; Kofka v. Rosicky (Neb.), 43 Am. St Rep. 696, 697.

[2] 26 Gratt. 926.

[3] Minor, Conflict Laws. 123.