In the light of the conclusions above noted, it is unnecessary for us to consider defendant's objection to the petition on the grounds of relevancy. However, for the guidance of counsel, we would note that at the time of the depositions taken on August 26, 1976, counsel for both parties agreed to waive all objections except as to the form of the question. In our judgment the relevancy objection is not available to the defendant so long as that stipulation is in effect.

ORDER

NOW, this 4th day of October, 1977, the Petition of Robert R. Nolder for Direction to Answer Questions on Deposition and Produce Documents is dismissed.

Exceptions are granted the Plaintiff.

DALE v. CRAWFORD, C. P. Fulton County Branch, No. 6 May Term, 1975

Equity - Specific Performance - Defense of Intoxication - Rescission - undue Influence - Failure of or Inadequacy of Consideration - Excuse from Tender of Consideration - Statute of Frauds - Sufficiency of Written Terms - Sufficiency of Description - Parole Evidence on Description - Effect of Uncertainty or Insufficiency in Description of Excepted Lands

1. In order for intoxication to be a defense, the intoxication must have been such that the vendor did not know what he (she) was doing; it must have been such as to suspend the use of reason and understanding.

2. A party seeking to repudiate a contract on the basis of intoxication when the contract was made must establish proof not only of the requisite incapacitation by the intoxication, but also that he placed the other party in status quo by returning the consideration received.

3. Proof of undue influence vitiating a contract requires evidence, direct or circumstantial, of coercion or improper conduct subjecting one's mind to the will of the person operating upon it; weakness of mind or an impaired condition, without more, is not sufficient to establish undue influence.

4. The facts of widowhood, being sixty-nine (69) years of age and occasionally moved to drink by grief, raise neither a presumption nor an inference of undue influence, when the party is generally competent, and initiates negotiations leading to the formation of the contract, which produce the funds the party then and there needs.

5. Adequacy or inadequacy of consideration can only be a factor to consider in determining whether there was undue influence or fraud.

6. The law will not enter into an inquiry as to the adequacy of the consideration in contracts of this type, and although inequity or hardship may be a valid defense in an action for specific performance, they are not a valid defense if the hardship is due to the defendant's own acts or to events clearly foreseeable.

7. A purchaser's non-performance or failure to tender performance is excused by the vendor's acts which prevent performance or tender.

8. To comply with the Statute of Frauds, it is not necessary that a writing be couched in formal legal terminology.

9. A contract for the sale of realty is unenforceable under the Statute of Frauds if the property is not designated with sufficient definiteness to determine what is intended to be conveyed.

10. Oral evidence may not be accepted to supply a description missing from a writing.

11. Parole evidence may be used, however, to explain and define the description contained in the writing.

12. A description is sufficient if it is clear enough to enable a surveyor to locate the land with certainty.

13. It will not be assumed that the parties to a contract for the sale of land intended land excepted therefrom to be landlocked and of no practical use to the vendor.

14. Experience, common sense and reason are attributes highly regarded by the law, but separately or in combination, they are not without tangible evidence or authority controlling; nor will the court take judicial notice that land is most often subdivided into rectangular shapes, without evidence in support of that argument.

15. If the contract contains the means by which the boundary lines can be run and marked out, there is sufficient compliance with the Statute of Frauds.

16. Uncertainty or insufficiency in the description of excepted lands affects only the validity of the exception and not the validity of the instrument as a whole.

17. Uncertainty of description does not render a reservation void where there is a method provided in the instrument whereby it can be made sufficiently certain.

Roy S. F. Angle, Esq., Attorney for Plaintiff

Richard W. Cleckner, Esq., Attorney for Defendant

ADJUDICATION AND DECREE NISI

KELLER J., September 22, 1977:

This action in equity for specific performance was commenced by the filing of a complaint on February 21, 1975, and service of the same by the Sheriff of Fulton County on March 3, 1975, upon the defendant. An answer containing new matter and counterclaim was filed on April 2, 1975, and service was accepted by counsel for the plaintiff on April 15, 1975. An answer to new matter and counterclaim was filed on May 31, 1975, and service was accepted by local counsel for the defendant on May 31, 1975. Other litigation bearing the same caption and dependent upon the resolution of the case in chief has developed since the filing of the plaintiff's answer to new matter and counterclaim.

Subsequent to May 31, 1975, both parties secured new counsel. Counsel for the plaintiff put the matter down for trial on December 14, 1975. A Pre-Trial Conference was held on February 8, 1977, at which time the new counsel for the parties stated in general terms their theories of the case and agreed that additional research and investigation would be required before the matter would be in a posture for trial. Trial was tentatively set for April 12, 1977; with five days estimated for the time for trial. The trial was continued and on April 12, 1977, a second Pre-Trial Conference was held and trial was scheduled for June 6, 1977, and five days reserved. An extensive Pre-Trial Conference Memorandum was prepared by the Court setting forth the various matters agreed upon or issues defined by counsel, and counsel were requested to submit any comments, corrections, objections or additions. As a result of comments submitted by counsel, the Court prepared a "Second Pre-Trial Conference Memorandum" further clarifying matters agreed upon and issues defined, and forwarded copies of the same to counsel on May 25, 1977, with the request that any comments or objections be submitted to the Court not later than June 3, 1977. The Pre-Trial Conference Memorada for each of the three conferences was filed and made part of the record of the case. On May 24, 1977, counsel for the defendant, without leave of Court, filed an amended answer, new matter and counterclaim raising the defense of the rule against perpetuties as applied to two first refusal options allegedly granted by the defendant to the plaintiff. Immediately prior to trial on June

6, 1977, counsel for the plaintiff presented a motion to strike the amended answer, new matter and counterclaim on the grounds that neither consent of the adverse party or leave of Court was obtained, and an order was entered granting the motion. The case was tried on June 6, 7 and 8, 1977.

FINDINGS OF FACT

1. The defendant, Florence Crawford, resides at R. D. Breezewood, Fulton County, Pennsylvania. She is a widow and was seventy-four (74) years of age at the time of this trial.

2. The defendant became the sole owner of a number of large tracts of real estate in Fulton County, Penna. upon the death of her husband approximately seven years ago.

3. The defendant testified that her husband's death had a severe impact on her life, causing her to grieve and drink excessively.

4. Prior to February 22, 1972, the defendant sold one or more tracts of her real estate totalling approximately 400 acres to Philip A. Dale, father of the plaintiff herein.

5. The defendant conveyed approximately 178.49 acres to Philip A. Dale and I. Louise Dale, his wife, dated August 5, 1970, and recorded in Fulton County Deed Book Vol. 75, Page 157 for a stated consideration of $20,000.00. Three (3) acres are excepted from the conveyance by the following language:

> "There is excepted and reserved from Tract No. 2, three (3) acres, more or less, on which is located the old Mountain House, the barn, and other buildings."

6. The defendant testified that she owned the "Old Mountain House" on three (3) acres more or less, that she pays taxes on it, and that it was very dilapidated but she planned to renovate it. The "Old Mountain House" is located on the North side of U. S. Route 30 in Brush Creek Township, Fulton County, Pennsylvania.

7. The "Old Mountain House" property is the only real estate owned by the defendant in Fulton County, and located on the North side of U. S. Route 30.

8. On and prior to February 22, 1972, the defendant owned a 140 acre, more or less, tract of real estate located on the South side of U. S. Route 30 in Brush Creek Township,

Fulton County, Pennsylvania. This tract is improved with the defendant's home known as the "Blue Ridge Guest Ranch" and out-buildings.

9. On and prior to February 1972, the defendant owned a home in Yerington, Nevada where she spent the winter months. The defendant's mother and brother lived in Nevada at that time.

10. In February 1972, the defendant owed money to the First National Bank of Nevada, Lovelock Branch, Nevada.

11. Prior to February 1972, Philip A. Dale, father of the plaintiff, and I. Louise Dale granted a mortgage to the defendant which required annual payments of principal and interest on the first day of April.

12. The defendant had at times requested and received advances on the annual mortgage payments from Mr. and Mrs. Dale.

13. In the days immediately preceding February 22, 1972, the defendant called Philip A. Dale at his home in Mercersburg, Franklin County, Penna. from Nevada to say that she needed money "then and now" to save her home in the West or make a necessary payment. She also stated that she would sell her remaining real estate other than the "lodge" (her home) and "The Mountain House."

14. The defendant testified that she did not remember calling Philip A. Dale and saying she needed money now, but it was possible that she made such a call.

15. Philip A. Dale told the defendant that he would see what he could do about advancing money on the annual mortgage payment; would discuss with his wife and son, the plaintiff, her offer to sell her real estate, and would call her back.

16. Philip A. Dale had reservations about purchasing the defendant's real estate for development purposes because he was at that time having "problems" with real estate he then owned in Brush Creek Township due to township real estate ordinances, Department of Environmental Resources regulations on sewage, and the threat of a gypsy moth invasion of the area.

17. Philip A. Dale returned the defendant's earlier call, discussed her offer to sell her Fulton County real estate other

tor of the estate of Sadie G. Mutersbaugh, late of Metal Township, Franklin County, Penna., deceased.

Zeigler — First and final account, statement of proposed distribution and notice to the creditors of Rosie I. Smith, Administratrix of the estate of Daniel Zeigler, late of Washington Township, Franklin County, Pennsylvania, deceased.

Freet — First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, executor of the estate of Sallie B. Freet late of Greene Township, Franklin County, Pennsylvania, deceased.

Bumbaugh — First and final account, statement of proposed distribution and notice to the creditors of Millard A. Ullman, executor of the estate of Charles Bumbaugh, late of Mont Alto, Franklin County, Pennsylvania, deceased.

Stoner — First and final account, statement of proposed distribution and notice to the creditors of Kathryn Stoner Sprenkle, Frances L. Anderson and M. D. Stoner, executors of the estate of Leila B. Stoner, late of Washington Township, Franklin County, Pennsylvania, deceased.

Hoover — First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, administrator of the estate of Stoey H. Hoover, late of Metal Township, Franklin County, Pennsylvania,

Cooke — First and final account, statement of proposed distribution and notice to the creditors of J. Glenn Benedict, executor of the estate of Mildred L. Cooke, late of The Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

Jacobs — First and final account, statement of proposed distribution and notice to the creditors of Helen Naugle, executrix of the estate of Howard G. Jacobs, late of Waynesboro, Franklin County, Pennsylvania, deceased.

Wise — First and final account, statement of proposed distribution and notice to the creditors of Hays Lauthers, executor of the estate of John E. Wise, late of Fannett Township, Franklin County, Pennsylvania, deceased.

Crego — First and final account, statement of proposed distribution and notice to the creditors of Jean M. Curtis and Robert F. Curtis, executors of the estate of Jennie M. Crego, late of The Borough of Chambersburg, Franklin County, Penna., deceased.

GLENN E. SHADLE
Clerk of Orphans Court
Franklin County, Penna.

(19-9)

"When there's no law, there's no bread." — Poor Richard's Almanack

than her home and "The Mountain House", and agreed upon terms under which Mr. and Mrs. Dale would make advance payments on account of their mortgage for 1972 and 1973, and the defendant would grant an option for the sale of her Fulton County real estate other than her home and "The Mountain House." The purchase price agreed upon was based on the usable acreage and what the Dales had paid defendant for other real estate she had sold them at a price she had set.

18. Philip A. Dale personally drafted and typed the "Agreement" according to the terms he and the defendant worked out inserting the name of his son, Anthony A. Dale, as "Grantee."

19. Anthony A. Dale, plaintiff, was named as "Grantee" in the agreement because his father, Philip A. Dale, felt he should have family property in his name and because he was to go to Nevada to handle the execution of the "Agreement" and payment of the consideration called for therein to the defendant.

20. Philip A. Dale is not an attorney and is not trained in the law.

21. The "Agreement" typed by Philip A. Dale provides inter alia:

> "I. This agreement, made this day of 2/22, 1972 between Florence Crawford (Grantor), whose residence is in Brush Creek Township, Fulton County, Penna. and Anthony A. Dale (Grantee), whose residence is 9 Grandview Ave., Mercersburg, Penna., is fully contained herein, there being no commitments, understandings, inclusions or exclusions, conditions or reservations other than so stated herein. This agreement is subject to all pertinent laws and statutes, and is binding on the parties thereto, and upon their heirs or assigns.
>
> "II. The Grantor hereby grants to the Grantee an option to purchase a tract of land located in Brush Creek Twp., Fulton County, Penna. (hence tract No. 1). This tract contains about one hundred and forty acres (140), being bounded on the North by U. S. Route 30, on the East by Penna. Rt. 915, on the South by lands of Duvall, and on the West by lands of Duvall and others. This tract is a part of a larger tract acquired by the Grantor through Deed No. 452 of the Fulton County records. It being all that land within the above boundaries with the following exception or reservation: A three (3) acre parcel upon which is situated a frame dwelling house and outbuilding, the buildings to approximate the

center of the parcel (unsurveyed). This parcel will hence be tract No. 2.

"III. This option to purchase tract No. 1 is hereby granted for the sum of $10.00, receipt of which is hereby acknowledged.

A. The option is for a three year period commencing the day of this signing.

B. The option can be exercised at any time by the Grantee by his giving written notice to the Grantor of his intention to do so. A deed will be delivered in a period not exceeding thirty days from the receipt of this notice at a time and place designated in such notice, or as is mutually agreed upon.

C. The agreed upon purchase price for this tract No. 1 is $18,000.00 payable as per the following schedule.

1. Upon notice by the Grantee that he wishes to exercise the option, the Grantor will present a deed, this deed subject only to encumbrances, judgments, or liens as they would appear in the Fulton County records at the time of this signing. Upon the receipt of a good and marketable deed, the Grantee will pay to the Grantor the sum of $3,000.00 with the balance, or $15,000.00, due and payable as per the following: On each anniversary of the granting of the deed the sum of $3,000.00 is payable yearly until the entire amount is paid off.

D. As further consideration for the granting of this option the Grantee will advance to the Grantor the sum of $2500.00. This payment is applicable to payments on an agreement between the Grantor and Philip A. and I. Louise Dale. Such advances will be made as follows:

1. An amount of $2,000.00 will be made upon the signing of this agreement. Receipt of which is hereby acknowledged.

2. The balance, or $500.00 will be paid on April 1, 1972.

3. The Grantor will credit the above amounts received to payments on the Philip A. & I. Louise Dale agreement as per the following.

a. The sum of $1,000.00 is credited on the April, 1972 payment.

b. The sum of $1,500.00 is credited to the April, 1973 payment.

IV. The Grantee, his heirs or assigns, for the consideration of $1.00, receipt of which is hereby acknowledges, is herein granted an option to purchase the abovementioned tract No. 2, if and whenever sold, for an amount equal to that of any written bonafide offer for tract No. 2 or any part thereof. This option can be exercised at any time within a period of thirty days of written notification of such offer.

V. Tract No. 3 is a three acre parcel of land on which is situated a frame building and a barn, same being owned by the Grantor and acquired through Deed No. 452 of the Fulton County records. It is bounded on the North by the Penna. Turnpike, on the East by land of P. A. Dale, on the South by Penna. Rt. 30, and on the West by land of P. A. Dale. The Grantee, his heirs or assigns, for the consideration of $1.00, receipt of which is hereby acknowledged, is herein granted an option to purchase this tract No. 3, if and whenever sold, by paying an amount equal to that of any written bonafide offer for tract No. 3, or any part thereof. This option can be exercised at any time within a period of thirty days of the written notice of such offer."

22. Philip A. Dale instructed the plaintiff to take the defendant to a lawyer in Nevada to review the "Agreement" with her before she signed it or went to the bank.

23. The plaintiff flew to Reno, Nevada several days prior to February 22, 1972, and arrived at the Reno airport at night. The plaintiff was carrying the original and several copies of the "Agreement" and several checks of "Baroney Tree Farms P. A. Dale" with which he was to pay the defendant. The plaintiff is authorized to write checks on the "Baroney Tree Farms P. A. Dale" account.

24. The defendant and her friend, Mrs. Perry, met the plaintiff at the airport and drove him to the defendant's home in Yerington, Nevada where he spent the night.

25. The following morning, a Saturday according to the deposition of Victor Alan Perry, the plaintiff went over the "Agreement" with the defendant. They then (sometime shortly after 9:00 A.M.) went to Attorney Victor Alan Perry, who was acquainted with the defendant and a friend of hers.

26. Mr. Perry had been admitted to the practice of law in December 1970, was employed by the Office of the Attorney General and operated a weekend law office in Yerington.

27. Attorney Perry examined the document in the presence of plaintiff and defendant, declined to express any opinion concerning the purchase price for the real estate, but recommended that the defendant not grant the option because the consideration was insufficient. He advised defendant that she should receive $500.00 for the option.

28. In a deposition taken May 18, 1977, Attorney Perry identified a photostatic copy of the "Agreement" executed by the plaintiff and defendant as the document that had been

exhibited to him, that he examined, and that he advised defendant not to sign.

29. Attorney Perry's testimony concerning the presence of Philip A. Dale in Nevada, the weekend "big toot" defendant, Philip A. Dale and plaintiff were on, and the defendant being "kicked out" of one or two bars in Yerington was effectively rebutted by the plaintiff and Philip A. Dale, and unsupported by the defendant's testimony. Consequently, his credibility is severely damaged, and we decline to accept his testimony concerning defendant's incompetency to conduct her own business affairs and his advice that the purchase price was inadequate.

30. The plaintiff drove the defendant to Hawthorne, Nevada to see her brother either on the same day or the day following their conference with Attorney Perry. The defendant visited a casino in Hawthorne for a short time. They returned to defendant's home in Yerington that night.

31. The plaintiff saw the defendant have some alcoholic beverages while with her in Nevada, but he never saw her drunk in Nevada or elsewhere.

32. The plaintiff does not drink any alcoholic beverages.

33. Prior to February 22, 1972, and while the parties were still in Yerington, Nevada, the defendant told the plaintiff she would sign the "Agreement" and that it could be done at the bank in Lovelock, Nevada where there would be a notary public and where she could pay her note.

34. Early in the morning of February 22, 1972, the parties left the defendant's home in Yerington, Nevada and proceeded to Lovelock, Nevada. The plaintiff did not see the defendant have any alcoholic beverages that morning, and in his judgment she was not intoxicated at that time.

35. The plaintiff and defendant went to the Lovelock Branch of the First National Bank of Nevada. Both parties executed and acknowledged the "Agreement" before a notary public at the branch bank, who notarized the document. The plaintiff then delivered two Baroney Tree Farms checks for $1,000.00 and $12.00 in cash to the defendant pursuant to the terms of the "Agreement."

36. The defendant used the money she received from the plaintiff to pay off her loan at the bank.

LEGAL NOTICES, cont.

ARTICLE IV. The corporation does not contemplate pecuniary gain or profit, incidental or otherwise.

ARTICLE V. The corporation shall exist perpetually.

ARTICLE VI. The corporation is organized upon a nonstock basis.

ARTICLE VII. The members of the corporation shall be the members of the Charge Conference of St. Paul United Methodist Church of Chambersburg in the County of Franklin, who are of legal age as determined by the law of the Commonwealth of Pennsylvania. Each member shall have the right to vote.

ARTICLE VIII. The corporation acknowledges itself to be a member of and belong to The United Methodist Church and that as such it accedes to, recognizes, and adopts the doctrines and "Book of Discipline" of The United Methodist Church and ministerial appointments of The United Methodist Church as from time to time such appointments may be made by the General Conference of The United Methodist Church and by the Annual Conference within whose bounds the corporation is or may hereafter be situated.

William R. Davis, Jr. of
DAVIS & ZULLINGER
5 North Second Street
Chambersburg, Pennsylvania 17201
Attorney
(12-30)

NOTICE OF FILING OF
ARTICLES OF INCORPORATION

NOTICE is hereby given by the undersigned corporation, A. R. Statler Body Work, Inc., that Articles of Incorporation for said corporation have been filed in the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on Decembre 2, 1977.

The name of the proposed corporation, organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended, is A. R. Statler Body Works, Inc.

The purpose or purposes for which the corporation has been organized are as follows: "The corporation shall have unlimited power to engage in and to do any lawful act concerning any and all lawful business for which corporations may be organized under the Business Corporation Law of Pennsylvania, Act of 1933, P.L. 364, as amended".

A. R. STATLER BODY WORKS, INC.
P. O. Box 258
Marion, PA 17235

BLACK AND DAVISON
209 Lincoln Way East
P. O. Box 513
Chambersburg, PAA 17201
Attorneys
(12-30)

"He is ill-clothed that is bare of virtue." — Poor Richard's Almanack

37. The notary public who was acquainted with the defendant did not specifically recall the plaintiff and defendant appearing before her on February 22, 1972, but she was definite in her testimony that she would not have notarized the document if they had not signed it in her presence and she identified her own signature and seal.

38. We decline to accept defendant's testimony that she never saw the "Agreement" or was led to believe it was something other than what it purported to be by reason of her identification of her own signature, her tentative and reluctant identification of her initials, her recalled use of the proceeds of the transaction, her attorney's identification of the agreement, and the testimony of the plaintiff and his father.

39. The plaintiff and the defendant visited the defendant's mother in Lovelock, Nevada, and plaintiff then drove the defendant from Nevada to her home in Pennsylvania.

40. Prior to March 11, 1972, the plaintiff presented the "Agreement" to the Recorder of Deeds of Fulton County for recordation, and the Recorder refused to accept it because it was not properly acknowledged.

41. On March 11, 1972, the plaintiff and defendant appeared before Justice of the Peace Neil P. Wilt of East Providence Township, Bedford County, Penna. and re-executed the "Agreement" and acknowledged "the foregoing Indenture to be an act and deed and desired that the same might be recorded as such." Justice of the Peace Wilt then completed the acknowledgment.

42. The defendant read the "Agreement" and struck a line through the word "deed" on the acknowledgment prepared by the justice of the peace.

43. On March 12, 1972, the plaintiff delivered a Baroney Tree Farm check for $500.00 to the defendant to complete the $2,500.00 mortgage prepayment called for by the "Agreement." Under the terms of the "Agreement" the $500.00 payment was not due until April 1, 1972, but defendant stated she needed the money.

44. On March 13, 1972, the "Agreement" was accepted for recording in the Office of the Recorder of Deeds of Fulton County and was recorded in Fulton County Deed Book Vol. 77, Page 282.

45. A slate, shale or gravel pit is located on defendant's

land and is included in the real estate which is the subject of the "Agreement" and this litigation.

46. Gravel had been removed from the pit prior to February 22, 1972.

47. The defendant gave Philip A. Dale permission to remove additional gravel subsequent to February 22, 1972 to construct fill for a road on real estate owned by Philip A. Dale and his wife on the opposite or North side of U. S. Route 30.

48. Philip A. Dale removed or caused to be removed an unknown quantity of the gravel in one or two weeks for use on real estate he and his wife owned.

49. Additional gravel has been removed by unknown persons since the removal above referred.

50. No probative evidence of the value of the gravel taken by Philip A. Dale was introduced.

51. There was no evidence introduced that the plaintiff owns any interest in the real estate on the North side of U. S. Route 30.

52. On January 10, 1973, counsel for the plaintiff notified the defendant by certified mail of plaintiff's intention to exercise the option to purchase defendant's real estate. A deed was enclosed for defendant to execute, acknowledge and return either to plaintiff's counsel or defendant's counsel. The return receipt for the certified mail was dated January 13, 1973, and signed for by "J. H. Marsh" as agent for defendant.

53. The defendant ignored counsel's request to conclude the transaction.

54. Plaintiff and plaintiff's father, Philip A. Dale, orally notified the defendant several times prior to February 22, 1975 of their intention to exercise the option. The defendant advised both the plaintiff and Philip A. Dale that she had been offered more money for the real estate by another party and didn't want to go through with the sale.

55. On January 8, 1975, counsel for plaintiff again wrote to defendant reminding her of the terms of the "Agreement", of plaintiff's intention to exercise the option, and that plaintiff would be prepared to settle at counsel's office on February 8, 1975 at 1:00 P.M. Counsel's letter was sent certified mail and the defendant signed the return receipt card on January 10, 1975.

56. Pursuant to the letter of January 8, 1975 the plaintiff and Philip A. Dale went to counsel's office at 1:00 P.M. prepared to proceed with settlement. They waited several hours. The defendant did not appear in person or by counsel, nor did she notify the plaintiff or his counsel that she would not or could not attend the meeting.

57. The defendant has never offered to make settlement pursuant to the terms of the agreement or tendered the consideration paid her.

58. The plaintiff's expert on real estate values has been a real estate broker in this Judicial District for eleven years, has had five years experience in making appraisals, and is familiar with real estate values in Brush Creek Township, Fulton County, Pennsylvania. Using comparable values and a 10% per annum appreciation rate, the expert valued the real estate here in question at $130.00 per acre or $18,200.00 for the 140 acre tract not excluding the excepted three acres, but not considering the improvements on the three acres.

59. The defendant's expert on real estate values was generally well qualified, but apparently has resided and conducted his real estate brokerage and real estate appraisal business in this Judicial District only since 1973, and had no experience in Brush Creek Township, Fulton County, Pennsylvania. Using comparables, the expert valued the real estate here in question, excluding improvement at $42,125.00, including $6,000.00 for timber value or approximately $258.00 per acre not excluding the excepted three acres.

60. The plaintiff's expert viewed "about three" of the properties he testified he used or disregarded as comparables, but was unable to recall which ones he viewed. His appraisals were predicated to a substantial degree upon his review of tax maps and assessment cards and verification of the information on the tax cards by talking to unidentified owners, prior owners and real estate people at undisclosed times about unidentified comparables.

61. The value of the real estate here under consideration as of February 22, 1972 has limited materiality and relevance, but we do find the testimony of the plaintiff's expert more persuasive and accept the same.

62. The description of the real estate which was the principal subject of the "Agreement", and referred to as "tract No. 1" is:

"This tract contains about one hundred and forty acres (140), being bounded on the North by U. S. Route 30; on the East by Penna. Rt. 915, on the South by lands of Duvall, and on the West by lands of Duvall and others."

63. The location of U. S. Route 30, Penna. Rt. 915, and "lands of Duvall" can be identified and located for the North, East, South and part of the West boundary lines of tract No. 1. The plaintiff's surveyor testified that the "lands of others" on the West boundary could be identified from the tax records and talking to the landowners.

64. The description of tract No. 1 is sufficient to permit its identification, location, and a survey of the same.

65. The three (3) acre tract, referred to in the "Agreement" as tract No. 2 is described as:

"A three (3) acre parcel upon which is situated a frame dwelling house and out-buildings, the buildings to approximate the center of the parcel (unsurveyed)."

66. The description for tract No. 2 identifies no monuments, and provides no adjoiners, courses or distances.

67. Plaintiff's engineer testified that the distance from a center point located between the frame dwelling house and outbuilding on tract No. 2 and U. S. Route 30 is approximately 165 feet.

68. U. S. Route 30 is the only public road near to and serving defendant's home. Access to the public road is essential to the practical use of the home.

69. Using the identifiable center point between the said frame house and outbuilding as the center of the excepted three acre tract and U. S. Route 30 as the North property line there are apparently an infinite number of geometric shapes than can be mathematically drafted to contain three acres. However, neither a circle nor a square are among those shapes.

70. A rectangle is the only geometric shape that can be drafted with equal diagonals using U. S. Route 30 as the North property line and the center point between the house and outbuilding being equal distance from its side. (Thus, if the distance from the said center point to U. S. Route 30 was exactly 165 feet, the dimensions of the rectangle would be 396 feet by 330 feet.)

71. Plaintiff's engineer proposed to locate the center point of defendant's home and outbuilding and the center point between them; then measure the distance from that point to U. S. Route 30; and then make a survey placing defendant's building in the geometric center of a rectangle.

72. Defendant's engineer agreed plaintiff's engineer's proposal would be the logical procedure; though other geometric shapes were possible.

73. The parties intended that the defendant should retain title to a three (3) acre tract of real estate with her home and outbuilding in the center.

74. The defendant and plaintiff's parents had used similar but less specific language in 1970 to except the Mountain House on a three (3) acre, more or less, tract and apparently those parties had experienced no difficulty in effectuating their intent or establishing their property lines.

75. If the defendant's exception were declared void for uncertainty, the plaintiff would reap an unexpected, unintended and unconscionable windfall.

76. If the plaintiff's option for a sufficiently described tract No. 1 were declared void by reason of the uncertainty of the description to tract No. 2, the defendant would also reap an unexpected, unintended and unconscionable windfall.

77. Tract No. 2 is sufficiently described to permit its identification, location and a survey of the same.

78. The defendant was competent to contract on February 22, 1972, when she executed the agreement, and on March 11, 1972, when she reacknowledged the "agreement".

79. No undue influence was exerted upon the defendant by the plaintiff or his agents to enter into the "Agreement".

80. The consideration set forth in the "Agreement" was negotiated by the defendant and the plaintiff's father on the basis of: (1) defendant's need for additional funds and (2) prices previously paid for real estate to the defendant.

DISCUSSION

The defendant has asserted several different theories of defense in support of her contention that specific performance

of the agreement should be denied. We will consider them seriatim.

I
INTOXICATION

It is long and well established law that, in order to relieve defendant from the contract, her drunkenness "must have been such that (she) did not know what (she) was doing, it must have been such as to suspend the use of reason and understanding." *Bush v. Breinig*, 113 Pa. 310, 316 (1886).

In the case at bar, the only evidence that the defendant was intoxicated was her own testimony, that she had been drinking heavily since her husband's death seven (7) years ago and that she was drunk when she executed and acknowledged the agreement and reacknowledged it several weeks later; and that provided in Attorney Perry's deposition. The defendant's testimony as to the extent of her intoxication in Nevada and specifically on February 22, 1972, and on March 11, 1972 in Bedford County, Pennsylvania is entitled to be given little credence because of its general nature and her recollection of receiving and using the consideration. The attorney's deposition is also entitled to be given little evidentiary weight due to his lack of credibility as noted in finding of fact No. 29. The testimony of the plaintiff effectively rebutted the defendant's evidence of intoxication and we do not find that defendant maintained the burden of proof necessary to establish the factual basis for the defense.

As noted above, the defendant recalled receiving from the plaintiff the consideration called for in the agreement and her personal use of the same. The general rule of law is that if a party seeks to repudiate a contract on the grounds that when he made it he was so intoxicated as not to know or understand what he was doing, then he must show not only that he was incapacitated by intoxication and rescinded the agreement within a reasonable time after his recovery, but also that he placed the other party in status quo by returning the consideration received. "Where a contract is sought to be rescinded by one of the parties thereto, he must place the other in status quo. He will not be allowed to repudiate a contract and retain the benefit derived therefrom against equity and good conscience, but must return, or offer to return such benefit." *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473, 476 (1904). Here there was neither allegation or evidence that the defendant returned or offered to return the money received from the plaintiff.

Thus, on the evidence and the law, we find that the defendant has not established the defense of intoxication.

II
UNDUE INFLUENCE

The defendant alleged and testified that the excessive importunity of the plaintiff and his father, their hounding her and plying her with alcohol deprived her of her free will. This contention was not borne out by the evidence presented. We have found that it was the defendant who called plaintiff's father and initiated the negotiations for the sale of the real estate here in question which led to the plaintiff travelling to Nevada, that it was the defendant who was in almost constant need of capital and made regular demands or requests on plaintiff's father for advance mortgage payments, that the defendant was competent to contract when she originally executed and acknowledged the agreement and when she reacknowledged it at a later date.

> "In order to constitute undue influence there must be evidence, direct or circumstantial, of coercion or improper conduct subjugating one's mind to the will of the person operating upon it; weakness of mind or an impaired condition, without more, is not sufficient to establish undue influence; there must be fraud or threats or misrepresentation or inordinate flattery or deception or excessive importunity or imposition or other improper conduct sufficient to dominate or control the other person's mind: (citing cases). Whether undue influence was exercised must often be inferred from the facts and circumstances of the particular case. . .; in this connection, acts and conduct are sometimes as important as spoken words in determining undue influence or mental capacity. . . ."

Kees v. Green, 365 Pa. 368, 376 (1950).

The facts of widowhood, being sixty-nine (69) years of age and occasionally being moved to drink by her grief, raises neither a presumption nor an inference of undue influence in the light of defendant's competency and her initiation of the negotiations leading to the agreement for the sale of her real estate, which produced the funds she then and there needed. We conclude the defendant has not established the existence of undue influence on the part of the plaintiff or his father.

III
INADEQUACY OF CONSIDERATION

Both parties called real estate brokers as expert witnesses to testify to the 1972 value of the subject real estate in response to defendant's contention that the consideration provided for in the agreement was inadequate to permit a decree of specific performance. While we did find the evidence introduced by plaintiff's expert more persuasive and accepted it, it is our opinion that this aspect of the trial was largely an exercise in futility, for in our judgment adequacy or inadequacy of consideration can only be a factor to consider in determining whether there was undue influence or fraud.

". . . . Courts do not sit to relieve suitors from the results of improvident agreements, nor the consequences of bad bargains", *(Owens v. Wehrle*, 14 Pa. Super. 536, 538 (1900), "The adequacy of consideration will not be gone into by the court in the absence of fraud. . ." *Wilson v. Viking Corp.*, 134 Pa. Super. 153, 161 (1938). " 'It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.' This rule is almost as old as the law of consideration itself." *Hillcrest v. McFeaters*, 322 Pa. 497, 503 (1938), Williston on Contracts, Vol. 1, Section 115. In *Payne v. Clark*, 409 Pa. 557, 561, 562 (1963), the Pennsylvania Supreme Court held:

> "Inequity or hardship may be a valid defense in an action for specific performance, and such decree refused if in the exercise of a sound discretion it is determined that, under the facts, specific performance would be contrary to equity and justice: *Barr v. Deiter*, 190 Pa. Superior Ct. 454, 154 A. 2d 290 (1959) and *Merritz v. Circelli*, 361 Pa. 239, 64 A. 2d 796 (1949). However, inequity or hardship is not a valid defense if the hardship is due to the defendant's own acts or to events clearly foreseeable: *Kramer v. Dinsmore*, 152 Pa. 264, 25 A. 789 (1893). Moreover, mere inadequacy of price, unless grossly disproportionate, will not defeat specific performance. *Borie v. Satterthwaite*, supra; *Welsh v. Ford*, 282 Pa. 96, 127 A. 431 (1925); Orr's Estate, 283 Pa. 476, 129 A. 565 (1925); *Oreovecz v. Merics*, 382 Pa. 56, 114 A. 2d 126 (1955)."

Here, we have found no evidence of fraud, mistake or undue influence. In addition, the evidence, including that of the expert witness for the plaintiff, satisfied us that the consideration provided for in the agreement was that which was bargained for by the defendant and was not grossly

disproportionate to the value of the land sold. Therefore, the defense of inadequacy of consideration has not been established.

IV
LACK OF TENDER OF CONSIDERATION

From the pleadings and pre-trial conference, we understood the defendant took the position that no decree for specific performance could be granted because the plaintiff failed to tender the sum of $3,000.00 to her by February 22, 1975.

The plaintiff, via his counsel, notified the defendant on January 10, 1973, of his intention to exercise the option and forwarded a deed to her for execution, acknowledgment and return at which time the consideration would be paid less any existing liens, and the defendant ignored the proposal to conclude the transaction. The plaintiff and his father orally notified the defendant several times of plaintiff's intention to exercise the option, and defendant responded by saying she had been offered more money for the real estate and did not want to go through with the sale. On January 8, 1975, plaintiff's counsel again notified the defendant of plaintiff's intention to exercise the option and that settlement would take place at his law office at 1:00 P.M. on February 8, 1975. The plaintiff went to the scheduled meeting on February 8, 1975 prepared to settle pursuant to the terms of the agreement. The defendant failed to attend in person or by counsel; failed to tender her deed and provided no explanation for her non-appearance or non-compliance.

At trial of the case, it did not appear that the defendant seriously pressed this theory as a viable defense, and we might properly consider it as banadoned. However, to remove all doubt we note:

> "A purchaser's non-performance or failure to tender performance, is excused by the vendor's acts which prevent performance or tender.
>
> "However, the most common excuse for non-performance is the vendor's refusal to perform . . . ", 32 P.L.E. Sales Realty Sect. 116, P. 352, and cases cited therein.

We conclude this defense is unavailable to the defendant on the facts and the law.

V
FAILURE OF CONSIDERATION

The defendant raised this defense under paragraphs 33 and 34 of her answer containing new matter. As a result of pre-trial conferences and pre-trial conference memoranda, it was determined that:

1. The defendant asserted failure of consideration as a defense on the theory that plaintiff had not paid to defendant the sum of $20,512.00, being the total consideration provided for in the agreement.

2. The consideration provided for in the agreement was so inadequate as to constitute a failure of consideration. (See paragraph 2 of Second Pre-Trial Conference Memorandum.)

With regard to the first of defendant's theories, we find that in paragraph 1 of the Second Pre-Trial Conference Memorandum, defendant's counsel conceded that plaintiff had paid all sums owed defendant under the agreement other than the principal consideration stated, i.e., the plaintiff paid $2,512.00, but not the $18,000.00 purchase price agreed upon for the real estate. Plaintiff's unchallenged testimony at trial, together with cancelled checks for $2,500.00 reinforces defense counsel's earlier concession. Therefore, defendant's first theory under "failure of consideration" is nothing more than a restatement of her previous contention that the plaintiff was required, as a matter of law, to tender to her the $18,000.00 purchase price before he could prevail in an action for specific performance. This, we have previously considered under "IV Lack of Tender of Consideration" and found to be without merit.

The defendant's second theory of "Failure of Consideration" is a restatement of her previously considered argument "III Inadequacy of Consideration". Whether denominated "failure of consideration" or "inadequate consideration", it remains a distinction without a difference and a defense not established by the defendant herein.

VI
STATUTE OF FRAUDS

The defendant here contended that the agreement is unenforceable as a matter of law because:

1. The agreement itself is legally insufficient to comply with the Statute of Frauds.

2. The description of the principle tract, i.e., the 140 acre, more or less, tract is legally insufficient to comply with the statute of frauds.

3. The descriptions of tracts 2 and 3 in the agreement are legally insufficient to make identification possible, and thus offends against the Statute of Frauds.

The Statute of Frauds here under consideration is the Act of 1772, March 21, 1 Sm. L. 389, Sect. 1, 33 P.S. 1, which provides:

> "From and after April 10, 1772, all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof; and moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said April 10, 1772, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law."

We are not certain what defendant and her counsel meant by their first contention, and they did not press the issue in their pre-trial or post-trial memoranda, or in their arguments at trial. The agreement was drafted by a layman and leaves much to be desired as a legal document. However, we are satisfied its form and poor choice of terms of legal art does not offend the Statute of Frauds.

The second and third contentions attack the sufficiency of the descriptions of the three tracts of real estate which are the subjects of the agreement. Tract No. 1 is the principle tract consisting of 140 acres, more or less. Tract No. 2 is a 3 acre tract containing defendant's home, which is excepted from the 140 acre tract. By paragraph IV of the agreement, the defendant granted plaintiff a limited first refusal option to

purchase Tract No. 2. Tract No. 3 is a 3 acre tract located on the North side of Route 30. By paragraph V of the agreement, the defendant granted plaintiff a limited first refusal option to purchase Tract No. 3.

In our judgment no consideration need by given to the effect of the Statute of Frauds on Tract No. 3 because the plaintiff does not seek enforcement of that option, and the legal sufficiency or lack of sufficiency of the description to Tract No. 3 has absolutely no effect on the two tracts (Nos. 1 and 2) located on the South side of Route 30. Hereafter, we shall limit our discussion to the effect of the Statute of Frauds on Tracts Nos. 1 and 2.

Counsel for the defendant correctly states the general rule that if the description is bad, that is indefinite or incomplete, the entire agreement is violative of the Statute of Frauds and the only remedy at this point would be a suit for damages and expenses. *Ladner on Conveyancing*, 3rd Ed. Sect. 5:03, P. 89. Counsel also correctly asserts that a contract for the sale of realty is unenforceable if the property is not designated with sufficient definiteness to determine what is intended to be conveyed, nor may oral evidence be accepted to overcome the failure of the writing to locate it with certainty, and the description of the land in a contract of sale must be clear enough to enable a surveyor to locate it with certainty. *32 P.L.E.*, Sales of Realty, Sect. 33, 36 and 53.

"It is not the function of a court of equity to make a contract for the parties nor to supply any material stipulation thereof . . . .(citing cases) While parole evidence cannot supply an omission in the terms of the written contract, it may be admitted to apply the description to the subject matter thereof. . . ." (Citations omitted). *O'Connell v. Cease*, 267 Pa. 288, 293 (1920). "The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transactions, so that, with the assistance of external evidence, the description, without being contradicted or added to, can be corrected with and applied to the very property intended, and to the exclusion of all other property." *Whiteside v. Winans*, 29 Pa. Super. 244, 250 (1905).

We quote with approval from *Bartlow v. Campbell*, 49 Lackawanna J. 126, 130, 130 (1949):

> "A description is sufficient if it points the way to definitely ascertainable boundaries and quantities of land (or) the identity of a known plot of ground, and parol evidence may be used to explain and define the description contained in the

> writing, but not to create the description itself. The general principle seems to be that the description ought to be clear enough to enable a surveyor to locate the land with certainty . . . ."

(See also *Pierro v. Pierro*, 438 Pa. 119, 123, 125, 126 [1970].

Applying the Statute of Frauds, supra, as above construed to the agreement the plaintiff here seeks to enforce, we understand the position of the defendant to be that the agreement is unenforceable because:

1. The description provided for the 140 acre, more or less, tract of real estate (Tract No. 1) is so vague and indefinite that it cannot be determined what specific real estate was intended to be conveyed.

2. Even if Tract No. 1 is sufficiently described to permit identification of its intended boundaries, the description of Tract No. 2, which both parties contemplated being excepted from the principle tract, is too vague and indefinite as to permit its identification and exclusion from the larger tract. Thus, it would be legally impossible for a surveyor to locate and lay out with precision the principle tract excluding therefrom the 3 acre exception.

We are satisfied from a review of the description of Tract No. 1 and the evidence introduced at trial, that U. S. Route 30, Pennsylvania Route 915, lands of Duvall and "others", can be readily identified and located by a surveyor. Therefore, we conclude the boundaries of Tract No. 1 can be located and surveyed, and the description of Tract No. 1 does not violate the Statute of Frauds. (See *Whiteside v. Winans*, supra, p. 250.)

We agree with the argument of counsel for defendant that the description of Tract No. 2 must also comply with the Statute of Frauds as above construed, or the description of Tract No. 1 will not effectively and accurately exclude the 3 acre tract, including defendant's home, which the parties clearly intended to except from Tract No. 1. We are not prepared to agree with defense counsel that the only possible legal effect of a conclusion that the description of Tract No. 2 violates the Statute of Frauds would be the rendering of the agreement as it applies to Tract No. 1 unenforceable.

The language of the agreement intended to except Tract No. 2 is:

"It being all that land within the above boundaries (i.e. of Tract No. 1) with the following exception or reservation: A three (3) acre parcel upon which is situated a frame dwelling house and outbuildings, the buildings to approximate the center of the parcel (unsurveyed)."

At the time of the several pre-trial conferences, we were impressed with defense counsel's position that the description of Tract No. 2 was almost totally lacking in certainty, and we could visualize no practical procedure by which a surveyor could locate and establish boundaries for the 3 acre tract. The plaintiff's surveyor was initially of the same opinion, for on cross-examination he testified that although he could center the buildings on 3 acres, there could be any number of forms and shapes for the entire tract, and that he would need additional evidence to establish boundaries for the tract. However, after further reflection, or perhaps after assistance from plaintiff's expert in mathematics, plaintiff's surveyor was recalled to testify he had made a mistake in his testimony the preceding day, and he was repudiating that testimony. The surveyor testified that he could locate the center point between the center point of the house and the center point of the out-building and then using U. S. Route 30 as one boundary of Tract No. 2; he could then lay out on the ground with certainty a rectangular tract with the center point between the dwelling and outbuilding on equal distance from each of the corners of the rectangle, and containing 3 acres, which would exactly comply with the description in the agreement.

While we confess to a vast lack of comprehension of anything beyond the simplest form of mathematics, it is our understanding from the testimony of plaintiff's surveyor and plaintiff's expert in mathematics, and defendant's surveyors that:

1. It is possible to geometrically determine a point equidistant from the center of the dwelling and the outbuilding.

2. If U. S. Route 30 is one of the boundaries and is not 204 feet from the center point of the buildings, then Tract No. 2 could not be in the shape of a circle containing 3 acres.

3. If U. S. Route 30 is one of the boundaries and is not 180.5 feet from the center point of the buildings, then Tract No. 2 could not be a square.

4. If the distance from the center point of the buildings to U. S. Route 30 is approximately 165 feet, the shape of Tract No. 2 could not be a circle, a square, an equilateral triangle or any other regular polygon containing 3 acres.

5. There are an infinite number of parallelograms and six-sided polygons that could contain 3 acres and have a point (i.e. center point of the buildings) in the geometric center of the 3 acres.

6. Only a rectangle would have corners of equal distance from the center (i.e. center point of the buildings).

The defendant contends vigorously that there is nothing in the description of Tract No. 2 justifying plaintiff's assumption that U. S. Route 30 must be or was intended to be one of the boundary lines of the tract. From this premise defendant proceeds to the conclusion that if there is no identifiable boundary line, then the tract may "float" in any 3 acre shape or form around the center point of the dwelling and outbuilding and clearly offends against the Statute of Frauds.

We must agree with the defense argument that nothing in the agreement identifies or, indeed, hints that U. S. Route 30 is to be one of the boundaries of Tract No. 2. However, we cannot ignore the established physical fact that the only public road accessible to defendant's home on Tract No. 2 is U. S. Route 30; nor will we assume that the parties intended to except the defendant's home from the principle tract and at the same time cause it to be landlocked and of no practical use to her. In our judgment the description establishing the buildings on Tract No. 2 as the center point of the tract and the on site physical facts dictate the conclusion that U. S. Route 30 was intended and should be considered as the North boundary line of Tract No. 2. " 'If the subject matter, the land, be described, we admit evidence in order to apply the description to the land, but we cannot admit parol evidence, first, to describe the land sold, and then, to apply the description' *Cohen v. Jones*, 274 Pa. 417, 419, 118 Atl. 362 (1922). *Sawert v. Lunt*, 360 Pa. 521, 62 A. 2d 34 (1948). Parol evidence may be used to explain and define the description contained in the writing, but not to create the description itself. *Bartlow v. Campbell*, 49 Lack. Jur. 126, 130 (1947)." *Pierro v. Pierro*, supra, p. 126.

As previously observed, the parties' experts agree that there are an infinite number of parallelgrams and six-sided polygons that could contain 3 acres with the center point of dwelling and outbuilding in the geometric center of the tract

and with U. S. Route 30 as the North boundary line of the tract. This being true, the defendant argues that the Court may not accept the contention of plaintiff that Tract No. 2 was intended to be and must be in the shape of a rectangle with the center point of dwelling and outbuilding as the center of the rectangle. In support of her position, defendant cites *Pierro v. Pierro*, supra, where the Supreme Court of Pennsylvania held unenforceable an agreement which required Joseph to transfer to Alphonso ten (10) acres and seven and one-half (7-1/2) acres of his 45 acre farm in Jamison, Bucks County, but with no more than 50% of the parcels fronting on either Poor House or Dark Hollow Road. We do not find *Pierro* applicable to the case at bar, for the Supreme Court quite accurately observed in addition to the fact that the tracts could take an infinite number of shapes that (1) it was possible less than 50% of the tracts would be on either road, (2) it was theoretically possible none of either parcel would be on either road, and (3) there were an infinite number of locations on the roads where the tracts could be located.

In support of his contention that Tract No. 2 must be a rectangle, plaintiff's counsel argues that: (1) common experience demonstrates that land is most often subdivided into rectangular shapes or as nearly rectangular shapes as possible; (2) common sense dictates the conclusion that the parties would not have intended an irregularly shaped tract, a circle or a multi-sided tract with skewed angles, and (3) reason and common sense analysis of the exception described as Tract No. 2 dictates that only a rectangle fits the description. Experience, common sense and reason are attributes highly regarded by the law, but separately or in combination, they are not without tangible evidence or authority controlling. This Court is not prepared to take judicial notice of the fact that land is most often subidivided into rectangular shapes, and no evidence has been introduced in support of that argument. Nor can we properly assume because plaintiff's counsel says so that the parties did not intend an irregular or uniquely shaped tract.

We do, however, find merit in the third argument presented in favor of a rectangular shape for Tract No. 2. Not only reason and common sense but a proper construction of the language, ". . . the buildings to approximate the center of the parcel.", requires Tract No. 2 to have a shape reflecting the expressed intention of the parties, viz. with the buildings as the center point of the tract. Only by the use of a rectangular shaped tract can the very center point of the dwelling and outbuilding be an equal distance from each of the four corners of the tract.

In *Felty v. Calhoon*, 139 Pa. 378 (1891), the plaintiff sought specific performance of an agreement for the sale of real estate described as:

> ". . . having a front of four hundred feet on West's run township road; starting at the corner of land now belonging to Frederick Drew, thence running along said road toward the Pittsburgh, Virginia & Charleston railroad, said distance of four hundred feet, and extending back along line of said Drew and another line to be fixed, sufficient, with said frontage, to make two acres of land; being a part of a larger tract of land now belonging to D. K. Calhoon, Esq."

The trial court sustained the defendant's demurrer concluding the description was too vague and only one line had been established with certainty. The Supreme Court reversed holding:

> "The object of the description is to identify the land with certainty. The learned judge was of opinion that, because one line remained to be fixed, it was impossible to identify it. If, however, the contract contains the means by which the lines can be run and marked out, the difficulty disappears. *Id certum est quod certum reddi potest.* The plain meaning of the contract is this: The lot is to have a front of four hundred feet on West's run township road. It is then to run back, of that width, along Frederick Drew's land, to a depth sufficient to make two acres. How far it must go to make two acres, can be ascertained with mathematical precision. A competent surveyor could run the lines, and locate the unfixed line, in an hour. It is evident that when the parties drew the agreement they did not know how deep the lot must be to give the two acres; that was left to be fixed by a survey. The case is too plain to require elaboration." (p. 382)

In *Felty v. Calhoon*, supra, nothing in the description evidenced the form that the tract to be conveyed would take, but the Supreme Court of Pennsylvania apparently had no difficulty in concluding it would be either a rectangle or a square depending upon the depth of the lateral lines required to encompass two acres. In *Tiffany Real Property*, 3rd Ed., Vol. 4, Sect. 997, p. 229 appears:

> "But not infrequently, if both the position of the smaller tract and its extent are stated, the description may be regarded as intended to cover a rectangular piece of land in the location named . . . ."

We conclude that the language of the agreement

establishes an intent on the part of both parties that Tract No. 2 would be a rectangle with its North property line adjacent to U. S. Route 30, and the center point between the dwelling and the outbuilding as the center point of the rectangle. The courses and distances of this rectangle can be established mathematically, and a survey can be made on the land establishing with certainty the boundary of Tract No. 2. We, therefore, conclude the description of Tract No. 2 does not violate the Statute of Frauds. We also conclude Tract No. 1 can be surveyed and Tract No. 2 can be excepted therefrom.

Consequently, we conclude that the Statute of Frauds is not a defense available to the defendant in the case at bar.

We previously noted that defendant's counsel took the position that if the description of Tract No. 2 violated the Statute of Frauds; then, of necessity, the agreement to sell Tract No. 1 must be void under the Statute because it would be impossible to carve out of Tract No. 1 the 3 acre Tract No. 2 as the parties intended. We do not find the conclusion asserted to be so readily determined.

In 162 A.L.R. 288 under the topic "Deed or Mortgage as Affected by Uncertainty of Description of Excepted Area" the general rule is stated as:

> "The cases are practically uniform in holding that uncertainty of or insufficiency in the description of an area of land which the grantor or mortgagor attempts to except from the operation of a deed or mortgage affects only the validity of the exception and not the validity of the instrument as a whole; accordingly the exception, if so uncertain as to be void, will be ignored and the deed or mortgage will have the effect of conveying the entire tract described including the part sought to be excepted."

(See also 91 C.J.S., Sec. 39, p. 890, 12 P.L.E. Deeds Sect. 51, p. 57.)

Counsel for defendant cites *Farrell v. Bowker*, 278 Pa. 323, 123 A. 305 (1924), *Mezza v. Beiletti*, 161 Pa. Super. 216 (1947), *Goldman v. McShain*, 432 Pa. 70 (1968) as authorities for the proposition that Pennsylvania has rejected the general rule enunciated in 162 A.L.R., supra. An analysis of *Farrell v. Bowker*, supra, does not support the conclusion asserted. In that case the decree of specific performance was refused on the grounds that the written agreement expressly provided for future joint action of the parties in identifying a half-acre of land reserved but never identified. However, the Supreme

Court of Pennsylvania seems to tacitly acknowledge the existence of the general rule by stating at page 327:

> "Under the express terms of the present agreement, the reservation is so connected with acts yet to be performed by the contracting parties, in order to determine and adequately describe the property involved, that there can be no application of the rule which appellants claim should control this case, namely, 'If the description of the exception is void for uncertainty, the title for the whole tract passes . . . . (8 R.C.L. 1097; 18 Corp. Juris 344, 348).' As correctly said in the work last above cited (18 C.J. 348), uncertainty of description does not render a reservation void where there is a method provided in the deed 'whereby it can be made sufficiently certain.' "

Neither *Mezza v. Beiletti*, supra, nor *Goldman v. McShain*, supra, are applicable to the facts or address themselves to the issues here under consideration.

Neither the research of counsel or our own research has produced any case law either accepting or rejecting the rule 162 A.L.R. asserts to be the general rule. It would thus appear that if we had concluded the description of Tract No. 2 violated the Statute of Frauds, we would be confronted with a case of first impression, and it would seem that the rationale for the general rule is more persuasive than defendant's argument that a valid enforceable contract for the sale of 140 acres should fall for want of an adequate description of a 3 acre exception despite the fact that she has had the use and benefit of plaintiff's rather substantial consideration for more than five years. To apply either the general rule or the conclusion urged by counsel for the defendant, would, in our judgment, produce a grossly inequitable result shocking to the conscience of the chancellor. Happily, we need not resolve this dilemma, for we are persuaded that the Statute of Frauds has been complied with as to Tracts Nos. 1 and 2.

COUNTERCLAIMS

The defendant has failed to sustain the requisite burden of proof as to her counterclaims. They will, therefore, be dismissed.

DECREE NISI

NOW, this 22nd day of September, 1977, the plaintiff's prayer for a decree of specific performance is granted.

Plaintiff's surveyor shall enter upon the lands of the defendant located on the South side of U. S. Route 30, Brush Creek Township, Fulton County, Penna. and survey Tracts Nos. 1 and 2 of the agreement pursuant to the detailed explanation given at trial. The deed conveying Tract No. 1 and excepting Tract No. 2 shall conform to the said survey.

Costs to be paid by the defendant.

Exceptions are granted the defendant.

HARSHMAN v. WILLIAMS, C. P. Franklin County Branch, No. 77 February Term, 1976

Negligence - Wrongful Death Action - Survival Action - Motion to Strike - More Specific Complaint - Administration Expenses - Household Services - Monetary Support.

1. The decedent's parents may not institute a wrongful death action within six months of the date of death under Pa. R.C.P. 2202.

2. Only the personal representative may institute a wrongful death action within six months of decedent's death.

3. A motion for a more specific complaint will be granted where the plaintiff sets forth a demand for administrative costs in a lump sum and does not plead each item included in the lump sum.

4. A motion for a more specific complaint will be granted where the plaintiff seeks to recover for household services the decedent rendered, but does not specify the economic value of these services.

5. In order to recover for monetary support rendered plaintiff by a decedent, plaintiff must plead regular monetary contributions made prior to death.

Daniel W. Long, Esq., Attorney for Defendant

Roy S. F. Angle, Esq. Attorney for Plaintiffs

OPINION AND ORDER

EPPINGER, P.J., November 10, 1977:

The Plaintiffs, Robert E. Harshman and Beulah B. Harshman, his wife, (Harshmans) individually, and as