April 1983

Property

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PROPERTY

I. ABANDONMENT


Cutone v. Cutone1 presented the court with a question of first impression in West Virginia: whether, and under what conditions, does a surviving spouse abandon his or her right to quarantine. Quarantine is the right of the surviving spouse to either inhabit or enjoy the rents from his or her former marital residence until dower is formally assigned.2 At common law quarantine only applied to widows.3 In West Virginia, however, quarantine is defined by statute and applies to surviving spouses of either sex.4

Edward Cutone, the plaintiff's husband, died testate in 1973. The marital residence of plaintiff and her husband was titled in his name only. Edward devised the residence to his son, the defendant. The plaintiff, who apparently was unaware of her rights relating to her marital abode, moved into an apartment. The defendant subsequently moved into the house before the plaintiff's dower had been assigned. Mrs. Cutone, after consulting a lawyer, petitioned the trial court for fair rental value of the house until dower was assigned and for the assignment of her dower. The trial court concluded that the plaintiff had abandoned her right to quarantine.

On appeal, the court first held that the right to quarantine may be abandoned.5 The court noted that this position is consistent with the general American view.6

Next, the court addressed the primary issue concerning the conditions under which quarantine should be deemed abandoned. The court applied the general rule on abandonment of possession of real property to the specific case of quarantine.7 Such an approach has been used by other courts on the same issue.8 In West Virginia, a person abandons land when he leaves the land, does not intend to repossess it and is apparently indifferent as to what happens to it.9 The court qualified the application of this rule to quarantine by holding

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1 285 S.E.2d 905 (W. Va. 1982).
3 See Amis v. Hiteshew, 106 W. Va. 703, 705, 147 S.E. 26, 28 (1929).
5 285 S.E.2d at 908.
6 Id. See, e.g., Owen v. Lee, 185 Va. 160, 37 S.E.2d 848 (1946). The Cutone court also noted that the right to abandon quarantine had been implicitly recognized in an earlier opinion. 285 S.E.2d at 908. See Love v. Ward, 121 W. Va. 516, 5 S.E.2d 411 (1939). The court in Love noted that at common law if a widow remarried, her right to quarantine terminated. 121 W. Va. at 518, 5 S.E.2d at 413.
7 285 S.E.2d at 908.
8 Although there is very little case law on the abandonment of quarantine, this seems to be the accepted approach. See, e.g., Owen v. Lee, 185 Va. 160, 37 S.E.2d 848 (1946).
that the surviving spouse must first know of his or her right to quarantine before that right is deemed abandoned. The court reasoned that many lawyers are unfamiliar with the nature of quarantine; thus, to hold laymen to knowledge of such an obscure right would be a gross misapplication of the law.

The court noted that the record in the instant case was not sufficiently developed for the court to rule. Therefore, it remanded the case to the circuit court of Hancock County for development of the evidence and for reconsideration in light of the factors it had set forth.

II. EASEMENTS


In Kell v. Appalachian Power Co., the court held that the defendant power company could not, pursuant to rights derived from a 1939 indenture, spray toxic herbicides from an aircraft over its right-of-way across the plaintiffs' property. The defendant argued that language in the indenture allowed it to cut and remove trees and other obstructions that interfered with the safe operation of its power lines and that it was therefore also entitled to aerially spray herbicides.

In analyzing the issue, the court first examined the general rights of parties to easement agreements such as the 1939 indenture. The grantee of an easement does not have the right to exclusive possession of the right-of-way. Moreover, the grantor retains the right to make any reasonable use of the property subject to the rights of the grantee. The court approved of, as consistent with these principles, a case which held that a grantee of an easement may not unreasonably increase the burden placed upon the servient tenement. The court held that the power company clearly has the right under these common law principles, and under the 1939 indenture, to enter upon the plaintiffs' property to cut and remove trees and other obstructions. However,

10 285 S.E.2d at 905, 909.
11 Id.
12 See id.
13 Id.
14 289 S.E.2d 450 (W. Va. 1982).
15 Id.
19 289 S.E.2d at 450, 454.
the court stressed that the power company's rights are not unlimited and that
the power company may not inflict unnecessary damage to the land or unre-
asonably increase the burden placed on the servient tenement.20

The court next analyzed the nature of aerial spraying to determine if the
power company's spraying of the right-of-way unreasonably burdened the
plaintiffs' interest in the land. First, the court noted that problems arise in the
aerial spraying of herbicides, since the herbicides cannot easily be contained to
a small area and may drift to adjoining areas.21 In addition, one or more po-
isons used in aerial spraying operations can kill crops, are toxic to fish and may
contaminate water sources.22 Second, the court noted that aerial broadcast
spraying of toxic herbicides has been called inherently dangerous and has been
found to be an extra hazardous activity.23

The court held that it was clearly not the intention of the parties to the
1939 indenture to allow the power company to destroy all vegetation within
the area sprayed and areas where the toxic herbicide could drift without regard
to whether the vegetation was actually a hindrance to the power company's
equipment.24 The court agreed with the power company's contention that a
grantee of an easement can take advantage of technological innovations in
utilizing his easement. However, the court held that the power company's right
to use technological improvements must be balanced against the landowner's
right to use the land adjacent to and underlying the power lines.25 In this case,
the court found that the power company's spraying of toxic herbicides unre-
asonably burdened the plaintiffs' right to use the land adjacent to the power
lines.26 The court remanded the case, instructing the trial court to enjoin the
power company from aerial spraying.

In Stricklen v. Kittle,27 the court decided that an avigation easement can-
not be acquired by prescription in West Virginia. An avigation easement is the
right to navigate in airspace by low and frequent flights over designated land.28

In Stricklen, the defendant Board of Education sought to construct a
school building on a site within 3,000 feet of the county airport. The plaintiff
airport authority asserted that the school building would lie under normal
flight patterns to and from the airport. They further asserted that they had
acquired an avigation easement over the property in question through hostile,
actual, open and exclusive use of the airspace directly overlying the proposed
school site. In order to protect its asserted rights in the airspace above the
planned school site, the airport authority sought to enjoin the Board of Educa-

20 Id.
21 Id.
22 Id. at 455.
23 Id. at 456. See Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir.), cert. denied, 393 U.S.
841 (1968).
24 269 S.E.2d at 450, 456.
25 Id.
26 Id. at 457.
28 Id. at 153. See United States v. Brondum, 272 F.2d 642, 645 (5th Cir. 1959).
tion from building the school on the site in question. Because of the scarcity of law on the issue, the trial court certified the question of whether an avigation easement can be acquired by prescription.

The supreme court found no cases that directly held that an avigation easement can be acquired by prescription.29 Although some cases have implied that an avigation easement may be acquired by prescription, courts have generally been reluctant to support such a position.30

The court also cited several practical problems that could arise from allowing an easement to be acquired by continuous overflights. First, changes in the type and number of overflying aircraft could modify or cancel the easement.31 Second, questions would arise as to whether more than one flight pattern over particular land would create more than one easement.32 Another problem cited by the court was the difficulty in determining the manner in which an easement would be acquired if several tracts of land were involved.33

The court noted that its holding is narrow, and left open the issue of whether an avigation easement could be acquired by contract.34 Also, the court took pains to distinguish an avigation easement from a clearance easement.35 The question of whether a clearance easement may be acquired by prescription was left unresolved.

III. Usury


Community Bank & Trust v. Keyser36 presented the court with the question of whether usury exists where a bank requires borrowers to maintain a balance in a checking or savings account causing the effective interest rate on the loan to exceed that allowed by law. The court implicitly adopted a rule that would allow a verdict of usury in such a case.37 Because a jury verdict had been returned against the parties asserting usury in this case, the court affirmed the trial court order entering the jury verdict.

In Community Bank & Trust, the defendant sought to raise funds from two banks for a corporation for which he was the president and sole stock-

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29 See 287 S.E.2d at 154-55. Although some courts have indicated that avigation easements can be acquired by prescription no court has adopted this position. See Drennan v. County of Ventura, 38 Cal. App. 3d 84, 112 Cal. Rptr. 907 (1974); Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 169 Cal. Rptr. 174 (1980); Peterson v. Port of Seattle, 94 Wash. 2d 479, 618 P.2d 67 (1980).
30 287 S.E.2d at 155. See supra note 29.
31 Id. 287 S.E.2d at 155.
32 Id.
33 Id.
34 Id. at 153 n.5.
35 Id. at 153 n.3. A clearance easement is the right to demand that no natural or man-made obstructions interfere with the flight of aircraft. Id. at 153. An avigation easement provides for low and frequent flights over the land in question and may or may not deal with obstructions. United States v. Brondum, 272 F.2d 642 (5th Cir. 1959).
37 Id. at 430.
holder. Each bank required, as a condition for the loan, that the corporation maintain an account with the bank with a balance equal to half the loan amount. Withdrawals could not be made from either account without the consent of the respective bank. Until default, the corporation made payments on the loan and debited Keyser's corporate account. Upon Keyser's default on the loans, both banks instituted actions against Keyser and the corporation for the unpaid balance of the loans. The defendants counterclaimed asserting that the loans were usurious. The defendants' theory was that since the banks required an account balance equal to half the loan amount as collateral for the loan, the loan, in effect, was equal to only half the amount interest was paid on.88 Thus, the effective interest rate was greater than that allowed by law.89

The court said that even under the defendant's theory of usury, the defendants were not entitled to judgment as a matter of law.90 First, the court relied on authority holding that in the absence of evidence that a borrower was limited in his use of funds in the required deposit at the bank, no usury existed.91 Second, the court indicated that it will not find a transaction to be usurious if the required deposit was not made by the party who received the loan. In the instant case the corporate defendant maintained the deposit in the required account; the individual defendant received the loan. However, the banks were not held to have been entitled to a directed verdict. Rather, the court held that the trial court was correct in submitting to the jury the questions of whether the individual defendant, as sole stockholder of the corporation, had maintained the required deposit and whether the individual defendant had access to the funds in the required account.92

In Community Bank & Trust the court said that it will look beyond the mere form of a loan transaction to determine if a loan is, in fact, usurious.93 Arguably, the court could have reasoned that if the mere form of the loan transaction is ignored, the loan was, in fact, usurious. Community Bank & Trust indicates that when a usury issue involves questions of fact which border on questions of law, the court will hold that usury is a jury issue.

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88 Id. at 429.
89 In 1971, the time in question, eight percent was the maximum interest rate allowed by law. See W. Va. Code § 47-6-5A (1969).
92 285 S.E.2d 424, 431.
93 Id. at 430.
IV. COAL, OIL AND GAS


In Bethlehem Steel Corp. v. Shonk Land Co., the court examined various aspects of West Virginia law applicable to coal mining leases. Bethlehem Steel Corporation had violated certain terms of a lease of property for the purposes of coal mining granted to Bethlehem by Shonk Land Co. The court considered issues concerning forfeiture of the lease, proper payment of royalties, holdover damages, and damages for Bethlehem's trespass on Shonk's land not included in the lease.

First, the court discussed the forfeiture issue. The lease had provided that if Bethlehem violated any of the lease's terms then Shonk could declare a forfeiture and take possession of all Bethlehem's improvements on the land. The lease had also given Bethlehem the option to renew the lease, provided that Bethlehem did not violate the lease's terms. The court held that Shonk could be made whole by monetary damages and by permitting Shonk to refuse to renew the lease.

The court relied on three theories in refusing to allow a forfeiture. First, the court held that a clause declaring a forfeiture for breach of any non-specific term in the lease is inadequate as a forfeiture clause. The forfeiture clause in the lease between Bethlehem and Shonk was thus invalid since it was such a "catchall" clause. This indicates that the court will not allow a non-breaching party to declare a forfeiture based on a "catchall" forfeiture clause, even where the parties are corporations dealing at arms length, as in the instant case. Second, the court held that Shonk had waived its rights to assert forfeiture. Third, similar to waiver, the court held that Shonk was estopped to assert its right of forfeiture. Shonk had, for a considerable period of time, accepted Bethlehem's payment of incorrect royalties and had not complained of Bethlehem's breach of the lease. The court reasoned that a lessor must act on a breach of the lease and not "[t]hrow [him] off his guard."

The second major issue in Bethlehem Steel concerned the basis on which Bethlehem was to pay Shonk royalties on the coal mined from the leased premises. Shonk argued that the lease required royalties to be paid on each ton of raw coal. Conversely, Bethlehem argued that the lease required that royalties be paid per ton of processed coal. The court agreed with Bethlehem. The

44 288 S.E.2d 139 (W. Va. 1982).
45 Id. at 141.
46 Id.
47 Id. at 142. A forfeiture would have permitted Shonk to re-enter, and take title to Bethlehem's improvements which were worth over $20 million.
49 288 S.E.2d at 143.
50 Id. at 143-44.
51 Id.
52 Id. (quoting Hukill v. Myers, 36 W. Va. 639, 15 S.E. 151 (Syl. pt. 2) (1892)).
court noted that the agreement between the parties stipulated that the royalty tonnage was to be calculated upon railroad car weights of coal. The court reasoned that the royalties were to be paid based on processed coal. The court also will hold parties to an interpretation of the contract that is consistent with the parties' long-term conduct. For ten years Bethlehem paid, and Shonk accepted, payments based on processed coal tonnage. Therefore, the court reversed the trial court's determination that royalties were due on raw coal.

The third major issue in *Bethlehem Steel* concerned holdover damages. Bethlehem had neither surrendered the premises at the end of the lease's term nor met the conditions for renewal. The court noted that the usual measure of holdover damages is reasonable rent. The court then relied on *Koppers Coal Co. v. Alderson* to explain that in West Virginia reasonable rental value for mineral leases means reasonable royalties. In addition, the court held that where a mineral lease does not make separate provisions for rental of buildings and equipment, reasonable royalty payments are the entire rental value of the property.

The court accepted the trial court's ruling that Bethlehem paid Shonk incorrect royalties for coal mining by punch mining. The lease provided that the same rate be applied to deep mining and "punch mining where the overburden is not disturbed." The court held that Bethlehem's method of punch mining, which disturbed the overburden, was subject to the strip mining rate. The court also commented on the damages assessed by the trial court for Bethlehem's trespass on Shonk's land not subject to the lease. The trial court found Bethlehem's trespass to be an innocent trespass. In West Virginia, the standard for innocent removal of coal is the market value of the coal, less reasonable cost of mining. The court held that the proper standard had been applied in this case.

V. JOINT SURVIVORSHIP BANK ACCOUNTS


*Smith v. Smith* involved a dispute over funds in a decedent's bank account. The account was a joint survivorship account registered in the names of

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53 288 S.E.2d at 145.
54 Id. at 145-46.
55 Id. at 146. See Prudence Coal Co. v. Perkins, 217 F. 569, 574 (4th Cir. 1914).
56 Bethlehem could not be in breach of the lease at the end of the lease term in order to have the option to renew. 288 S.E.2d at 152.
57 Id. at 149.
59 288 S.E.2d at 149.
60 Id. at 146.
61 Id.
63 288 S.E.2d at 147.
the decedent and the appellant. The appellant argued she was conclusively entitled to the funds under West Virginia law. Conversely, the appellee, the administratrix of the decedent's estate, asserted that a fiduciary relationship existed between the appellant and the decedent, which, under West Virginia law, would require the appellant to prove the decedent had intended to make a causa mortis gift of the funds to the appellant. The court held that the appellant must have exercised possession or control over the decedent's assets during the decedent's lifetime for a fiduciary relationship to have been established between the decedent and the appellant.

*Smith* is the latest in a line of cases interpreting a West Virginia statute which provides for the payment of the proceeds of a jointly registered bank account to the surviving joint registrant. The court in *Dorsey v. Short* had held that the West Virginia Code creates, in the absence of fraud or other serious fault, a conclusive presumption that the deceased depositor of a joint survivorship account intended the funds from the account to be a causa mortis gift to the party in whose name the account was jointly registered. However, the court later recognized in *Kanawha Valley Bank v. Friend* that, if the parties to the joint account occupy a fiduciary or confidential relationship, the presumption of survivorship is not applicable. Rather, the fiduciary relationship between the parties will create a presumption of constructive fraud. In such cases, the burden shifts to the surviving party to prove that the funds in the account were in fact a bona fide gift.

*Smith* indicates that the court will find that a fiduciary relationship existed between joint registrants of a survivorship bank account only if the surviving registrant exercised possession or control over the deceased registrant's assets. The court in *Smith* said that this possession or control must be exercised independently of the joint account. This implies that if a joint account was created solely to allow the surviving registrant access to the account in case the deceased became ill, then a gift of the funds is conclusively presumed.

The court contrasted the instant case with *Kanawha Valley Bank v. Friend*. In *Kanawha Valley Bank*, the surviving joint tenant of the bank account had general power of attorney from the decedent. Furthermore, he used this power of attorney to cash treasury bills belonging to the decedent and deposited the proceeds in the joint account. The court noted that, unlike the

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65 W. Va. Code § 31A-4-33 (1982) provides in part:
When a deposit is made by any person in the name of such depositor and another or others and in such form to be paid to any one of such depositors, or the survivor or survivors of them, such deposit, and any additions thereto, made by any of such persons, upon the making thereof, shall become the property of such persons as joint tenants; and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any one of them during the lifetime of them, or to the survivor or survivors after the death of any of them . . .

67 Id. at 871, 205 S.E.2d at 690.
69 Id. at 531.
70 286 S.E.2d at 147.
surviving joint tenant in *Kanawha Valley Bank*, there was no indication from
the record that the appellant ever assumed control over the decedent's assets,
by legal document or otherwise.\textsuperscript{71}

VI. WILLS


In *Reedy v. Propst*\textsuperscript{72} the court held that a testator clearly intended the
terms "a child . . . born of her body"\textsuperscript{73} to exclude adopted children.\textsuperscript{74} The
court has apparently retreated from the presumption announced in *Wheeling
Dollar Savings & Trust Co. v. Hanes*\textsuperscript{75} that adopted children are included
within the terms "child," "natural children," "issue," or similar language of a
will or *inter vivos* trust.\textsuperscript{76}

Pertinent provisions of the West Virginia Code, enacted in 1969, insure
that adopted children will be treated as natural children for all purposes.\textsuperscript{77} The
West Virginia Supreme Court of Appeals held in *Wheeling Dollar Savings* that
any testimony or *inter vivos* gift shall be construed in light of the 1969 statute.\textsuperscript{78} According to *Wheeling Dollar Savings*, an adopted child is excluded
from benefits in a will or *inter vivos* trust only if the instrument specifically
excluded adopted children by explicit language. The *Wheeling Dollar Savings*
court reasoned:

> While there may be testators and trustors who are so concerned with medieval
> concepts of "bloodline" and "heirs of the body" that they would truly be upset
> at the thought that their hard-won assets would one day pass into the hands of
> persons not of their blood, we cannot formulate general rules of law for the
> benefit of eccentrics.\textsuperscript{79}

This broad language concerning "heirs of the body," together with the
*Wheeling Dollar Savings* presumption in favor of adopted children, could have
lead the court in *Reedy* to conclude that "a child . . . born of her body" included
adopted children. The court in *Reedy* instead found that the testator
clearly intended by these terms to exclude adopted children. Thus, the
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\textsuperscript{71} Id.

\textsuperscript{72} 288 S.E.2d 526 (W. Va. 1982).

\textsuperscript{73} Id. at 530.

\textsuperscript{74} Id.

\textsuperscript{75} 237 S.E.2d 499 (W. Va. 1977).

\textsuperscript{76} Id.

\textsuperscript{77} W. Va. Code § 48-4-5 (1980). One form or another of this statute has been in effect since
1882. The statute makes adopted children "natural" children of their adoptive parents for all purposes,
and excludes adoptive children from any estate of inheritance or any obligation whatsoever
toward their biological parents.

\textsuperscript{78} 237 S.E.2d at 503-04.

\textsuperscript{79} Id. at 503.
Struing similar language. In neither case, however, was the court bound by a presumption similar to that of Wheeling Dollar Savings.

The court could have distinguished Reedy from Wheeling Dollar Savings on the basis of the interest protected by the 1969 statute. In Wheeling Dollar Savings an adopted child's bequest depended on whether the adopted child was included in the operative language of the will. In Reedy the estate of the parent of an adopted child vested only if the adopted child was included in the operative language of the will. Since in Reedy an adopted child's rights were not directly affected, the court could have held the presumption in favor of adopted children was not applicable on that basis.

The cardinal rule in the construction of a will in West Virginia is that the intent of the testator is controlling. The holding in Reedy implies that the court will give more effect to common law principles in construing a testator's intent concerning the rights of adopted children than Wheeling Dollar Savings would indicate.

In other developments in the area of wills during the survey period, the court in Barone v. Barone established two new causes of action in West Virginia. First, the court recognized an equitable cause of action for fraud in the procurement of a will. Second, the court established a claim for tortious interference with a testamentary bequest.

Barone was originally an action to require distribution of estate assets following the probate of a will. A deposition revealed that the will was prepared containing dispositive provisions contrary to the testator's wishes. The appellant, the testator's daughter, crossclaimed and counterclaimed against the preparer of the will and the party who gave the deposition. The appellant alleged fraud in the procurement of the will and tortious interference with her bequest. The trial court granted a motion against the appellant for failure to state a claim on which relief may be granted.

The supreme court reversed the trial court, holding that fraud in the procurement of a will was a claim for which relief could be granted in West Virginia. The court noted that its holding was consistent with the principle that equity will establish constructive trusts for fraudulently deprived beneficiaries.

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80 288 S.E.2d 526, 530.
82 237 S.E.2d at 503-04.
83 288 S.E.2d at 530.
84 Id. at 528.
85 294 S.E.2d 260 (1982).
86 294 S.E.2d at 263.
87 Id. at 262-63. The court distinguished a prior decision, Tenant v. Tenant, 43 W. Va. 547, 27 S.E. 344 (1897), that had refused to impress such a trust on the grounds that the facts of Tenant did not support a cause of action for fraud in the procurement of a will. See also Monarch v. Koloorski, 322 Mass. 466, 78 N.E.2d 4 (1949); Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168 (1949); Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758 (1933); Pope v. Garrett, 147 Tex. 18, 211
The court also found that tortious interference with a testamentary bequest is a tort in West Virginia. The court analogized this tort to tortious interference with business interests and tortious interference with contractual relations, both of which are recognized as torts in West Virginia.

The court held that appellant’s claims were not barred by the two-year probate statute of limitations. Since the appellant’s actions for tortious injury and equitable fraud could not have been heard in the probate proceedings, the court reasoned that the probate contest statute of limitations could not apply. Therefore, the court found that appellant’s claims were barred only by laches and the tort statute of limitations, respectively.

In so holding, the court disapproved of language in Weese v. Weese. In Weese, the court held that the probate statute of limitations barred a claim based on the defendant’s fraudulent presentation of an earlier will to probate, with knowledge of a later will. The Weese court said in dicta that any claim of fraud asserted to challenge the probate of a will, including fraud in the procurement of the will, was governed by the probate contest statute of limitations. Weese is distinguishable from Barone since the claim of fraud in Weese could have been brought in probate court. The court declined to distinguish Weese, and characterized Weese as overbroad since Weese implies that all claims of fraud related to a will are governed by the probate statute of limitations. The court, therefore, overruled Weese to the extent that it is inconsistent with Barone.

VII. Deeds


In Sheppard v. Clay Peacock Coal Co., the supreme court held that the trial court erred in refusing to consider whether the mental infirmity of a deceased grantor, together with the inadequacy of the purchase price, warranted

S.W.2d 599 (1948).


294 S.E.2d at 264; W. VA. CODE § 41-5-9 (1982). The court noted that other jurisdictions have recognized that a probate statute of limitations is inapplicable to actions which could not be brought in probate court. 294 S.E.2d at 264. See, e.g., Alexander v. Compton, 57 Ohio App. 2d 89, 385 N.E.2d 638 (1978).


Id. at 243-44, 58 S.E.2d at 808.


294 S.E.2d at 264.

Id.

285 S.E.2d 902 (W. Va. 1982).
the cancelling of a deed. The trial court considered the inadequacy of consideration and the mental infirmity of the deceased grantor as separate theories on which to set aside the deed. Since the purchase price was not inadequate, the trial court rejected that theory. The trial court also found the decedent mentally competent at the time of the deed. Therefore, the trial court refused to cancel the deed.

The court relied on Kadogen v. Booker, to conclude that the mental infirmity of the grantor, coupled with the inadequacy of consideration, could warrant setting aside the deed. In Kadogen, the court had affirmed the setting aside of a deed given by a seventy-five year old, physically infirm widow. The consideration given for the deed had been one dollar and repairs made on the widow's house. The low purchase price and the grantor's poor physical and mental condition were considered together in Kadogen as grounds on which to cancel the deed.

In the instant case the decedent had sold the property in question for far less than its ultimate resale price. At the time of the deed, four months before his death, the decedent was seriously ill. The court remanded the case, instructing the trial court to consider whether these circumstances warranted setting aside the deed.

Joseph J. Starsick, Jr.