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Deeds--Construction--Where Not Effective until the Future

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stances of contempt.[21] The *Smith* case could have been based partly on the fact that this statute[22] was intended by the legislature to be applicable to both law courts and chancery tribunals.[23]

Since the conclusion reached by the instant case is that the order should be entered upon the law docket in order to conform to the well-established procedural precedents, in view of the fact that the recent tendency seems to be away from those precedents, it would seem that the court should have gone further and held that the entry on the chancery side of the order imposing punishment was not error.

W. H. S.

DEEDS — CONSTRUCTION — WHERE NOT EFFECTIVE UNTIL THE FUTURE. — In consideration of love and affection and one dollar, *X* and her husband executed an instrument, without warranty, granting to their children in fee a tract of land. The instrument contained the clause, "this grant does not take effect until the death of the said Mary E. Queen. . . .", and was promptly recorded. *Held*, that the instrument will be construed as a deed vesting in the grantee an immediate estate though its enjoyment is postponed until the grantor's death. *Liggett v. Rohr*.[1]

In the early English case of *Adams v. Savage*[2] it was held that a use limited after an estate for years to a person not *in esse* was bad as a contingent remainder unsupported by a freehold. This type of estate was impossible at common law because there was no one to take the seisin at the time of the conveyance.[3] But, by way of a use, a freehold could be granted to commence in the future.[4] Later English cases[5] hold that a future contingent devise after an estate for years is a good executory devise and not a bad remainder. As there is no intelligible difference between a springing executory devise and a springing use, if the above estate were created by deed it would be a valid springing use in England today.[6]

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21 W. VA. REV. CODE (1931) c. 61, art. 5, §§ 26-27.
22 W. VA. CODE (Hogg, 1913) c. 147, § 27.
23 Hallam v. Alpha Coal Co., 9 S. E. (2d) 818 (W. Va. 1940).

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1 7 S. E. (2d) 867 (W. Va. 1940).
2 2 Ld. Raym. 854, 92 Eng. Rep. R. 71 (1703).
3 Adams v. Savage, 2 Ld. Raym. 854, 92 Eng. Rep. R. 71 (1703); Rawley v. Holland, 22 Vin. Abr. 189, 2 Eq. Cas. Abr. 753, 22 Eng. Rep. R. 638 (1712).
4 GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) 54.
5 Gore v. Gore, 2 P. Wms. 28, 24 Eng. Rep. R. 629 (1722); Harris v. Barnes, 4 Burr. 2157, 98 Eng. Rep. R. 125 (1768).
6 GRAY, RULE AGAINST PERPETUITIES 54.

Today in West Virginia our statute expressly covers this situation by providing, "Any estate in such property may be made to commence in futuro, by conveyance inter vivos, in like manner as by will, and any estate which would be good as an executory devise or bequest, shall be good if created by conveyance inter vivos."[7] The express purpose of this statute was to make springing uses valid if created by deed.[8] Due to this any springing use, freehold or less, is a valid conveyance *inter vivos* today in West Virginia.[9]

In determining whether an instrument is testamentary or not, the courts do not allow language peculiar to either deeds or wills, or the belief of the maker as to the character of the instrument, or the name given to it by them, to control inflexibly its construction.[10] Giving due weight to these circumstances, the courts look further and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give it such construction as will effectuate the manifest intention of the maker.[11] That the instrument is delivered, acknowledged, recorded, or not witnessed, or any of these is evidence, though not decisive, that a deed was intended.[12] Literally the provision that the instrument should not take effect until the maker's death sounds testamentary. This language is suggestive of the ambulatory concept of a will and in it may lurk the idea that it is revocable by the maker.[13] Most courts give these instruments the liberal construction of immediately passing the fee subject to a life estate in the maker.[14] This seems a reasonable interpretation when the other language of the instrument contains words of present grant. The words of present grant are not to be paralyzed by the clause deferring enjoyment of the estate, when we can assign to it a reasonable function and give each clause its fair relative meaning, when laid by the side of the other clauses.[15] When the grantor reserves the right of revocation

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[7] W. VA. CODE (Michie, 1937) c. 36, art. 1, § 9.

[8] See GRAY, RULE AGAINST PERPETUITIES §§ 58-60, as to reason for the adoption of this provision in VA. CODE (1819).

[9] See Abbott v. Holway, 72 Me. 298 (1881) where the Maine court without a statute held valid a contingent springing estate to the survivor.

[10] Pass v. Stephens, 22 Ariz. 461, 198 Pac. 712 (1921); Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898).

[11] Seay v. Huggins, 194 Ala. 496, 70 So. 113 (1915); Trumbauer v. Rust, 36 S. D. 301, 154 N. W. 801 (1915).

[12] Seay v. Huggins, 194 Ala. 496, 70 So. 113 (1915); Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898).

[13] ATKINSON ON WILLS (1937) 145.

[14] Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898); Rust v. Commercial Coal & Coke Co., 92 W. Va. 457, 115 S. E. 406 (1922).

[15] Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898).

in an instrument in the form of a deed, the instrument is properly held to be testamentary and invalid as not executed as a will.[16]

Since looking at all the facts, there were irrevocable delivery, recordation, and lack of witnesses, it seems that the instrument in the present case was properly held to be a deed. The case is analogous to the quasi-escrow transaction wherein the grantor delivers the deed to a third person with the instruction to give it to the grantee on the grantor's death.[17] This is deemed to pass the fee to the grantee at once subject to a life estate reserved by implication in the grantor.[18]

The case is close and appears to be sound. On the other hand, if there had been any evidence of the intent of the grantor to reserve a power of revocation over this alleged conveyance, the result should have been otherwise, as the instrument would have been testamentary.

W. J. C.

LANDLORD AND TENANT — TERMINATION OF A YEAR TO YEAR TENANCY. — *D* (county court) leased a farm from *P* for a pauper family. The family held over after the expiration of the one-year term, and *D* continued to pay rent for a year and a half, at which time *D* entered a general order that it would no longer be responsible for the support of paupers. The clerk of the court called this order to *P's* attention, but no other notice was given as to the termination of the tenancy. *Held,* that a tenancy from year to year may be terminated only in the way prescribed by the statute.[1] *Deitz v. County Court of Nicholas County.*[2]

At common law to terminate a year to year tenancy a six-calendar-months parol notice, expiring always with the same year as the tenancy, was adequate.[3] By agreement of the parties the

[16] Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482 (1892); Spangler v. Vermillion, 80 W. Va. 75, 92 S. E. 457 (1917).
[17] Thurston v. Tubbs, 257 Ill. 465, 100 N. E. 947 (1913); Noah v. Noah, 246 Mich. 324, 224 N. W. 611 (1929).
[18] Wilson v. Jones, 280 Mass. 488, 182 S. E. 917 (1932); Noah v. Noah, 246 Mich. 324, 224 N. W. 611 (1929).

[1] W. VA. CODE (Michie, 1937) c. 37, art. 6, § 5: "A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same." The remainder of the section deals with the termination of periodic tenancies of less than a year, service of the notice, and manner of contracting out of the statute.
[2] 8 S. E. (2d) 884 (1940).
[3] 2 MINOR'S INSTITUTES (4th ed. 1892) 201.