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Deeds--Rules of Construction--Intent of Grantor

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RECENT CASE COMMENTS

DEEDS—RULES OF CONSTRUCTION—INTENT OF GRANTOR.—*O* conveyed to *H* and *W* and to the survivor of them in fee. *W* survived *H* and subsequently executed a warranty deed granting "all her undivided interests" in the land, "it being her one-half undivided interest". Then following the habendum clause *W* conveyed "all the rights, title and interest that is vested in her", expressly reserving the right to occupy the house on the premises. By a final provision, *W* reserved from the conveyance any dower right held by her. Suit was later brought for construction of the two deeds. *Held,* that the first deed creates a tenancy by the entireties with survivorship,[1] and that the grantee under the second deed takes a fee simple absolute. *Realty Securities & Discount Co. v. National Rubber & Leather Co.*[2]

The modern doctrine of construing deeds is to view the instrument as a whole, rather than to divide it into its formal parts; and in such construction, the intention of the grantor will be sustained unless this violates some rule of law.[3] If, in a deed, there be two clauses so totally repugnant to each other that these cannot stand together, effect will be given to the first, and the latter rejected.[4] But where the provisions of the granting and habendum clauses of a deed disclose possible inconsistency or repugnancy, creating doubt as to the nature of the estate sought to be conveyed, those must be read together in the light of all the provisions of the instrument and, if reasonably possible, harmonized.[5] Of course,

[1] W. VA. CODE (Michie, 1937) c. 36, art. 1, § 19 provides that when any joint tenant or tenant by the entireties shall die "his share shall descend or be disposed of as if he had been a tenant in common." This, in effect, abolished survivorship. However, c. 36, art. 1, § 20 provides that survivorship shall be preserved "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." The instant case is a rare application of this section. The habendum clause of the second deed likewise contained the language of survivorship. Realty Discount & Securities Co. v. National Rubber & Leather Co., 7 S. E. (2d) 49, 50 (W. Va. 1940): "To have and to hold unto the said party of the second part, and to the survivor of her, the said property hereby conveyed, forever." However, this had no significance whatever, for the grantee was then single.

[2] 7 S. E. (2d) 49 (W. Va. 1940).

[3] Hurst v. Hurst, 7 W. Va. 289 (1874); Uhl v. Ohio River Ry., 51 W. Va. 106, 41 S. E. 340 (1902); Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119 (1910); Maddy v. Maddy, 87 W. Va. 581, 105 S. E. 803 (1921); Bartlett v. Petty, 93 W. Va. 608, 117 S. E. 551 (1923); Blake v. Hedrick, 94 W. Va. 761, 120 S. E. 906 (1924); Thompson v. Smitley, 108 W. Va. 463, 151 S. E. 435 (1930); 16 AM. JUR., Deeds, § 170; 7 THOMPSON, REAL PROPERTY (1940 ed.) § 3527.

[4] Paxton v. Benedum-Trees Oil Co., 80 W. Va. 187, 94 S. E. 472 (1917).

[5] Maddy v. Maddy, Bartlett v. Petty, both *supra* n. 3; 7 THOMPSON, REAL PROPERTY § 3527; 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 980.

where there is ambiguity in a deed, or where it admits of two constructions, the one will be adopted which is most favorable to the grantee;[6] but this rule of construction should be applied only as a last resort.[7] It should be noted that the granting clause of a deed will prevail over subsequent clauses which would have the effect of abridging the estate conveyed,[8] subject to exceptions where the intent of the parties is otherwise.[9] Also, one group of cases holds that the particular interest specifically or impliedly granted may be enlarged so as to cover the grantor's estate in the property, where the deed contains a further clause indicating such a purpose.[10] On the other hand, courts have refused to enlarge the interest specifically conveyed merely because of subsequent general language under which a larger interest held by the grantor might possibly pass.[11]

It is submitted that the language of the second deed here throws clear light on the intent of the grantor, revealing a purpose to convey only a one-half undivided interest. The use of the expression "undivided interests" in the granting clause indicates a belief that the grantor held simply as a cotenant; and the expression, "it being her one-half undivided interest", bears this out. Furthermore, the reservation of any dower rights is further evidence of the fact that *W*, the grantor, thought she owned in common with the heirs of *H*, with dower rights in the other one-half undivided interest. It seems difficult to explain these provisions in any other way. Hence, since all rules of construction give way to the actual intent, if that can be ascertained from the

[6] Deer Creek Lumber Co. v. Sheets, 75 W. Va. 21, 83 S. E. 81 (1914); Paxton v. Benedum-Trees Oil Co., 80 W. Va. 187, 94 S. E. 472 (1917); Brewer v. Yellow Poplar Lumber Co., 100 W. Va. 304, 130 S. E. 454 (1925). Analogously, unless a contrary intention shall appear in a deed, a conveyance shall be construed to pass the entire estate vested in a grantor. W. VA. CODE (Michie, 1937) c. 36, art. 1, § 11.

[7] See White Flame Coal Co. v. Burgess, 86 W. Va. 16, 21, 102 S. E. 690 (1920); Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 298, 114 S. W. 531 (1908); 4 TIFFANY, REAL PROPERTY § 979.

[8] McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566 (1889); Sequatchie Land Co. v. Sewanee Coal, Coke & Land Co., 137 Tenn. 313, 193 S. W. 106 (1917); Moran v. Somes, 154 Mass. 200, 28 N. E. 152 (1891); Preston v. Heiskell's Trustee, 32 Gratt. 48 (Va. 1879); Murphy v. Murphy, 132 N. C. 360, 43 S. E. 922 (1903); Bourne v. Farrar, 180 N. C. 135, 104 S. E. 170 (1920); Note (1938) 115 A. L. R. 192, 195.

[9] Zittle v. Weller, 63 Md. 190 (1885); Faivre v. Daley, 93 Cal. 664, 29 Pac. 256 (1892); Haley v. Sippley, 317 Mo. 505, 297 S. W. 362 (1927); Note (1938) 115 A. L. R. 192, 199.

[10] Murphy v. Murphy, 132 N. C. 360, 43 S. E. 922 (1903); Hoover v. Roberts, 146 Kan. 785, 74 P. (2d) 152 (1937); Note (1938) 115 A. L. R. 192, 193.

[11] Jackson, *ex dem.* Stevens v. Stevens, 16 Johns. 110 (N. Y. 1819); Ballantine's Appeal, 67 Pa. 178 (1870); Note (1938) 115 A. L. R. 192, 194.

deed, it should not have been necessary to resort to any of the foregoing somewhat arbitrary rules of construction not predicated upon having a knowledge of the intent of the parties.

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LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND —RULE IN DUMPOR'S CASE.—*P* leased the right to mine all the coal under certain lands to *X* who covenanted that he would not assign or encumber the lease without consent. Later an "Amendatory and Supplemental Lease Agreement" was made by the parties, in which *P* gave permission to *X* to mortgage the leasehold to *D*. Eventually *X* abandoned the operation. *P* then filed a bill asking that the leasehold and equipment "be sold as a whole and as a mining unit, subject to the terms and conditions of said original lease and amendatory and supplemental lease." The court so decreed, and *D*, the mortgagee, appealed contending that the order to sell the leasehold should have provided for future assignment without the necessity of *P's* consent. *Held*, that the purchaser can not assign or encumber without the lessor's consent. Rule in *Dumpor's* case does not apply. *Reconstruction Finance Corp. v. Kentucky River Coal Corp.*[1]

The rule in *Dumpor's* case[2] provides that if a lease be given with a condition against assignment by the lessee or his assigns without the consent of the lessor, and such consent be given to even one assignment without restraint as to future assignments, no subsequent alienation can be a breach of the condition—the doctrine being founded on the traditional hostility of the law toward conditions for forfeiture. By holding that the purchaser could not assign further without the lessor's consent, the court refused to apply the ancient rule to the facts in the instant case.[3] It should be noted, incidentally, that in *Dumpor's* case the condition expressly applied both to the lessee *and his assigns*. The leading West Virginia decision on the issue[4] involved a condition against assign-

[1] 114 F. (2d) 942 (C. C. A. 6th, 1940).

[2] Dumpor v. Symms, 4 Coke 119, 76 Eng. Rep. R. 1110 (1603).

[3] The court said, at page 945: "The trend of recent cases, however, is to limit strictly or even repudiate the rule in Dumpor's case. . . . It would be inequitable to apply it here. . . ."

[4] Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 302, 112 S. E. 512 (1922): "Notwithstanding the fault found with it, [*i. e.*, the rule in Dumpor's case] . . . . it seems to be recognized as unimpeachable common law in all jurisdictions and applied, in the absence of a statutory repeal or modification thereof. . . . However much there might be an inclination to dissent from it, as an original proposition, if any at all, it is so well fortified in precedents