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Abstracts of Recent Cases

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for doubt. It would appear that existing case law has adequately covered these provisions, but as in the case of all statutes the ultimate determinations lie with the courts.

J. C. W., Jr.

ABSTRACTS OF RECENT CASES

CONSTITUTIONAL LAW.—The supreme court proceeding in mandamus directed *D*, a circuit judge, to authorize the court reporter to furnish to *P*, who had been convicted of murder, a copy of the trial proceedings without charge under a statute providing that a copy of the trial proceedings should be furnished without charge to an indigent person for the purpose of appeal when the court has appointed counsel for such indigent person. W. VA. CODE c. 51, art. 7, § 7 (Michie 1955). *D* contended that the statute did not apply to *P* since he did not have court appointed counsel. *Held*, that the statute favors the class of indigent persons for whom counsel has been appointed in criminal proceedings; and as to indigent persons for whom counsel has not been appointed is violative of the guarantees of due process and equal protection provided for in the fourteenth amendment and the Constitution of West Virginia. *Linger v. Jennings*, 99 S.E.2d 740 (W. Va. 1957).

This case points out that even though in this state a defendant in a criminal proceeding is not, as a matter of right, entitled to a writ of error, nevertheless a right to apply for a writ of error is guaranteed by the fourteenth amendment and should not be refused because of the defendant's inability to pay for a transcript for such purpose. The court followed *Griffin v. Illinois*, 351 U.S. 12 (1956), which is fully treated in Comment, 59 W. VA. L. REV. 79 (1956).

J. E. J.

EASEMENTS—PRESCRIPTIVE RIGHT.—*P* brought suit to compel *D* to remove two gates placed across a private road leading from *P*'s adjoining property to a public road, and to restrain *D* from obstructing the road in the future. There was no instrument granting the way nor any contract defining rights of adjoining property owners. Evidence established that *P* had a prescriptive right to use the road although gates and bars had been maintained there for many years. *Held*, reversing the lower court, that a landowner may put

gates and bars across a way over his land which another is entitled to enjoy, unless there is something in the instrument creating the way or in the circumstances under which it has been acquired or used, which shows that the way is to be open. *Hartsock v. Powell*, 99 S.E.2d 581 (Va. 1957).

This case demonstrates the weight of authority throughout the United States that a right of way gained by adverse use, gives rights commensurate with such use. If one acquires a way by prescription, with gates thereon, he is restricted to the use of it with the gates and cannot have them removed as obstructions. Although authorities are at variance, the weight of authority is that a right also exists in the landowner to erect gates on a previously free right of way in the case of agricultural lands, if it does not substantially interfere with the use of the easement established. Annot., 73 A.L.R. 778 (1931); 17A AM. JUR., *Easements* § 145 (1957); 28 C.J.S., *Easements* § 98 (1941); 3 TIFFANY, REAL PROPERTY § 812 (3d ed. 1939).

J. E. J.

WILLS—CAPACITY.—“No person of unsound mind, or under the age of eighteen years, shall be capable of making a will.” W. VA. CODE c. 41, art. 1, § 2 (Michie Supp. 1957).

The right or privilege of disposition of property by will is accorded by statute in all American jurisdictions, a majority of which require the person making the will to be of majority. 57 AM. JUR., *Wills* §§ 50, 54 (1948). This recent West Virginia statute may be appraised on the basis that if a person under twenty-one can own property, and also dispose of it by an inter vivos conveyance, why should he not have a power of testamentary disposition. 5 TIFFANY, REAL PROPERTY § 1369 (3d ed. 1939).

There remains however, an inconsistent limitation in both cases in that the testamentary disposition is limited to persons over eighteen and inter vivos conveyance by persons under twenty-one are voidable.

J. E. J.

OPTIONS IN LEASES—RULE AGAINST PERPETUITIES.—“An option contained in any lease to purchase the whole or any part of the leased premises, exercisable either during the term of the lease or

immediately upon its termination, shall, if otherwise valid, be enforceable in accordance with its terms, irrespective of the rule against perpetuities. In any suit to enforce such option, the lessor, or the successor in interest of the lessor, shall not plead the rule against perpetuities as a defense, and the same shall not constitute a defense either in law or in equity: Provided, this section shall not apply to any lease heretofore executed." W. VA. CODE c. 36, art. 1, § 24 (Michie Supp. 1957).

This statute puts West Virginia in line with the present trend in the United States to exclude from the rule against perpetuities, options in leases to purchase before or upon termination of the lease. Annot., 162 A.L.R. 581 (1946). This view is also propounded by RESTATEMENT, PROPERTY § 395 (1944).

The scope of this statute does not include regular options to purchase which are subject to the rule against perpetuities in this state as in a majority of jurisdictions in the United States. Annot., 162 A.L.R. 581 (1946).

J. E. J.