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Deeds--Mental Capacity to Execute

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DEEDS—MENTAL CAPACITY TO EXECUTE.—The Supreme Court of Appeals of West Virginia, in a recent case, 1 has laid down the rule that "when * * * a grantor in a deed is below the average of mankind in intellectual capacity, the law raises a presumption against the validity of the deed." In thus prescribing a definite intellectual standard for persons who convey property, the case marks a departure from former well-established holdings of the West Virginia and the Virginia courts. In Greer v. Greers, 2 the Supreme Court of Appeals of Virginia, in discussing the question of competency of grantors, has said that "no particular degree of mental acumen is to be prescribed as the measure of one's capacity to execute deeds." This enunciation has been repeatedly re-affirmed by the same court. 3 The West Virginia Supreme Court of Appeals, in considering the same subject, 4 has said that "courts do not measure the capacity of persons" (grantor). These holdings of the Virginia and the West Virginia courts accord with the competency rule enforced elsewhere. 5 The usual statement of the competency rule is that the law does not attempt to determine the degree of intelligence that parties must possess to bind themselves by deed. 6 The legal presumption is that all persons, with well defined exceptions, 7 are competent to contract and therefore execute valid deeds. And the only test of competency laid down by the courts is "the capacity to recall the property conveyed, the manner of disposing of it and the object of the bounty." 8 Or differently stated, "if a person is capable of knowing the nature, character and effect of his deed at the time of making it, he is considered legally composit mentis." 9 In making application of this rule the courts have held that old age, abatement of mental vigor and impairment of memory do not overcome the legal presumption of competency. 10

Comparison of the foregoing cases discloses that a higher degree of intellectual capacity is required of the grantor under the hold-

2 9 Gratt. 330 (1852).
3 Beverly v. Walden, 20 Gratt. 147 (1870); Wampler v. Harrell, 112 Va. 641, 72 S. E. 135 (1911); Huff v. Welch, 115 Va. 87, 78 S. E. 572 (1913).
5 See 13 Cyc. 573 and cases there cited.
6 1 Devlin, Deeds, § 64.
7 Insane, Infants, etc., 1 Devlin, Deeds § 64.
8 Woodville v. Woodville, supra; Miller v. Rutlege, 82 Va. 363, 1 S. E. 202 (1887).
ing of the case of Morris v. Williams-Garrison,\textsuperscript{11} for it is apparent that there are many persons who may know "the nature, character and effect of their deeds" and yet be "below the average of mankind in intellectual capacity." Certain objections, however, are to be urged against the use of "the average of mankind in intellectual capacity" as a standard to determine the competency of persons to execute deeds. Surely to ascertain "intellectual capacity," mental measurements would have to be made, something the courts before the case of Morris v. Williams-Garrison,\textsuperscript{12} declared they would not do. But it is obvious that if "the average of mankind" is to be ascertained, not only would individual mental measurements have to be made, but mental measurements of the social or political group would be necessary; for the standard proposed as a test of the competency of grantors—"the average of mankind"—could only be determined in this way. Psychologists, however, are far from being in accord among themselves as to the use and value of the mental tests they sponsor, and none of them have even yet claimed that the intellectual average of mankind has been calculated. It is submitted the courts have no machinery juridically to make such determination.

A consideration of the law of averages discloses that the rule in the case of Morris v. Williams-Garrison, supra, divides mankind, and, therefore, those who have property to convey into two approximately equal groups—those above the average, and those below the average, in intellectual capacity: for it is a necessary corollary of the law of averages that there should ordinarily be approximately as many in one group as in the other. Those above the average the rule of Morris v. Williams-Garrison declares competent to convey, those below, incompetent. Herein is the further objection to the rule that it places under contractual disability, so far at least as the execution of deeds go, nearly one-half of mankind, and, therefore, of the persons who have property to convey. It is difficult to see how, in such a situation, there could be a presumption of competency on the part of any one to execute deeds. But even if the law should allow a presumption of competency, it would be subject to be overcome by testimony that the particular grantor was "below the average of mankind in intellectual capacity." How could a prospective purchaser of property, under this rule, ever be certain that his grantor was

\textsuperscript{11} Supra n. 1.
\textsuperscript{12} Supra n. 1.
above "the average" and so intellectually competent? Would he be required to demand that his grantor submit to mental tests to determine his legal competency? Or otherwise would the purchaser have to buy at his peril? The difficulties in such a rule of mental competency proposed by the case of *Morris v. Williams-Garrison* are obvious. It is submitted that every consideration of public policy argues against such a rule.

—F. L. L.

**THE PROCEDURAL STATUS IN WEST VIRGINIA OF A TRUSTEE IN A DEED OF TRUST TO SECURE A DEBT.**—In a recent West Virginia case,* the grantor in a deed of trust sued to cancel the deed of trust and the notes secured thereby on the ground of fraud in their procurement. One of the grounds of demurrer to the bill was non-joinder of the trustee. The Supreme Court of Appeals held that the trustee was not a necessary party. The holding in this case revives in the mind of the writer a previously formed impression to the effect that the West Virginia law has not always been consistent in its treatment of the procedural status of a trustee in an ordinary deed of trust executed for the purpose of securing a debt.

It is perhaps unnecessary to cite authority to sustain the proposition that ordinarily the effect of a deed conveying property to a trustee, for whatever purpose, is to vest the legal title in the trustee. So literally has this principle been accepted as true, and so rigidly has it been enforced in the legal forum, that no small space in the equity reports is taken up by cases in which equity, looking after the affairs of the real party in interest, has found it necessary to curb activities of the holder of the legal title who undertakes to pursue his legal prerogatives too literally. It is in pursuance of this principle that in many jurisdictions—perhaps in all jurisdictions where a different practice is not authorized by statute—the trustee, and not the beneficiary, in a deed of trust to secure a debt is held to be the proper party to execute a release of deed of trust.* Of course a legal discharge of the debt secured leaves the trustee shorn of any potentially active or contingent powers that he may have possessed, so that he becomes a bare repository of the legal title and thence has no right to deal in any way with that title except to pass it back to the grantor, but

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2. 2 Jones on Mortgages (7th ed.) 588. "Where a mortgage takes the form of a deed of trust, the legal title is vested in the trustee, and he is therefore the proper person to execute a release." 27 Cyc. 1417.