

January 1924

Deeds--Construction--Grantees in Official Capacity

H. L. S. Jr.

West Virginia University College of Law

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Recommended Citation

H. L. S. Jr., *Deeds--Construction--Grantees in Official Capacity*, 30 W. Va. L. Rev. (1924).

Available at: <https://researchrepository.wvu.edu/wvlr/vol30/iss2/10>

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ous theories are assigned as a basis for the relief granted. The more common are inadequacy of remedy at law and failure of consideration. In *Glocke v. Glocke, supra*, the agreement is treated as a condition subsequent, for which upon non-performance and a re-entry, or equivalent, equity will set aside the deed. In *O'Ferrall v. O'Ferrall, supra*, the Illinois court holds that the conduct of the grantee, in breaching the agreement, gives rise to a presumption of fraud at its inception and grants relief on that consideration. As a consequence of that theory, the Illinois court has held that where the failure to perform was occasioned by the death of the grantee there could be no such presumption, and so no cancellation of the deed. *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102; *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673. So, also, where the agreement is treated as a condition subsequent, the conveyance has been annulled on the death of the grantee. *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Morgan v. Loomis*, 78 Wis. 594, 49 N. W. 109; *Bishop v. Aldrich*, 48 Wis. 619, 4 N. W. 775; but see *Danielson v. Danielson*, 165 Wis. 171, 161 N. W. 787. Where the basis for rescission is failure of consideration the courts seem to favor cancellation of the deed, though they require the grantor to do equity to the grantee's estate. *Maddox v. Maddox*, 135 Ky. 403, 122 S. W. 201; *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629. The later West Virginia cases seem to have gone on failure of consideration. *Cumberledge v. Cumberledge*, 72 W. Va. 773, 79 S. E. 1010; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019. In *White v. Bailey, supra*, the court refers to two prior cases as having been decided on the same grounds. *Fluharty v. Fluharty*, 54 W. Va. 407, 46 S. E. 199; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 246. On the authorities the principal case might well have been decided in favor of rescission but on the whole the action of the court is perhaps the better precedent and the more equitable relief. It has the support of several cases granting similar relief. *Simmons v. Shafer*, 98 Kan. 725, 160 Pac. 199, *Webster v. Cadwallader*, 133 Ky. 500, 118 S. W. 327; *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285.

— R. M. M.

DEEDS — CONSTRUCTION — GRANTEE IN OFFICIAL CAPACITY.—
P brought a bill to quiet title, alleging he had a valid title. The

validity of his title depended on a deed, under which, through mesne conveyance, he claimed. The deed was made to "Right Reverend P. J. Donahoe, Bishop of Wheeling." Later the property was conveyed to another by deed, signed and acknowledged by Donahoe in the same manner. Question whether this deed was valid. *Held*, that a conveyance to one whose name is followed by official title or name of office vests legal and equitable title in him individually. *Hyman v. Swint*, 119 S. E. 866, (W. Va. 1923).

In this decision, the West Virginia court follows an apparently well-settled doctrine. Where land was conveyed to several, after whose names was inserted "trustees of the Asso. Presby. Congregation of Newark," the grantees took individually, and the congregation had no title to the land. *Den v. Hay*, 21 N. J. L. 174. A grant of land to W and R, followed by the word "executors," passed title to them individually, and not in an official capacity. *Pfeiffer v. Rheinfrank*, 2 App. Div 574, 37 N. Y. Supp. 1076. See also *Innerarity v. Kennedy*, 2 Stew. 156, (Ala. 1829); *Jackson v. Roberts*, 95 Ky. 410, 25 S. W. 879; *Brown v. Combs*, 29 N. J. L. 36; *American Surety Co. v. McDermott*, 5 Misc. Rep. 298, 25 N. Y. Supp. 467; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246. Where a testator derived title through a deed made to "A and C, trustees of the separate estate of E," the testator took the title in his own name, no trust being declared upon the face of the instrument. *Kanembly v. Volkenberg*, 70 App. Div. 97, 75 N. Y. Supp. 8. See also *Baulos v. Ash*, 19 Ill. 187. As a matter of fact, it is quite probable that the deed referred to in the principal case was intended to convey property to the grantee to hold for the benefit of a religious organization. The case was much like another recent decision which intimated as much. *Donahue, Bishop, etc. v. Rafferty*, 82 W. Va. 535, 96 S. E. 935 (1918). The effect of the principal decision, and of the others cited, may be two-fold. If the holder of the legal and equitable title of land, who in fact represents a religious organization, although that fact be not shown in the instrument, is faithful to that organization, it seems that it is a practical evasion of that statute providing that land shall be held by churches or religious congregations only as a place of public worship, or as a burial place, or as a residence for a minister. W. VA. CODE, c. 57, § 1. If, on the other hand, he is unfaithful, and should appropriate the property to his own use and benefit, there would be no way to compel him to account for land which he held individually. The statute referred to is understood to have been framed not for the purpose of preventing religious con-

gregations from becoming rich, but to prevent the accumulation of real estate withdrawn from commerce, the purpose being essentially the same as that of the English mortmain statute. It would probably be more frank, more honest, to declare such conveyances to the grantees in trust. If the effect of such a decision would be to void such conveyances, then perhaps the legislatures would come to the aid of those affected by revising the mortmain statutes.

— H. L. S., Jr.

EVIDENCE—CARBON COPY AS SECONDARY EVIDENCE.—P sued D on a contract and offered as evidence a carbon copy of a letter which he had sent to D, D failing to produce the original after notice. It was shown that D could have secured the letter and have brought it into court within a very short time after the notice given in court. *Held*, the notice to produce the letter at the trial was sufficient to authorize the admission of secondary evidence. *Waddell v. Trowbridge*, 119 S. E. 290 (W. Va. 1923).

The dictum in the case, to the effect that the carbon copy was admissible as secondary evidence, indicates that the court does not agree with decisions of the courts of Virginia and many other states, where a carbon copy is admissible as a duplicate original. The trial court had refused to admit the carbon copy on the ground that non-production of the original had not been excused. The upper court merely reversed this decision, on the ground that non-production of the original had been excused, and that the carbon copy was therefore properly admissible as secondary evidence. By requiring that non-production of the original be excused, the court indicates that it does not regard a carbon copy as a duplicate original, admissible as such, but as secondary evidence, subject to the rules governing the admissibility of secondary evidence. The law of West Virginia, if we can say that the law is a reasonable prediction as to what the court would decide if the question should actually come before it, may be considered as against the admissibility of a carbon copy as a duplicate original. This rule is not in accord with the settled law of many other states. It is a settled rule of evidence that when a party makes out two papers for the same purpose and to exactly the same effect, and delivers one to the defendant, retaining one in his own posses-