Volume 28 | Issue 4 Article 6

June 1922

Certainty Requisite in Deeds as to Parties Grantee

Frederick L. Lemley

quality, and the heating and ventilating systems more up to date than the original plans called for.

The foundation and the ground floor are now almost completed and the contractor is pushing the work rapidly. The building will be ready for occupancy early next spring. When completed it will embody the best features of law school buildings throughout the country and will be one of the most complete and up to date to be found anywhere. It should be a source of great pride not only to the Bar, faculty, students and alumni of the University, but also to the people of the state generally.

CERTAINTY REQUISITE IN DEEDS AS TO PARTIES GRANTEE.—In the recent case of *Hickel* v. *Starcher*,[1] the Supreme Court of Appeals of West Virginia, in passing on the validity of a deed conveying real estate to the "heirs" of a person living at the date of the execution thereof, has construed the word "heirs" in its technical sense and has held the deed void for uncertainty as to parties grantee. The correctness of this decision, it is submitted, is based upon two necessary findings: (1) that the deed conveyed an estate vesting in possession *in praesenti;* and (2) that the parties named as grantees were not *in esse* and ready to take the estate vesting immediately in possession.

An essential requirement of common law conveyancing by deed is that the party grantee should be designated with particular certainty.[2] An important distinction, however, was made by this rule between present and future estates. In the case of present estates, the certainty rule required not only (a) definiteness in the designation of the party grantee, but also (b) the present existence of the party grantee designated ready immediately to take the estate conveyed.[3] In the case of future estates, definiteness in the designation of the party grantee was required, but it was never a requirement of the common law that the grantee of a future estate should be *in esse* at the time of the creation of the estate.[4] A future estate, therefore, could be created by deed in an unborn child of a living person or in the heirs of a living person.[5] And such convey-

---

[1] 110 S. E. 695 (W. Va. 1922).
[2] MAUPIN, MARKETABLE TITLE TO REAL ESTATE, § 18; 13 CYC. 538.
[3] Newsom *v.* Thompson, 2 Ired. 277 (N. C. 1842); Lillard *v.* Ruckers, 9 Yerg. 64 (Tenn. 1836).
[4] Preston *v.* Brant, 96 Mo. 552, 10 S. W. 78 (1888). See TIFFANY, REAL PROPERTY, 120.
[5] See W. VA. CODE, sec. 11, ch. 71. Irwin *v.* Stovar, 67 W Va. 356, 67 S. E. 1119 (1910); Carter *v.* Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919).

ances do not fail for uncertainty as to parties grantee. But a present estate to an unborn person or to the heirs of a living person fails for uncertainty as to parties grantee.

At common law, however, the creation of future legal estates by deed was restricted by the highly artificial rule requiring a particular estate to support the future estate.[6] This rule was never applied to future estates created by will and under the Statute of Uses.[7] In many states this rule has been changed by statute.[8] Section 5 of chapter 71 of the Code of West Virginia provides:

> "Any interest in or claim to real estate may be disposed of by deed or by will. Any estate may be made to commence in futuro, by deed, 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 deed."

This section and section 12 of chapter 71 which provides, "that a contingent remainder shall in no case fail for want of a particular estate to support it," would seem to have abolished the common law rule requiring a particular estate to support the creation of a future estate by deed. Hence any future estate that could be created by way of remainder by deed at common law can now be created without the intervention of a particular supporting estate. Therefore, since a future estate in an unborn child of a living person, or in the heirs of a living person was valid at common law as a contingent remainder, it would seem now under our statute the same could be created immediately without the particular estate. This conclusion is fortified by the provision of section 5, quoted *supra,* that "any future estate may be made to commence in futuro, by deed, in like manner as by will."

What future estates then could be created by will at common law as a devise or bequest? A devise of a legal estate, without a supporting particular estate, could be created in the unborn son of a person living at the death of the testator.[9] And a devise of a legal estate, without a supporting particular estate, in the "heirs" of a person living at the death of the testator was valid.[10] Both the English and the West Virginia courts have construed the word

---

[6] TIFFANY, REAL PROPERTY, § 119, 16 CYC. 649.
[7] TIFFANY, REAL PROPERTY, §§ 134 and 135.
[8] 1 STIMSON, AMERICAN STATUTE LAW, §§ 1403, 1426.
[9] TIFFANY, REAL PROPERTY, § 135.
[10] Weld *v.* Bradbury, 2 Vern. 705 (Eng. 1715); Stuart *v.* Stuart, 18 W. Va. 675 (1881); Tomlinson *v.* Nichol, 24 W. Va. 148 (1884).

"heirs" in its technical sense and held that the estate conveyed vested in possession as of the date of the determination of the class designated.

The question may now profitably be asked: Why should the West Virginia court that has held valid an executory devise to the "heirs" of a person living at the death of the testator as conveying a future estate, hold void a deed to the "heirs" of a person living at the date of its execution, when our statute expressly provides that "any estate that would be good as an executory devise or bequest shall now be good if created by deed?" The answer to the question is found in the holding of the court that the estate conveyed is one vesting *in praesenti.* The word "heirs" being construed in its technical sense and the parties designated as grantees not being presently ascertainable, the deed therefore fails for uncertainty. It is submitted that the deed is invalidated not by the construction of the word "heirs" in its technical sense but by the construction of the deed as conveying an estate *in praesenti.*

It is conceded that no other result could have been reached at common law for the reason that the deed as a present grant is void for uncertainty as to parties grantee, and is void also as a future grant for the reason that there was no particular supporting estate. But under our statute clearly a deed conveying a future estate to the heirs of a living person to vest in possession on his death would be valid. The only question then in the construction of the deed in *Hickel* v. *Starcher* is: Did the grantors intend to convey an estate *in futuro?* That such may have been the intent of the grantors seems to have occurred to the court. The court says: "The words 'unto the heirs' may make it a grant *in futuro.*" And again: "It [the granting clause] is the usual form of expression, and, if the grantors meant what they said in the granting clause, it does not necessarily effect a grant *in praesenti.*" But that this was a grant *in futuro* does not seem to have been urged upon the court, and section 5 of chapter 71 does not seem to have been called to its attention. It is submitted that the fact that the granting clause contains words of present grant cannot possibly affect the construction of the deed. Words of present grant are necessary to convey estates to commence *in futuro* as well as estates to commence *in praesenti.*[11].

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

The deed must therefore be held void if construed as a grant *in praesenti*: it will be held valid if construed as a grant *in futuro*. Where alternative constructions are possible—one of which will render the deed void—and the other of which will render the deed valid—that construction will be adopted which will render it valid.[12] In other words the grantor is presumed to have intended to make a valid deed. There could be no question of the intent of the grantors and therefore of the validity of the deed, if, after the grant, they had added the words "the same to take effect and vest in possession on the death of C. C. Hickel," or "the grantors reserve an estate in the land herein conveyed during the life of C. C. Hickel." Such conveyances have without exception been held valid in West Virginia.[13] Yet it is difficult to understand how the addition of the words suggested would add anything to the deed. The "heirs" of C. C. Hickel would not be determined until his death and the estate could not vest until they were determined as a class. It is submitted that the construction of the word "heirs" in its technical sense compels the conclusion that the grant was of an estate to commence *in futuro*. This construction validates the deed, is in accord with the apparent intent of the grantors, and is, it is submitted, in harmony with the remedial provision of the West Virginia statute.

FREDERICK L. LEMLEY.

Fairmont, W. Va.

CONTRIBUTORY NEGLIGENCE OF YOUNG CHILDREN.—Although a few early decisions held a child to the same rigid rule applied to an adult in determining whether he had exercised due care to avoid danger,[1] it has long been settled that the conduct of a child should be measured by a different standard, generally stated to be the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience, under the same or similar circumstances.[2] If such considerations as these measure the care which is required of a child, there must be an age at which the doctrine of contributory negligence can have no application.

[12] Higgins *v.* Coal & Coke Co., 63 W. Va. 218, 59 S. E. 1064 (1907).
[13] Hurst *v.* Hurst, 7 W. Va. 289 (1874); Lauck *v.* Logan, *supra*.

[1] Neal *v.* Gillett, 23 Conn. 437; Burke *v.* Broadway etc. R. Co., 49 Barb. 529 (N. Y. 1867).
[2] Birmingham etc. R. Co. *v.* Mattison, 166 Ala. 602, 52 So. 49 (1909); Marius *v.* Motor Delivery Co., 146 App. Div. 608, 131 N. Y. Supp. 357 (N. Y. 1911); Thomas *v.* Oregon Short Line R. Co., 47 Utah 394, 154 Pac. 777 (1916).