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William R. Watkins

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DEEDS TO "HEIRS" OF A LIVING PERSON

By EDWIN W. HADLEY, A. B., J. D.

The purpose of a deed is to transfer property, and without a transferee there is no transfer. This failure may vitiate the whole deed, or any part of it which lacks a grantee for the particular interest there dealt with; and since an interest cannot be left hanging, it is deemed to have remained in the grantor unless he provided otherwise. Our premise is axiomatic. Thus a deed to a purely fictitious person has no legal effect.

In determining whether there is a grantee capable of holding a particular interest, the courts have of course followed the doctrine, *id certum est quod certum reddi potest*. Hence, when it is actually proven that the grantor intended a certain person when he named "my son", or "J. S.", or "the legatees and devisees of X, deceased",¹ the proof is admissible whether intrinsic or aliunde and the court will look on the said person as a named and certain grantee. So a conveyance to the heirs of one deceased has been held to have a definite grantee, the persons meant being ascertainable.²

Suppose that realty be deeded to the "heirs" of a person who is living at the moment the instrument takes effect? It has long been settled that *nemo est haeres viventis*; there is no such creature as the "heir" of a living person. Herein the law has adopted the most strict philological definition. Therefore it would seem at first glance that such an instrument fails to designate a grantee, and so fails to pass anything under the rule of our first paragraph. But the phrase which is in itself uncertain may, under the rule of our second paragraph, be explained by extrinsic or intrinsic evidence to have been intended by the grantor as a designation of some certain person or persons, the word "heir" or "heirs" amounting to such designation in the grantor's vocabulary. This was permitted at common law as to the singular, "heir", but not as to the plural, "heirs". The principle of holding the intent back of a word

1. *Webb v. Den*, 17 How. (U.S.) 576, 15 L. Ed. 35.

2. *Tiffany, R. P.*, 2nd Ed., p. 1594, note 49; 18 C. J. 159.

to be the intent usually back of such word is most easily overcome by affirmative proof that the word always had a certain peculiar meaning to the one who executed the instrument, the idiosyncrasy being purely personal or perhaps a usage of his business or community. But as to the word "heir" such proof is seldom available, for the simple reason that the one who drew the instrument generally has not previously used the word often enough to show its meaning to him. Then we must turn to intrinsic evidence, other parts of the instrument itself.

The first and easiest type of such evidence is *the use elsewhere in the deed of other and different words* in describing the grantee. If in a deed to "heirs" of X" the instrument later says "and the said eldest child," the word "heir" may be held to mean the eldest child of X. To A. and "such heirs as she may have" has been held to give the special meaning of "children". In *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122, "minor heirs" was held to provide sufficient evidence that "heirs" meant "children". In *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077, the deed was to "Sarah A. Tinder and the heirs of Simeon Tinder and Sarah A. Tinder", and the Court held although the named parties were still alive the deed was a good present transfer, the grantees being the children of the Tinders. This language might easily have been held to mean the heirs of their bodies, persons not presently determinable, so the case is a strong one and shows how important is the general principle that a conveyance is to be construed most strongly against the grantor who chose the words, and in favor of validity. Cases accepting this first type of evidence to vary the usual meaning of the word "heirs" are numerous.³ The same type of evidence is also commonly accepted to vary the meaning of the word when used in a will.

In *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, the deed was "between Benjamin Heath of the first part and the heirs of Warren Heath of the second part ** excepting and reserving to myself the whole use and absolute control of the said prem-

3. *Southern Ry. Co. v. Hayes*, 150 Ala. 212, 43 So. 487; *McDill v. Meyer*, 94 Ark. 615, 128 S. W. 364; *Black v. Stephenson*, 166 Ark. 429, 267 S. W. 130; *Henderson v. Sawyer*, 99 Ga. 234, 25 S. E. 312; *Howard v. Sebastian*, 143 Ky. 237, 136 S. W. 226; *Polley v. Adkins*, 145 Ky. 370, 140 S. W. 551; *Mullins v. Moberly*, 145 Ky. 477, 140 S. W. 652; *Hunt v. Hunt*, 154 Ky.

ises during my natural life ** and to my son, Warren, during his natural life." The Court held that "heirs" meant the "present children" of the grantor's son, Warren, because in looking at the deed as a whole language is found which recognizes that the ancestor of the so-called heirs is still alive and hence the only persons whom the grantor could have contemplated for a present transfer were the children⁴. It seems perfectly fair and reasonable to accept this type of evidence, also; especially when we remember that construction is strongest against the grantor, that in deeds as well as wills the whole instrument must be looked to when the intent is involved, and that public policy calls for the stability and validity of apparent titles where such is reasonably possible.

In *Roberson v. Wampler*, 104 Va. 380, 51 S. E. 835, the deed was to the "John B. F. Roberson heirs in consideration of the natural love and affection they have for their sd. son, and especially for his heirs." The Court held that the grantees, definite and ascertained, were John's children, although the deed used no other description than "heirs" and there was no clear evidence in it of a consciousness that John was then living. The Court first stated the general rule that a deed as well as a will must be construed by looking at the whole instrument and fairly trying to determine the intention of the parties. This principle lies back of all cases in which the technical meaning of "heirs" is varied, and is modernly settled in spite of some early cases to the contrary. The Court then pointed out that the deed called for support of the grantor by the grantees, mentioned repairs to be maintained by the grantees, mentioned that the residence of the grantees is a certain county, and declared affection for

679, 159 S. W. 528; *Whitworth v. Whitworth*, (Ky.) 265 S. W. 801 ("T. G. Whitworth's bodily heirs" held to mean present children. The evidence in this language seems very scant.); *Umfreville v. Keeler*, 1 Thomp. and Cook (N. Y.) 486; *Huss v. Stephens*, 51 Pa. 282 ("to the heirs of Andrew Lantz, in consideration of the natural love and affection he hath for his grandchildren"); *Darrah v. Darrah*, 202 Pa. 492, 52 Atl. 183; *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137, (to A. and "at her death to such heir or heirs as she may hereafter have"; *Reeves v. Cook*, 71 S. C. 275, 278, 51 S. E. 93; *Rembert v. Evans*, 86 S. C. 445, 68 S. E. 659; *Fountain Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. 202 (to A. "and her present heirs"); *Brasington v. Hanson*, 149 Pa. 289, 24 Atl. 344 (children actually named). See a dictum in *Aetna Ins. Co. v. Hoppin*, 214 Fed. 923, 933, citing a number of other cases wherein other words alter the actual meaning of "heirs".

4. Using such evidence to vary the technical meaning of heirs, see *Tanner v. Ellis*, (Ky.) 127 S. W. 995; See *v. Derr*, 57 Mich. at 372, 24 N. W. at 109; *Fullagar v. Stockdale*, 138 Mich. 363, 101 N. W. 576; *Heard v. Horton*, 1 Denio (N. Y.) 165; *Vanorsdall v. Van Deventer*, 51 Barb. (N. Y.) 137.

the grantees to be part of the consideration. This evidence as a whole was felt to show that the grantor intended his deed to have a present effect on present persons; and since to have this effect the word "heirs" must be interpreted as "children", that meaning was given. It is to be noted that none of this evidence is conclusive, it being perfectly possible that the grantor still intended that the grantees should only be determined by the death of the ancestor, legally standing in the shoes of that ancestor. The acceptance of *intent that the deed have a present effect* therefore is a liberal view, subject to the objection that it at least verges on looking into the secret and unexpressed intent of the grantor⁵. A similar attitude was taken in *Texas Co. v. Meador*, (Tex.) 243 S. W. 991, wherein "M. C. Arnold and her heirs" was held to mean children because the consideration is recited as coming from "Arnold and her heirs" and so "heirs" probably meant living persons capable of furnishing a consideration. Apparently in accord are *Findley v. Hill*, 133 Ala. 229, 32 So. 497, and *Eckle v. Ryland*, 256 Mo. 424, 165 S. W. 1035, 1042. The language of *Tanner v. Ellis*, (Ky.) 127 S. W. 995 looks the same way. This attitude of giving effect to a deed whenever possible has been codified in North Carolina by Revisal 1905, sec. 1583, where it is provided that a deed to the heirs of a living person is to be construed as meaning children unless a contrary intention actually appears in the deed⁶. In a note in 4 Mich. Law Rev. 234 it is hinted that in *Roberson v. Wampler*, *supra*, the words "sd. son" show an expressed knowledge that the son is living and so puts the case on the same basis as *Heath v. Hewitt*. This seems hardly justified, for love and affection might well be presently felt for a deceased son.

We have shown three types of evidence which have been held sufficient to give to "heirs" a special meaning, such as "children": first, description of or reference to them by the deed in other words; second, language in the deed recognizing that the ancestor of the "heirs" is still alive; and third, the apparent intent of the whole deed to have a transfer to present effect and

5. Using such evidence, see a very liberal decision by Lumpkin, J., in *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. 915. And see *Bailey v. Willis*, 56 Tex. 212.

6. See *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921. Applying the same principle where the grantee is uncertain for other reasons, see 18 C. J. 175, text and notes.

validity. We may say, therefore, that a deed to those non-existent persons, the "heirs" of a living person, may be saved as a valid transfer of a present estate by proper proof⁷ that the word meant a very certain person or persons, now determinable and determined independent of the death of the ancestor.

Even though the usual meaning of "heirs" cannot be altered under the facts of a particular deed, there is another means by which the deed may be upheld. If an *intermediate estate* is created in the deed, giving the heirs a remainder on the contingency of their becoming ascertained, their present indefiniteness does not at once vitiate the grant to them.⁸ The grant is temporarily good as to the future as well as the present, and if the grantees have become definite by death of the ancestor, on or before the termination of the intermediate estate, they may then take. By statute in England, and in many American States, the ascertainment of the grantees is effective even after the ending of the intermediate estate, so long as the Rule Against Perpetuities is not violated (Tiffany, R. P., 2nd ed., p. 508; Ill. Laws 1921, p. 470).

There is still another possibility. Why may it not be said that a deed to the "heirs" of a living person, actually meaning heirs and without an intermediate estate, creates an *executory interest*? When the contingency of their ascertainment is resolved, an estate springs up and vests in them as a springing use, void at common law but valid under the Statute of Uses. This statute has been followed or substantially re-enacted in most American States. Under such an interpretation, the fee is considered to remain temporarily in the grantor and his heirs (or is considered to be in abeyance in a few jurisdictions), and when the grantee becomes ascertained the fee passes to him by automatic operation of the Statute. It is today quite settled that in a deed to an ascertained person it may validly be provided that although no other estate is to intervene the grant for the present is to be executory and is to ripen into a vested estate at some time in the future. The creation of such a future estate is gener-

7. For some cases in which the evidence was held insufficient, see 18 C. J. 159 note 86.

8. Tiffany, R. P. p. 1595 55; DuBois v. Judy, 291 Ill. 340, 126 N. E. 104.

ally allowed by *devise* to persons unascertained as well as ascertained.⁹ It is submitted that there is no valid objection to creating such an estate or interest by *deed* where the grantee is not in esse or otherwise unascertained. Since the actual transfer is deemed to be made by force of the Statute of Uses, it makes no difference if there is no definite grantee at the time the deed is executed, for the Statute will hang back and only function when the grantee has become ascertained and otherwise ready to take. Livery of seisin is no longer a necessity, nor need there be a grantee to furnish the consideration because consideration may now validly come from a third party, so to require a grantee in esse when an executory interest is created by deed is not based on either practical necessity or legal logic. Mr. Gray and Mr. Tiffany have both argued in favor of the proposition here approved. Careful note should be taken of a principle stated in 18 C. J. 157: "A conveyance of land by deed may be considered as any species of conveyance necessary to effect the intent of the parties to the deed and not repugnant to the terms of it." Therefore a deed to a grantee not ascertained should be called a declaration of a use, which use will hang like a fungus to the legal fee till operated upon by the Statute when the grantee is ascertained within the period of perpetuities. The majority of cases, however, unreasonably refuse to allow an executory interest by bargain and sale deed where there is no present and definite grantee; they are collected in Tiffany, R. P., 2nd ed., p. 550 and p. 1595 note 53. Many of these cases are diota, and they are not so numerous as to put the point beyond argument. The proper principle seems to be applied in *Southern Ry. Co. v. Hayes*, 150 Ala. 212, 43 So. 487, where a deed to the heirs of a living person was allowed to include after-born children on the theory that on birth they automatically become tenants in common with the children who were alive when the deed was executed. A scant distinction of the case might be made on the ground that some of the grantees were present to furnish the consideration and take livery of seisin, but since neither of these things are necessary the distinction is one without a difference. The co-grantees occupy only a formal position, so we should be able to let the grantor himself

9. Tiffany, R. P. p. 554., text and note 23, and p. 488 note 71, citing many cases.

occupy such position after he declares the use, he and his heirs furnishing the consideration and holding the fee as quasi-trustees for a sole and unascertained grantee. The language of *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333, is also in accord with the view here contended for.

The application of the principle just discussed is of interest in connection with the recent case of *Legout v. Price*, 149 N. E. 427, decided by the Supreme Court of Illinois on October 28, 1925, and published last month. The important language of the deed there involved is as follows:

"This indenture :: between Julian Legout :: and the heirs of Adolphus Legout :: do grant, bargain and sell (described property) :: Provided always that Adolphus Legout may retain the possession of, and have the use of the lands during his lifetime. It is also understood and agreed that the said Julian Legout do hereby reserve during his lifetime the rent off all the land herein conveyed."

The Court, speaking through Chief Justice Dunn, held that the deed was totally void and ineffectual for lack of a definite grantee. The opinion fails to mention the general principle of construction in favor of validity and hence fails to consider solutions which an orderly and full attack would have unravelled and brought to mind. There is no attempt to construe the word "heirs," and of course no theorizing on the existence of a valid executory interest. The possibility of upholding the grant through existence of an intermediate estate is discussed only in part, mention being made of only one of the two intermediate estates attempted. The whole horizon of counsel or court, or both, seems blotted out by the prima facie mist of *nemo est haeres viventis*.

After realizing the prima facie invalidity of the deed, it would be well to remember the principles of construction and take at least a casual look for means of effectuating the intent of the grantor. The deed is to the "heirs" of a living person. Giving technical meaning to the words, there is no grantee, and since the transfer purports to be of present effect it fails. But can the uncertainty be reduced to a certainty?

Nowhere in the deed are the grantees described in other words. The word "heirs" is not even qualified, as it would be by "present Heirs", "heirs of their bodies," "heirs she has or may

have," "minor heirs," "said eldest child," "the aforesaid grandchildren," et cetera. The only bit of evidence that might possibly qualify under the first type discussed, to vary the technical meaning of the word, is the statement in the deed that it is "agreed" that the grantor shall retain the rents for life. The very idea of agreement necessitates two parties capable of promising and communicating with each other, so it might be said that this word makes the deed show on its face that the grantees intended are the living children of Adolphus Legout, who are ascertained and capable of making an agreement as well as taking a present title under a bargain and sale.

The second type of evidence for varying the usual meaning of "heirs" seems clearly present. The deed attempts to give a present estate to the ancestor of the "heirs," which shows that at that moment the grantor consciously knew that the ancestor was still alive and so was thinking about and really attempting to benefit the *children* of Adolphus. This is the doctrine of *Heath v. Hewitt, supra*, and it is submitted that such a deduction would be reasonable and fair, as well as good policy in maintaining an apparently valid deed and title. On this point the recent Illinois case seems clearly to have erred.

Under the third and most lenient attitude, the deed at hand of course would be good. The whole tenor of the instrument shows an intent to pass the fee presently and at once; it purports to *bargain*, it mentions an *agreement*, and it recites that consideration has been actually received *from the parties of the second part*. The more one examines this deed, the more it must appear that somewhere in the legal suit there was a serious failure of careful analysis.

Even if we should grant that the Illinois Court was correct in failing to find that "heirs" meant "present children" (which we certainly do not grant,) the decision may still be wrong. If the deed created an intermediate estate, the heirs were contingent remaindermen and by the modern law did not need to be in esse or otherwise ascertained at the moment the deed was executed. Judge Dunn discusses this point with Adolphus Legout as grantee of the intermediate estate, and disposes of the argument on the ground that Adolphus took nothing for lack of proper words of conveyance to him, and words "may retain and

have the use of" being insufficient. This is probably correct; but the Court fails to note that the deed also attempts to create, or rather reserve, an intermediate estate in the grantor himself. "Reserve" has generally held sufficient to give the grantor a limited estate. It requires some straining to apply this idea here, however, as the reservation is only of rent in a part of the land.

The third solution mentioned in the first part of this article might have been of aid to council for the grantees. Although "heirs" meant just what it said and there was no valid intermediate estate, it is arguable that the fee remained in the grantor *subject to a use* which he had attached to it by a voluntary and formal declaration in writing. When the grantees become definite and ascertained through the death of their father, the Illinois Statute of Uses¹⁰ will operate to turn the use into a legal title in fee.

In conclusion, it is only fair to state that the decision is probably correct because the only matter officially before the Court was a bill by Adolphus Legout attempting to have the fee declared in him. We have merely raised a fictitious quarrel with the case because the deed involved *could* raise all the solutions that we have discussed for validating a deed to the "heirs" of a living person. It is hoped that the purpose of forceful illustration will pardon the fiction. A dictum in the case does lay it open to the criticisms here made, for in closing the Court says, "Since there was no conveyance to him (Adolphus) of a life estate, the attempted conveyance to his heirs in his lifetime was void, and *the instrument was wholly ineffectual.*" It is submitted that there were several grounds on which effect could be given to the deed as far as the "heirs" are concerned, in a proper case raising the issue.

10. Ill. Rev. Stat. 1903, C. 30, Sec. 3.