



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 1

Article 14

12-1-1950

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Recommended Citation

Thomas M. Moore, *Deeds -- Conveyance to the Heirs of a Living Person*, 29 N.C. L. REV. 58 (1950).

Available at: <http://scholarship.law.unc.edu/nclr/vol29/iss1/14>

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ground that, if the issue of lack of knowledge is raised by the pleadings or evidence, it is error for the court to fail to instruct the jury that defendants would not be guilty unless they had knowledge of the presence of the liquor in the automobile. It should be noted, however, that the court qualified the statements it had made in *State v. Welch* on the guilty knowledge issue by declaring that the state made out a prima facie case of guilty knowledge when it proved that there was more than one gallon of liquor in an automobile in the possession of and operated by the defendant. Thus, if the defendant wishes to avail himself of lack of guilty knowledge as a defense, he incurs the burden of procuring and offering evidence to establish that fact.¹⁶

TENCH C. COXE, III.

Deeds—Conveyance to the Heirs of a Living Person

By the common law, if an owner of land in fee simple attempted to convey a life estate or an estate in tail, with a remainder to the grantor's heirs, the remainder was void and a reversion was created by operation of law.¹ If, however, the grantor sufficiently indicated that "heirs" meant a class of remaindermen different from his heirs general, the rule had no application.² The application of this rule meant that the grantor might subsequently defeat his heirs by conveying the property in question to other persons. The reasons given for the rule were: (1) the maxim that there can be no heirs of a living person,³ and (2) the reluctance to deprive the grantor's overlord of certain feudal rights which attached only if the property passed by descent.⁴ At common law the rule was applied as a strict rule of property,⁵ as e.g., the Rule

¹⁶ For a discussion of the wisdom of submitting a case to the jury on the strength of a presumption, see McCormick, *Charges on Presumptions and Burdens of Proof*, 5 N. C. L. REV. 291, 302 (1927). For a recent general discussion of presumptions, see Morgan, *Further Observations on Presumptions*, 16 So. CALIF. L. REV. 245 (1943).

¹ *Godolphin v. Abington*, 2 Atk. 57, 26 Eng. Reprint 432 (1740); *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919); *Therrell v. Clanton*, 210 N. C. 391, 186 S. E. 483 (1936).

² See *Thompson v. Batts*, 168 N. C. 333, 335, 84 S. E. 347, 348 (1915). In *Campbell v. Everhart*, 139 N. C. 503, 510, 52 S. E. 201, 203 (1905), the court stated, ". . . but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word 'heirs' as *designatio personarum*, or if a preceding estate was created so as to make the limitation to the heirs of the living person a contingent remainder depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word 'heirs' was construed to mean 'children.'"

³ *Whitley v. Arenson*, 219 N. C. 121, 124, 12 S. E. 2d 906, 909 (1941). "'Heir' and 'ancestor' are correlative terms. There can be no heir without an ancestor. Hence, there can be no heirs of the living, *nemo est haeres viventis*. One may be heir apparent or heir presumptive, yet he is not an heir, during the life of the ancestor. Consequently, under the strictness of the old law, a limitation to the heirs of a living person was void for want of a grantee."

⁴ I SIMES, *FUTURE INTERESTS* §145 (1936).

⁵ See *Doctor v. Hughes*, 225 N. Y. 305, 306, 122 N. E. 221 (1919).

in *Shelley's* case; but the precise nature of the rule in this country is uncertain.⁶ The common law rule has been recognized in North Carolina and has been applied as a positive rule of property.⁷

In a recent North Carolina case⁸ the grantor, after reserving a life estate, conveyed to her son for life, and at his death to his issue surviving, with the further limitation that if he die without issue, then to the living heirs of the grantor. The court did not invoke the common law rule; instead, they applied N. C. GEN. STAT. §41-6 which reads: "A limitation by deed, will or other writing to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will." The court decided that there was a contingent remainder in the children of the grantor.

It seems to be well settled that the statute is not applicable where there is a precedent estate conveyed to the living person.⁹ The primary reason for establishing such a restriction to the application of the statute was to preserve the Rule in *Shelley's* case.¹⁰ Absent this situation, however, the statute is generally applicable, regardless of whether the limitation is to the heirs of the grantor¹¹ or to the heirs of a third person.¹² The argument of counsel in the principal case that a life estate reserved was comparable to a precedent estate conveyed was not sustained, indicating an emphasis on the *precedent estate conveyed*.

The statute also is inapplicable if the grantor expresses in the instrument an intention that the word "heirs" is used in a sense contrary to that of "children." However, great difficulty may be encountered in trying to determine the grantor's true intention. In *Therrell v. Clanton*

⁶ I SIMES, FUTURE INTERESTS §147 (1936).

⁷ *Therrell v. Clanton*, 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59 (1936).

⁸ *Ellis v. Barnes*, 231 N. C. 543, 57 S. E. 2d 772 (1950).

⁹ *Bank v. Snow*, 221 N. C. 14, 18 S. E. 2d 711 (1942); *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. 2d 906 (1941); *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842 (1906); *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 735 (1904).

¹⁰ *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893) (court held that the statute did not alter or abolish the Rule in *Shelley's* case). In *Marsh v. Griffin*, 136 N. C. 333, 334, 48 S. E. 735 (1904), the court says the statute applies ". . . only when there is no precedent estate conveyed to said living person, else it would not only repeal the Rule in *Shelley's* case, but would pervert every conveyance to 'A and his heirs' into something entirely different from what those words have always been understood to mean." However, consider the case where the conveyance is to A for life, then in trust to the heirs of A. Under the rule set forth by the court the statute is inapplicable; yet the Rule in *Shelley's* case is also inapplicable.

¹¹ *Thompson v. Batts*, 168 N. C. 333, 84 S. E. 347 (1915). The grantor, in contemplation of his second marriage executed a deed to his intended wife conveying to her for life, remainder to her issue of such marriage, and on failure of such issue to revert to the heirs of the grantor; held, N. C. GEN. STAT. §41-6 is applicable and the children of the grantor have a contingent remainder.

¹² *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905) (conveyance directly to the heirs of a third person, with no intervening estate being conveyed). *Smith v. Brison*, 90 N. C. 284 (1884) (an intervening estate was conveyed, but the ultimate limitation was to the heirs of a third party).

ton¹³ the grantor conveyed to A (only child of grantor, and her husband for their joint lives with remainder to A's children of such marriage; if no such children, then in fee simple to the "right heirs" of the grantor. Instead of the statute, the court applied the common law rule, evidently because it thought the grantor, by using the words "right heirs" in that context, had sufficiently expressed an intention that "heirs" was not to mean "children."¹⁴ By so doing the court defeated the grantor's apparent intent to convey the property to his collateral heirs. Likewise, it seems that the statute would be inapplicable in the case of a direct conveyance to the heirs of a living person who has no children,¹⁵ for the fact that there are no children should be sufficient to indicate that the grantor used the word "heirs" in a sense contrary to that of "children."

The effect of N. C. GEN. STAT. §41-6 seems to be that the presumption arising from the use of the word "heirs" is changed.¹⁶ For, at the common law, where the limitation was simply to the heirs of a living person, nothing else appearing, the presumption was that "heirs" meant "heirs general" thereby creating a reversion in the grantor (if to the heirs of the grantor) or else invalidating the limitation for lack of a grantee (if to the heirs of a third person). Now, by virtue of the statute, a limitation to the "heirs" of a living person, nothing else appearing, is presumed to mean "children." However, both at the common law and under the statute the presumptions are capable of being rebutted by the grantor's expressing a contrary intention in the instrument.

Where the statute, however, is inapplicable either (1) because the living person has no children or (2) because the grantor expresses an intention to the contrary, it is likely, on the basis of *Therrell v. Clanton*, that the court will resort to the common law to reach a solution to the problem. By so doing it seems that the court is applying a rule without a reason, the reason for the rule having vanished.¹⁷ It also appears that the court is defeating the intention of the grantor, for where the grantor expressly conveys an estate, his intention may be inferred to be that the conveyance should be given full effect.¹⁸ The common law

¹³ 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59, 61 (1936).

¹⁴ It is possible that the court overlooked N. C. GEN. STAT. §41-6, for it was not mentioned in the decision. However, it seems more probable that the court considered the statute but found it inapplicable, for the reason that if the statute were applied, the conveyance, in effect, would be to A for life, remainder to A's children, and if no children then to A.

¹⁵ If the statute were applied where there was a direct conveyance (no intervening estate being conveyed) to the heirs of a living person who had no children, it seems that the conveyance would be void because it is a class gift, and there are no members of the class in existence at the time the conveyance is to take effect.

¹⁶ See *Campbell v. Everhart*, 139 N. C. 503, 510, 52 S. E. 201, 203 (1905).

¹⁷ I SIMES, FUTURE INTERESTS §147 (1936).

¹⁸ See 4, FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS,

rule was considered so objectionable in England that a statute was passed in 1833 which abolished the rule¹⁹ and permitted the heirs of a living person to take as purchasers. This method of dealing with the rule has also been suggested by the American Law Institute.²⁰

An addition to N. C. GEN. STAT. §41-6 permitting the heirs of a living person to take as purchasers where the grantor indicates that "heirs" does not mean "children" would allow the grantor's intention to be carried out and avoid the harshness of the common law rule.

THOMAS M. MOORE.

Federal Courts—Venue—Transfer of Actions Under §1404(a) of New Judicial Code

Section 1404(a)¹ incorporates into the new Judicial Code² the doctrine of *forum non conveniens*,³ but rather than requiring dismissal, permits transfer to a more convenient forum even though the venue of the original forum be proper.⁴ The lower federal courts, however, have not agreed in construing and administering the new subsection, and all of the resulting conflicting views have not yet been resolved by the Supreme Court.⁵

(A). One question causing difficulty is whether a plaintiff, the party choosing the forum in the first instance, can invoke §1404(a) to transfer his action to a district where a defendant is not amenable to process. Of the four cases found in which the problem was considered, two federal district courts have denied plaintiffs the use of §1404(a),⁶ while

APPOINTED TO ENQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 74 (1833), reprinted in LEACH, CASES ON FUTURE INTERESTS 3 (2d ed. 1940), *Therrell v. Clanton*, 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59 (1936).

¹⁹ STAT. 3 & 4 WM. IV, c. 106 §3 (1833).

²⁰ UNIFORM PROPERTY ACT §15. "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent."

¹ "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

² Title 28 U. S. C. (Supp. 1949). Effective September 1, 1948.

³ For a discussion of this doctrine see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

⁴ 28 U. S. C. §1404(a), Reviser's Notes at 802-03 (Supp. 1949). This subsection should not be confused with §1406(a) which, in a situation where the original venue is *improper*, gives the court the alternative of dismissing the action or transferring it to a proper venue.

⁵ One question, whether §1404(a) applies to actions governed by special venue provisions, appears to have been settled in the affirmative. See Note, 28 N. C. L. REV. 100 (1949).

⁶ *Bolten v. General Motors Corp.*, 81 F. Supp. 851 (N. D. Ill. 1949) (personal injury, diversity suit); *Barnhart v. J. B. Rogers Producing Co.*, 86 F. Supp. 595