VINEYARD et al. v. O'CONNOR.

(Supreme Court of Texas. June 22, 1896.)

DEED—DESCRIPTION—SUFFICIENCY—FAILURE TO NAME GRANTEE.

1. A deed by a father to his son, for a nominal consideration, describing the land conveyed as "all my right, title, and interest in the estate of J. W. B., purchased by me at administrator's sale in behalf of my son," is not bad for want of a sufficient description, as the words "purchased by me at administrator's sale in behalf of my son," will be construed as expressing a motive for the conveyance of all the interest purchased at the sale, and not as limiting the interest conveyed to that purchased in behalf of the son. 35 S. W. 1084, affirmed.

2. A deed recited that "I [grantor] * * * for the sum of one dollar, and out of the affection for my son, S. H. V., do hereby grant, release, and convey, to have and to hold forever, all my right, title, and interest in the estate of J. W. B., purchased by me at administrator's sale in behalf of my son, S. H. V., and heirs of S. C. [grantor] and Anna W. V.; hereby reserving the right to control, as guardian, said estate for the benefit of S. H. V. and heirs of S. C. and Anna W. V. And I, the said S. C. V., for and in consideration of the sum of one dollar to me in hand paid, do hereby bind myself by these presents to warrant, defend, and protect unto the said S. H. V. and heirs of S. C. V. all the possessions hereunto conveyed." *Held*, that the deed was not void for failure to name a grantee, as the recitals showing that the conveyance was in consideration of love and affection for S. H. V., and that the land was purchased in behalf of S. H. V., and the warranty of title to S. H. V. and heirs of the grantor, are sufficient to designate S. H. V. as the grantee. 35 S. W. 1084, reversed.

Error to court of civil appeals of First supreme judicial district.

Action by S. C. Vineyard and another, as guardians of Lillian Vineyard, against Dennis M. O'Connor. There was a judgment of the court of civil appeals (35 S. W. 1084) affirming a judgment for defendant, except as to the lands by him disclaimed, and plaintiffs bring error. Reversed.

Ward & James, for plaintiffs in error. Glass, Callender & Carsner, for defendant in error.

GAINES, C. J. This was an action of trespass to try title, brought by Lillian Vineyard, a minor who sued by her guardians, to recover of Dennis M. O'Connor, the defendant in error, certain tracts of land. The defendant, in an amended answer, disclaimed as to some of the tracts sued for, but pleaded not guilty, and set up title, as to the others. There was a judgment for defendant for the lands claimed by him in his answer, which judgment was affirmed by the court of civil appeals.

Upon the trial the plaintiff introduced in evidence patents to one James W. Byrne for six of the tracts in controversy, and also a patent to one Isaac C. Robertson for the seventh. It was agreed between the parties that Byrne, who was then dead, was the owner at the time of his death of the tract patented to Robertson. The plaintiff then introduced the proceedings of the probate court of Aransas county in the matter of the estate of James W. Byrne, deceased, showing an order for the sale of the lands, and an order confirming a sale of the same to S. C. Vineyard, together with a deed by the administrator conveying to such purchaser the lands so sold. The plaintiff then offered a purported deed, of which the following is a copy: "State of Texas, County of Aransas. Know all men by these presents, that I, Samuel C. Vineyard, of the state of Texas and county of Aransas, for the sum of one dollar, and out of the affection for my son, Samuel Harvey Vineyard, do hereby grant, release, and convey, to have and to hold forever, all my right, title, and interest in the estate of James W. Byrne, purchased by me at administrator's sale in behalf of my son, Samuel Harvey Vineyard, and heirs of S. C. Vineyard and Anna W. Vineyard, hereby reserving the right to control as guardian said estate for the benefit of S. H. Vineyard and heirs of S. C. Vineyard and Anna W. Vineyard; and I, the said Samuel C. Vineyard, for and in consideration of the sum of one dollar, to me in hand paid, do hereby bind myself by these presents to warrant, defend, and protect unto the said Samuel H. Vineyard and heirs of S. C. Vineyard all the possession hereunto conveyed this eighth day of October, 1873, A. D. In testimony whereof, I have hereunto signed my name, and affixed my scrawl for seal, on this eighth day of October, A. D. one thousand eight hundred and seventy-three. S. C. Vineyard. Witness: Eustace Hatch." The instrument was duly acknowledged. The introduction of the paper in evidence was objected to on three grounds, but we need only consider two of them. The first was that it was void because it contained no sufficient description of the property intended to be conveyed; and the second, that the grantee was not named therein. In connection with the instrument, the plaintiff offered to prove by her mother that she (the proffered witness) was the wife of S. C. Vineyard, and that Samuel Harvey Vineyard was their son, and that he was the only child born to them at the date of the purported conveyance, but that subsequently she bore to her husband the plaintiff and another child. The plaintiff also offered in evidence a deed executed by Samuel Harvey Vineyard, conveying to her all his "entire interest in the conveyance from S. C. Vineyard to me, Harvey S. Vineyard, A. D. 1873; the same tracts being purchased from the estate of James W. Byrne," etc. The first deed was excluded by the court upon the objection already stated, and the second was objected to upon the ground that, since the first deed had been ruled out, the second was irrelevant. This latter was also excluded. We are of the opinion that neither ground of objection to the instrument executed by S. C. Vineyard is tenable. The majority of the court of civil appeals held that the description of the property intended to be conveyed was sufficient, and we think that ruling correct. If the de-

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scription had ended with the words, "purchased by me at administrator's sale," it is quite too clear for argument that it would have been sufficient. Bowles v. Beal, 60 Tex. 322; Cattle Co. v. Chisholm, 71 Tex. 523, 9 S. W. 479; Wilson v. Smith, 50 Tex. 365; Kingston v. Pickins, 46 Tex. 99; Ragsdale v. Robinson, 48 Tex. 379. If the purpose of the use of these words, "in behalf of my son," etc., was to limit the conveyance to a part of the lands bought at the administrator's sale, and the whole of the descriptive language should be construed as if it had read, "all that portion of the property bought by me at administrator's sale, which was purchased in behalf of my son," there might be some question as to its sufficiency. But we think such was not the purpose of the grantor, but that the object in the use of the words just quoted was merely to declare that he had purchased all the lands bought by him at the sale of Byrne's estate for the use of his children, and thus to make more manifest the motive which prompted the conveyance. At all events, the language fairly admits of that construction; and when words in an instrument are capable of two constructions, one of which will make it void, and the other of which will make it valid, the latter must prevail.

This brings us to the second ground of objection, which was that there was no grantee in the deed. Every deed of conveyance must have a grantee. But it is a mistake to suppose that any mere formalities are necessary to its validity. Lord Coke says: "I have tearmed the said parts of the deed formal or orderly parts, for if such a deed be without premises, habendum, tenendum, reddendum, clause of warrantie, the clause of in cujus rei testimonium, the date and the clause of hiis testibus, yet the deed is good. For if a man by deede give lands to another and to his heirs without more saying, this is goode if he put his seale to the deede, deliver it, and make livery accordingly. So it is if A. give lands to have and to hold to B. and his heires, this is good, albeit the feoffee is not named in the premises." 1 Co. Litt. 7a. In a deed, as in all other written instruments, it is the duty of the court to determine the intention of the parties to it; and when the instrument itself makes it manifest that it was the purpose of the grantor to convey the property to another, who in the deed itself is designated with reasonable certainty, it will take effect as a conveyance. The grantee need not be named. He may be described. A deed to the heirs of a person who is dead is good, for the reason that the heirs may be definitely ascertained. That is certain which may be made certain. So if the deed do not express to whom the property is conveyed, yet, as we have seen, if the grantee be named in the habendum, the deed is sufficient,—not because the habendum says expressly who the grantee is, but because the inevitable presumption is that the person who is "to have and to hold" the property is the party to whom it was intended to be conveyed. The case of Newton v. McKay, 29 Mich. 1, is similar to the case before us, and the remarks of the court in their opinion are quite pertinent to the question we have under consideration. There the instrument, neither in the granting clause, nor in the habendum, nor in the warranty, named the grantee, though it began, "This indenture, made and agreed to between Jacob Sammons, of the first part, and F. H. Genereaux, of the second part," etc. The court, in their opinion, say: "It is undoubtedly true that to constitute a valid conveyance the grant must in some way distinguish the grantee from the rest of the world. But it is equally true that if, upon a view of the whole instrument, he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties, through the means furnished by the whole document and such extrinsic aids as the law permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is,—if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee,—it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument. The grant before us is very awkward and unskilled. It was evidently drawn by a person unacquainted with the principles of conveyancing, and yet having some knowledge of the phraseology commonly used in deeds. But, notwithstanding its infelicity of arrangement and its numerous shortcomings, it seems to me that it is not invalid for the uncertainty alleged against it. True, no one is expressly named or described as grantee in the premises or subsequent parts of the instrument. But no person can escape the impression that the paper was meant to be an actual and lawful grant to Genereaux. It was not prepared, executed, acknowledged, and delivered as an idle ceremony. It describes Sammons as being the party of the first part, and Genereaux as being the party of the second part. The nature of the act to be consummated, and the writing got up as an instrument of conveyance to effect the consummation, explain the sense in which Sammons is called the 'party of the first part,' and Genereaux the 'party of the second part.' When we reflect that the parties were by this paper seeking to effect a transfer of land from one to the other, these expressions of party 'of the first part' and party 'of the second part' very plainly convey the idea that the former was grantor and the latter grantee." After referring to another peculiarity of the deed, the court conclude: "Without pausing to elaborate the point, it is

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sufficient to say that the instrument imports upon its face to be a grant from Sammons to Genereaux." The case of Doe v. Hines, Busb. 343, was decided upon the same principles. Let us then apply the rules announced to the instrument before us. Treating the recital of the consideration of one dollar as formal, we see that the true consideration of the deed is the affection of the grantor for his son. It declares that the property had been purchased at the administrator's sale in behalf of (that is, for the benefit of) his son and the "heirs" of the grantor and his wife, and also reserves control of the property, as guardian, for the benefit of the son and such "heirs." And finally the grantor covenants to warrant the title to his son and the "heirs" of himself and wife. So the deed expressly shows who is to have the beneficial interest in the property, and to whom the title was to be warranted. Can there be any reasonable doubt, from the face of the deed itself, to whom the grantor intended to convey the land? If the grantor may be pointed out in the habendum, why not in the covenant of warranty? The whole instrument is consistent with the theory that Samuel Harvey Vineyard was intended to be a grantee therein, and no other possible construction can reconcile its peculiar provisions. We therefore conclude that the instrument in question was a valid conveyance, and that it passed to him the legal title in the land. For the error of the trial court in excluding the deed from S. C. Vineyard to Samuel H. Vineyard, and the court of civil appeals in affirming that ruling, their judgments are reversed, and the cause remanded.

MORRISON v. LAZARUS.

(Supreme Court of Texas. June 22, 1896.)

MORTGAGE—VENDOR'S LIEN AS COLLATERAL—ENFORCEMENT AGAINST HOMESTEAD.

The owner of a tract of land which included his homestead, and who owed a part of the purchase money, evidenced by a note reserving a vendor's lien, borrowed from a mortgage company, securing the loan by a trust deed on the land exclusive of the homestead; the company taking up the purchase-money note from the proceeds of the loan, under an agreement contained in the trust deed that it should retain such note as collateral, together with the lien securing it. The company foreclosed the trust deed, taking judgment against the mortgagor for the full amount of the loan, and sold and bought in the property covered thereby for a part only of the debt, the amount being credited on the judgment. It afterwards transferred the purchase-money note to plaintiff, who brought suit against a purchaser of the homestead from the mortgagor, to enforce against it the vendor's lien. *Held*, that if the sale under the foreclosure by the mortgage company, which was then the owner of such lien, extinguished it as to the land other than the homestead, the proceeds of such sale operated, when applied on the judgment, as a satisfaction of the purchase-money debt; that, if the lien was not extinguished, it survived as to all the land, unaffected by the foreclosure of the prior lien, and could only be enforced, as to the homestead part of the property, after the remainder had been exhausted. 35 S. W. 498, reversed.

Error to court of civil appeals of Third supreme judicial district.

Action by Sam Lazarus against Hiram Morrison and others. Judgment for plaintiff in the trial court was affirmed on appeal by the court of civil appeals (35 S. W. 498), and defendant Morrison brings error. Reversed.

J. D. Thomas, for plaintiff in error. Alexander, Clark & Hall, for defendant in error.

BROWN, J. W. N. George purchased from H. H. Rawlings 1,380 acres of land, for which he gave his note for $8,047.50, dated November 19, 1885, due November 19, 1893. George occupied 200 acres of the tract as a homestead, and while he was so occupying it, on the 23d day of October, 1888, borrowed from the Western Mortgage & Investment Company $16,500, giving his note therefor, which matured prior to the 26th day of December, 1891; and to secure this note George executed to the Western Mortgage & Investment Company a deed of trust on 1,180 acres of the land, not including his homestead. The principal and interest of the note given by George to H. H. Rawlings were embraced in the note given by George to the mortgage and investment company; and he received from the investment company the difference between the principal of the said note and unpaid interest up to date when he borrowed the money from the said investment company, and the amount of the note executed to it, being something over $6,000. The mortgage and investment company, with the money borrowed by George, paid off the note to Rawlings, and received the same, with an indorsement thereon showing that it was transferred by Rawlings without recourse. The deed of trust included only the 1,180 acres of land, describing it by metes and bounds, and calling for the 200 acres as the homestead of George on two of its lines. No other land was described in the deed of trust than the 1,180 acres. In the deed of trust was a space thus designated: "This space is to be used to secure subrogation of the lien, and recite facts where a vendor's or other lien is paid off by the note secured hereby." In the space was written: "It is expressly agreed that the taking of this trust deed shall in no wise impair the vendor's lien existing upon the said land, as evidenced by the note of the said W. N. George for $8,047.50, executed to H. H. Rawlings, and transferred to the Western Mortgage & Investment Company, Limited, and now owned by the said company." It was proved by J. B. Simpson, who was trustee in the deed of trust, that when the said transaction occurred it was agreed between him and George that the note made to Rawlings should be held

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