# Dickinson Law Review - Volume 22, Issue 2

# Dickinson Law Review

VOL. XXII NOVEMBER, 1917 No. 2



*Subscription $1.50 per annum, payable in advance*

## ESCROWS

Rice, P. J., adopts[1] as a definition of an escrow, the following language of 16 Cyclopedia of Law and Procedure, p. 561, "An escrow is a written instrument which by its terms imports a legal obligation, deposited by the grantor, promisor or obligor or his agent, with a stranger or third person, that is, a person not a party to the instrument, such as the grantee, promisee or obligee, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect." A definition quoted by Trunkey, J.,[2] is "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such delivery is good." The former definition states that the escrow "imports a legal obligation." Some escrows do; e. g. bonds, promissory notes. But a conveyance does not,

[1]Murphy v. Greybill, 34 Super. 539.
[2]Baum's Appeal, 113 Pa. 58.

by its terms import an obligation. There may be an obligation to convey, arising out of some previous contract, but the conveyance does not express or impart this obligation. It is rather the performance, the extinction of the obligation. Perhaps there has been no previous duty to convey. Then the deed does not import even the extinction of an obligation. A may gratuitously and without B's knowledge, make to B a deed in fee of land, and deposit it with C until A dies, or until B reaches the age of thirty years, when he, C, is to deliver it to B. Nothing is to be done by A, by the terms of the paper. His duty towards B is, like that of any other human being, that of respecting the property rights of B, a duty not expressed, not imported, by the deed.

**Instruments Which May Be Escrows**

Deeds which purport to convey interests in land, are the usual specimens of escrows. The sheriff, selling land in execution, may deposit the deed with another than the purchaser.[3] The ordinary vendor of land may make the deed an escrow.[4] A gratuitous conveyance, e. g. of husband to wife,[5] of grandfather to grand-children,[6] may be deposited with another till the grantor's death. An assignment of a patent,[7] or of a bond and mortgage,[8] may be an escrow. A, purchasing land from B, may execute a bond to B, for the purchase money of land, putting it into the custody of C, to be

[3]Robbins v. Bellas, 2 W. 359.

[4]Baum's Appeal, 113 Pa. 58.

[5]Levengood v. Bailey, 1 Woodw. 275.

[6]Stephens v. Hess, 54 Pa. 20.; Stephens v. Rinehart, 72 Pa. 434.

[7]McMillan v. Davis, 54 Super. 154.

[8]Booth v. Williams, 2 W. N. 504; 11 Phila. 266.

retained until certain incumbrances shall have been discharged, and then to be delivered to B.[9]

**Grantee Cannot Be The Depositary**

"An instrument, complete on its face for the conveyance of land, cannot be deposited with the grantee as an escrow; such deposit becomes a delivery, and the instrument so delivered becomes a deed, which takes effect presently as the deed of the party making the delivery, regardless of the oral conditions attached, which the party will not be bound to perform."[10] There might be justification for the rule that if A put a deed absolute in its purport, in the hands of B, the grantee, and B, thus in possession of it, dealt with the land named in the deed as his, so that another, who had inferred from his possession that he was the owner, would be injured if A were allowed to deny B's ownership, by showing that the delivery of the deed to him was to operate only on a condition, the delivery to B should, in the interest of the person bona fide dealing with him, as owner, be treated as absolute. A is indebted to several, on a recognizance in the Orphans' Court, for property taken in partition. Certain of the heirs entitled under their recognizance, released A. In a distribution of A's estate, after his death, among creditors, the releasors will not be permitted to claim against the other creditors, that the release was not to operate, unless the releasee, A, should pay the amounts owed by him on the recognizance. To allow this claim "would not only be putting it in the power of the party in whose favor the deed (release) is made, to practice a fraud upon the community by means of it, in obtaining a credit that otherwise would not be given to him, but would be

[9]Beaumont v. Kline, 3 Phila. 44.

[10]16 Cyc. 571.

opening a wide door for the introduction of frauds and perjuries.[11] But, when the grantee's assertion that he was the owner, would be a violation of the understanding that he was only to become the owner on the doing of a certain act, or the happening of a certain event, the only reason for refusing to allow proof of this understanding would be that which denies the right of a party to alter or contradict a writing by parol. If the grantee admitted in writing that he had received the deed as an ascrow, this reason would be inapplicable.

**Who May Be Depositaries**

It may be said generally that anybody may be made the depositary of an escrow. The father of the grantee was such.[12] The sheriff having sold the land on an execution, may deposit the deed with the prothonotary, who is to deliver to the vendee only on his paying the purchase money.[13] A corporation may be the depositary;[14] e. g., a national bank.[15] A father, intending to convey to his son, may deposit the deed with his wife, the son's mother, until the grantor's death, and the payment by the son of all the father's debts.[16] The justice of the peace, who takes the acknowledgment of the deed, may be the depositary.[17] The grantor who

[11]Kennedy, J., Simonton's Estate, 4 W. 180: The justice surmises that the release was made to help the releasee to convince others that his land was discharged of the recognizance. To allow the releaser to claim against other creditors who had possibly been induced to give credit, would be unjust to them.

[12]Eckman v. Eckman, 55 Pa. 269.

[13]Robbins v. Bellas, 2 W. 359.

[14]Dempwolf v. Graybill, 213 Pa. 163; Murphy v. Graybill, 34 Super. 339; Gochnauer v. Union Trust Co., 225 Pa. 503.

[15]McMillan v. Davis, 54 Super. 154.

[16]Landon v. Brown, 160 Pa. 538.

[17]Levengood v. Bailey, 1 Woodw. 275.

makes a will, when making the deed, may deposit the latter with the person whom he has named as executor, with direction to deliver it to the grantee on his payment of the purchase money, $1,000.[18] The grantor may select his own attorney to hold the deed.[19] A mortgagor negotiating for an assignment of the mortgage to his wife, may direct it to be deposited with his attorney until he pays for it.[20]

**Nature of The Determining Event**

The object of making an escrow is to suspend the right to possession or the ownership, upon the occurrence of some event. The event may be contingent. its happening at all may be uncertain. It may be certain to happen, the time of its occurrence only, being unknown.

**Event Contingent**

Various events may be selected as conditions precedent to the vesting of ownership and of the right to the possession of the deed. The event may be the payment of a definite purchase money,[21] of a designated purchase money, and certain shares of stock,[22] of a series of notes given for the purchase money,[23] of the

[18]Smith's Estate, 6 Kulp. 76.

[19]Baum's Appeal, 113 Pa. 58.

[20]Booth v. Williams, 2 W. N. 504.

[21]Robins v. Bellas, 2 W. 359; Pace v. Yost, 10 Kulp. 538; Vorheis v. Kitch, 8 Phila. 554.

[22]Murphey v. Greybill, 34 Super. 339; Dempwolf v. Greybill, 213 Pa. 163.

[23]McMillan v. Davis, 54 Super. 154.

grantor's debts.[24] The event may be the painting and glazing of thirty-two houses, by the grantee.[25]

**Events Certain**

The death of some person may be the event upon which the grantor intends the right to the possession of the deed to pass to the grantee. Usually it is the death of the grantor himself. He intends to pass an estate which shall entitle to possession not before but immediately upon his own death. The estate intended to pass is usually a fee. It might be less. The motive for making the conveyance in the form of an escrow, is to retain the possession and ownership of the land, for the grantor's life. This could be done by making a will instead of a deed, but, were a will used, there would be a risk of the acquisition of interests which would minify that intended to pass. Should the donor marry, before death, his wife might insist on dower. In several cases, the intention to prevent the attachment of dower or curtesy is manifest. A grandfather, about to remarry, conveyed land to his grand-children, but deposited the deed with a third person to keep until his death, and then to put it on record and deliver it to the grantees.[26] A childless husband conveyed to his wife, but deposited the deed with X to be held until his death.[27] There may be no allusion in the mind of the grantor, to the avoidance of delivery, etc., the sole purpose of depositing the deed being to retain for the grantor, an ownership for his life.[28] An uncle made a deed which re-

[24]Landon v. Brown, 160 Pa. 538.

[25]Beam v. Curran, 2 W. N. 260.

[26]Stephens v. Huss, 54 Pa. 20; Stephens v. Rinehart, 72 Pa. 434.

[27]Levengood v. Bailey, 1 Woodw. 275.

[28]Werley v. Werley, 2 Leh. 343.

served a life estate, and subject thereto, conveyed to his nephews the fee, and deposited it to be delivered to them at his death.[29]

**Several Events, Contingent and Certain**

It is possible to suspend the grantor's right to the possession of the deed and of the land upon several events; e. g., the deed may be deposited to be delivered on the death of the grantor, and the payment of the designated purchase money.[30]

**Several Grantors, Obligors, Etc.**

A bond, deed, recognizance, etc., may be intended not only by the obligee, grantee, etc., but by each of the several obligors, grantors, etc., to be executed by the whole of them. Suit on a bond to indemnify persons who become sureties on a sheriff's bond. The defense was that the sureties to be indemnified, by their agent agreed that a certain number of indemnitors should be procured, and that some of this number had not been obtained. When the defendants signed and delivered the bond, they did so on the condition that the required number of signers should be obtained. The delivery by each signer was not absolute, but on this condition. There could be no recovery against the signers.[31] A principal and two sureties were named in a bond as obligors. The statute under which it was given, required two sureties. One who signed such a bond (one of the two sureties named) had a right to assume that the signature of the other surety would be procured. If it was not procured, he is not liable.[32] Several devisees in remainder

[29]Eckman v. Eckman, 55 Pa. 269.
[30]Smith's Estate, 6 Kulp. 76.
[31]Fertig v. Bucher, 3 Pa. 308.
[32]Sharp v. United States, 4 W. 21.

after a life estate. They are applied to to release their interests as devisees, for the purpose of avoiding a contest over the will. Some of them execute the release, which the others subsequently decline to sign. The delivery of those who sign is to be considered as conditioned on the signing by all and if all do not sign, those who do are not bound.[33]

**Depositary's Duty, How Expressed**

The grantor, when he deposits the deed with another than the grantee may orally express the duty of the depositary, to make delivery. This oral expression may be proved as other facts. A sheriff's deed was left in the prothonotary's office. On it was written "19th January, 1819, acknowledged, George W. Brown, Prothonotary." "Deposited as an escrow." There was evidence that the sheriff's vendee had desired him to deliver the deed, on his giving a receipt of payment of a later judgment than that on which the sale had been made, and that the sheriff, declining to deliver the deed, deposited it with the prothonotary until payment by the vendee should be made.[34] Evidence of the condition upon which the deed was to be delivered to the depositary was, in part, in a will of the grantor, in which he mentions the conveyance and states that it is to be delivered, after his death, and only on the grantee's paying all his debts.[35] The grantor's deed, the grantee's agreement to pay $15,000, and his bond for that amount, were put into an envelope and left with a depositary until the death of the grantor. The facts were orally proved.[36] The terms on which the deed

[33]Donnelly v. Rafferty, 172 Pa. 587.

[34]Robins v. Bellas, 2 W. 359.

[35]Landon v. Brown, 160 Pa. 538.

[36]Gish v. Brown, 171 Pa. 479.

is to be delivered may be written by the grantor. The depositary may by writing state what his duty is concerning delivery; e. g., "This deed was left with me by Jacob S. Beam, in escrow, to be delivered to S. S. Kelly, when Charles C. Carman delivers his deed to Jacob S. Beam." J. S. Yardley.[37] In Gochenauer v. Union Trust Co.,[38] the Trust Company executed this paper, on receiving the deed: "Received of George C. Gochenauer, depositor, deed dated March 25, 1901, from George C. Gochnauer and wife to Joseph C. Murphy for property situated in Monroe Township, Cumberland County, Pa., to be held in escrow under terms of agreement dated February the 28th, 1901, between the depositor and Newton Jackson. (signed) The Union Trust Company." The vendor of land may give a written option to X to buy it at a fixed price, in money and stock, and may therein stipulate, "the deed to the property to be deposited in escrow with the Union Trust Company of Philadelphia, on or before March 15, 1901, and upon delivery by the said Newton Jackson (the grantee) of the consideration named above, said deed shall be recorded * * * and become the property of said Newton Jackson or company."[39] If the condition precedent be expressed in writing, the construction of the writing is for the Court. Though strict compliance with the condition precedent to delivery is required of the depositary, no strained construction is put on the words used. Where the words can be interpreted as a condition, a reservation or a covenant, the Court favors the finding of a covenant.[1]

[37]Beam v. Carman, 2 W. N. 260.

[38]225 Pa. 503.

[39]Murphey v. Greybill, 34 Super. 339.

[1]Murphey v. Greybill, 34 Super. 339; Dempwolf v. Greybill, 213 Pa. 163.

**Grantee's Failure to Comply With Condition and Accept Deed**

If the grantee refuses to comply with the condition, e. g., to pay the specified purchase money, after the grantor's death, the deed is deemed not to have effect, and the grantor dies the owner of the land.[2]

**When Deed Is Improperly Delivered**

If the grantee obtains the deed, from the depositary without complying with the condition, he obtains only a voidable title.[3] Among "recognized and settled principles of law," Elkin, J., mentions these; the grantee in a deed placed as an escrow, is entitled to the possession of it only upon a strict compliance with the conditions precedent to such delivery; if the depositary delivers the deed without authority of the grantor; if the grantee obtains possession fraudulently, not performing the condition, the deed is void; if the future delivery of the deed depends on the payment of money or the performance of some other condition, and the grantee obtains possession of the deed without performing the condition, he acquires but a voidable title.[4] Apparently a void deed and a voidable title are conceived to be synonymous. The sheriff having sold land to X, and deposited the deed with the prothonotary to deliver only on the payment of the purchase money, X, some years afterwards obtained an order of the Court for the delivery of the deed without requiring him to pay. The Court had no power to make this order, and the plaintiff in the execution on which the sale was made, and who had failed to obtain satisfaction of his debt, by the refusal of X to

[2]Smith's Estate, 6 Kulp. 76.

[3]Landon v. Brown, 160 Pa. 538; Dempwolf v. Greybill, 213 Pa. 163; Murphey v. Greybill, 34 Super. 339.

[4]Dempwolf v. Greybill, 213 Pa. 163.

pay his bid, might issue an alias writ, and cause a second sale of the land.[5] The voidness of the delivery of the sheriff's deed did not need to be decided by any Court. The plaintiff in the execution assumed it, in issuing the second execution. In Booth v. Williams,[6] an assignment by an obligee and mortgagee, of the bond and mortgage, to the wife of the mortgagor, was put in escrow, until the payment of the price agreed upon. The judgment which had been entered on the warrant of attorney in the bond, was for some reason not assigned. After default in paying some of the price, the mortgagee threatened to enforce the mortgage for the whole of the original debt, although he had received $4,000. The depositary then delivered the bond and mortgage to the assignee. The mortgagee then attempted to have execution of the judgment. The Court, Mitchell, J., enjoined against the execution, saying that the validity of the assignment could not be contested without making the assignee, the wife of the mortgagee, a party, but refraining from passing on the effect of the delivery of the mortgage and bond.

**Judicial Avoidance of Deed**

A deed in escrow, having been, in violation of the terms of the deposit put on record, by the grantee, the grantor may, by bill in equity, obtain a decree for the cancellation of the deed and of the record of it.[7]

**Estoppel To Deny Fulfilment of Condition**

The party in whose favor the condition operates may preclude himself from insisting upon it; e. g., by him-

[5]Robins v. Bellas, 2 W. 357.

[6]2 W. N. 504.

[7]Eckman v. Eckman, 55 Pa. 269. The Court however found that the deed had been delivered absolutely.

self doing that which the other party was to do. A vendee of land on which were encumbrances, gave a bond for the purchase money, placing it in the custody of X, until these incumbrances should be removed. The vendee afterwards himself removed these incumbrances, by paying money less in amount than the bond. But the bond does not become void, as not having been delivered. On the contrary, the vendee's making impossible the doing of the act stipulated for, the bond will be treated as if delivered to the obligee, and a recovery on it will be allowed, deducting what the obligor has paid.[8] If the grantor so acts as to induce the depositary and others to suppose that the condition on which the deed is to be delivered has been fulfilled, and the grantee, as he knows, obtains it. and makes a mortgage on the premises to X, he will be precluded, as respects X and the purchaser at the foreclosure sale from denying that the terms of the deposit had been complied with. In ejectment by this purchaser against the grantor, the latter cannot allege that the grantee did not own the land and therefore could not validly mortgage it.[9]

**Conditioning After Absolute Delivery**

If a deed is delivered to the grantee, it cannot by a later act of the grantor only, (possibly not by the consequent act of grantor and grantee) be turned into an escrow. Says Rogers, J., "it is unquestionable law that a deed cannot be made an escrow by any other declarations than are made at the time of signing and executing the instrument." A deed signed, sealed, acknowledged, and deposited with a third person to be handed to the grantee, cannot the next day be converted into

[8]Beaumont v. Kline, 3 Phila. 44.

[9]Dempwolf v. Greybill, 213 Pa. 163.

an escrow by a direction to the third person to deliver it only when the purchase money is paid.[10]

**Minifying The Condition**

After an escrow is made, the conditions may be softened by the act of the grantor. The original terms may, e. g., require that the deed be retained until, within ten days payment of the purchase money be made, and the grantor may orally consent to a delay beyond the ten days, of the payment, and so prevent his withdrawing the deed from the depositary, before the expiration of the prolonged period, or his hindering the grantee's getting it, on tendering the payment within the extended time.[11] A deposits a deed with X with direction to deliver it after A's death to B, on B's paying a bond for $15,000. Subsequently, A writes on the back of the bond, "This obligation is hereby cancelled and made null and void for a valuable consideration to me in hand paid," by the grantee and signs the endorsement. He thus releases the grantee from the necessity of paying the $15,000, in order to entitle him to the land and the deed. On obtaining the deed without such payment, he could recover the land in ejectment.[12] A agrees to convey two houses to B, as soon as B has finished the painting and glazing of 32 houses, in process of erection by A. The deed is put in escrow until the finishing of the painting and glazing. Subsequently B agrees to sell one of the two houses to C, and A, in pursuance of this agreement makes a deed for it to B, and at the same time, B makes a deed for it to C. Both these deeds

[10]Blight v. Schenck, 10 Pa. 285; Antrim's Est. 16 Luz. 59. Cf. Eckman v. Eckman, 55 Pa. 269.

[11]Baum's Appeal, 113 Pa. 58. The Court decreed that the deed be delivered.

[12]Gish v. Brown, 171 Pa. 479.

are deposited with X, "until B shall have done sufficient painting and glazing * * * to warrant A to deliver the deed. By agreeing to this modification of the condition A waives his right to postpone the delivery of the deed until the painting and glazing of the 32 houses are completed.[13]

**Deed Ultimately Delivered Without Compliance With Condition**

A made a deed to his son, depositing it with his wife, to hand to the son, after A's death, upon the son's paying all of A's debts. There were judgments binding the land. The wife delivered the deed to the son after A's death, although he had not paid these judgments. The land was sold on one of these judgments. Whether it was entitled to the proceeds against the owner of a much younger judgment recorded against the son, depended on the question whether the earlier judgment's lien had been maintained by renewals. The Court held that, if the land was the son's, as devisee or as heir, the earlier judgment preserved its lien without revival, but if he became owner as grantee, a revival was necessary. It found that he owned the land as grantee,[14] but by a voidable title. If a sale of land is made, and the deed deposited with X, to be delivered to the purchaser only upon his paying the purchase money, and X allows the deed to be received by the grantee, who gets possession of the land, the grantor may doubtless recover the land from him in ejectment. The grantee however may convey the land to another, under such circumstances as would warrant his purchaser to believe that he was in legitimate possession of the

[13]Baum v. Carman, 2 W. N. 260. As owner B to the use of C, could recover in ejectment.

[14]Landon v. Brown, 160 Pa. 538.

deed. In such a case, the original grantor could not recover the land from his grantee's grantee. A causes a scrivener to prepare a deed to B. He is notified that the deed is at an alderman's office, ready for execution. He calls at the office, executes and acknowledges the deed, to have been signed, sealed and delivered by him. The deed is left with the alderman, and the scrivener procures it under instructions not to deliver it until the purchase money is paid. It is however delivered without payment, and possession of the land is also taken by the grantee. A bona fide purchaser from him, will get a good title. "He invests his money on the faith of the solemn acts and declarations of the plaintiff," the grantor.[15]

**Liability of Depositary For Improper Delivery**

Probably the depositary who delivers the deed before the conditions upon which he was to deliver it have been fulfilled, will be liable to the grantor for any resulting damage, in the action of assumpsit.[16] An explicit denial of the allegations that the terms upon which delivery was to be made have been violated will prevent judgment before trial.[17] Even if the delivery of the deed has been made before compliance with the conditions, the grantor may preclude himself from recovering damages from the depositary. If after the delivery, and with knowledge that it should not have been made, the grantor obtains the benefit which he has no right to, unless and until the conveyance has been made, he cannot even as against the depositary of the deed, deny the rightness of the delivery. A sells to a milling company his mill.

[15]Blight v. Schenck, 10 Pa. 285; Dempwolf v. Greybill, 213 Pa. 163.

[16]Gochnauer v. Union Trust Co., 225 Pa. 503.

[17]Gochnauer v. Union Trust Co., 214 Pa. 177.

The deed is put in escrow until the consideration, preferred stock, whose par is $10,500 and common stock of the same par value. The company is to buy the grain, flour and feed on hand at the time of the transfer. A month after the delivery to him of the stock, and the reception by the company of the deed from the depositary, the grantor transferred his grain, flour and feed, receiving the price. He thus, says Brown, J., "reaffirmed the agreement under which the deed had passed, and tacitly approved all that had been done."[18]

**Enforcement of Right Against the Grantor**

If the grantor refuses improperly to allow performance of the condition by the grantee, and to allow the depositary to deliver the deed, the Court will, on bill in equity, decree that the grantor and the depositary deliver the deed in a specified time to the grantee.[19] The grantee may recover the land in ejectment if he has performed the condition on which he was entitled to the deed, although the deed has been improperly withheld.[20]

**Sale Not An Option**

If an agreement is made by which A undertakes to sell an assignment of a patent to B, B giving notes for the price, the fact that the agreement (but not the notes) is put in the hands of a third person to keep until

[18]Gochnauer v. Union Trust Co., 225 Pa. 503. The approval was very "tacit."

[19]Baum's Appeal, 113 Pa. 58. Here the vendee under a contract to sell and buy land had paid the purchase money to the depositary, who kept it but refused to deliver the deed. The grantor alleged that by not paying the money in the time specified by the contract, the grantee had lost all right to the land. The Superior Court refused to find that only a proposition to sell had been made, which the vendor might withdraw.

[20]Beam v. Carman, 2 W. N. 260.

the payment of the notes, and then to deliver it, does not make merely an option in B to take or not. A can either recall the assignment, if the notes are not paid, or he may maintain assumpsit upon them.[21]

**Doctrine of Relation**

If A contracts to sell land to B, the deed to be deposited with another, till payment of the purchase money, the interest of the vendee, on his subsequently paying the money, and receiving the deed, will be what it would have been, had the deed been delivered directly to him, instead of the depositary. This fact is sometimes expressed by saying that the second delivery takes effect by relation to the first delivery. "When a feme sole," says Trunkey, J., "delivers a deed as an escrow, and marries before it ceases to be an escrow by second delivery, the relation back to time of first delivery becomes necessary to render the deed valid."[22] A deposited a deed to his son B, and put it in the hands of C, to be delivered to B after A's death. Apparently the understanding was that B was to pay certain sums of money, besides a bond for $15,000. Subsequently, the bond was marked cancelled by A. After A's death, the deed was delivered to B, who apparently, had not paid the other sums of money. Although B thus had the deed, he did not have possession of the land, and brought ejectment for it against A's other heirs. Apparently, the Court gave

[21]McMillan v. Davis, 54 Super. 154.

[22]Vorheis v. Kitch, 8 Phila. 544. But, the case shows that relation was unnecessary. A had made a contract to sell land to B, and he and his wife, executed the deed to B, which they deposited with C, to hold until payment of the purchase money. A's wife died, and he remarried. The second wife had no dower on the land, as against B, not because of relation, but because B had become owner in equity of the land prior to her marriage, her husband having only a right to the purchase money.

judgment for B, on condition that he pay the moneys he had agreed to pay, except the bond. Livingston, P. J., said to the jury, that if the deed had been delivered to C with direction to hold it until A's death, and then to deliver it to B, in such a case, a delivery actually made, by C to B, after A's death, "would relate back to its (the deed's) date of execution, and make it equivalent to a delivery by A at that time for ordinary purposes." But the observation means nothing more than that the delivery by C after A's death will have the same validity, as the delivery by A, during his life.[23] A made a deed to his wife, depositing it with the scrivener to hold until A's death, and then to deliver it to the grantee. After A's death, the deed was so delivered to her. In an action by her against her vendee of the land for the purchase money, Woodward, P. J., held her title to be good, saying, "in general when an instrument is delivered as an escrow to a third person to be delivered to the grantee on a future event, it is not the deed of the grantor until the second delivery; but this rule is subject to exceptions, founded as it is said on necessity ut res valeat." The Court finds no objection to the title of A's wife, remarking, "either as a conveyance vesting the estate at the delivery of the magistrate (the scrivener, a justice of the peace) or as a testamentary disposition of the property, this deed ought to be sustained."[24] A grandfather made deeds to his grand-children, deposited them with A, whom he directed to deliver them after his death. They were so delivered after his death. The grand-children's title was held to be good. Read, J., quotes from Shaw, C. J., in O'Kelley v. O'Kelley, 8 Metc. 436, "If it was delivered by the grantor to any person in

[23]Gish v. Brown, 171 Pa. 479.

[24]Levengood v. Bailey, 1 Woodw. 275. The conveyance was grantuitous.

his lifetime, to be delivered to the grantee, after his decease, it was a good delivery, upon the happening of the contingency, and relates back so as to divest the title of the grantor by relation from the first delivery." The grandfather was about to marry, and made the deeds, in order to pass the land to the grand-children free from any dower of the wife.[25]

**Title Vests With First Delivery**

The object of depositing the deed with the third person may be, not to postpone the vesting of title, or even of right to take possession of the land; but to embarrass and prevent the alienation of the premises by the grantee, until the death of the grantor. A deed was made by A to B and C (husband and wife and D and E, two living children, and was deposited with X, to keep till the grantor's death. A collateral agreement reserved to the grantor certain rights on the land, not inconsistent with the grantees' taking possession, and stated that, "the children, if any, which said Joseph Worley and his wife Agnes (B and C) may yet beget in future shall also be entitled to said farm." Possession of the land was taken, when the deed was deposited, and the grantees were to perform certain duties to the grantor. After the grantor's death, partition proceedings were instituted. Four children born after the deposit of the deed, and before the grantor's death, claimed a cotenancy with the rest. The Court decided that only the persons named on the deed, who were in existence when

[25]Stephens v. Huss, 54 Pa. 20. In Stephens v. Rinehart, 72 Pa. 434, C. J. Shaw is uqoted, to the effect that a deed delivered as an escrow, to await the happening of some contingency, and not the performance of some conditions "will not take effect as a deed until the second delivery; but when thus delivered, it will take effect by relation from the first delivery."

it was deposited, had any interest in the premises. The title passed at that time or related back to that time. Persons afterwards born, acquired nothing.[26]

**Revoking the Depositary's Authority**

If the depositor of a deed in escrow, reserves the right to withdraw it, he may probably, withdraw it, and prevent the vesting of the title. But, the mere reservation of the right to withdraw the deed, will not prevent the title from vesting, if no withdrawal is in fact made, and the depositary delivers the deed, on the happening of the event designated; e. g., the death of the grantor.[27] In Ramlow v. Ramlow,[28] a father and mother executed a deed to a son, and gave it to an attorney to hold until their death. No consideration was paid or to be paid by the son. The mother continued to occupy the premises and paid the taxes. Subsequently, the mother filed a bill for the cancellation of the deed. The Court found that the grantors were old, illiterate, Germans, who did not understand English, had made the deed without receiving advice, that they thought that they could withdraw the deed at any time; that the intention was to make a gift at their death, in case the deed was not cancelled in their lifetimes. The son, who did not know of the execution of the deed till after it had been deposited with the third person, and put on record by him (contrary to the intention of the grantors) conceded that his mother had a life estate in the land. The Court decreed cancellation of the deed.

[26]Werley v. Werley, 2 Leh. County Law J. 343.

[27]Stephens v. Huss, 54 Pa. 20; Stephens v. Rinehart, 72 Pa. 434.

[28]56 Pittsb. 120 The bzurden was on the grantee to show that the deed was irrevocable.

**A Vendee's Grantee**

A was entitled, under contract, to a conveyance of houses from X. Before the conveyance, X died. A petitioned the Orphans' Court to decree against X's executors and devisees specific performance. The answer of the defendants showed that A had directed the executors to make a conveyance of the houses to W, and that they had made a deed to W, and had deposited it with S. & C. for delivery to W. The Court refused the petition.[29]

**Depositary's Tampering With Deed**

A contract between A and B, entitled B to a conveyance of land from A. A and wife in possession thereof, executed a deed to B and delivered it to N, to be delivered by N to B upon B's paying the purchase money. Meantime B receives possession of the land and contracts for the erection of a building thereon. N, the depositary, without the authority of the grantors, or the grantee, erased the name of the grantee, and substituted that of Y. Y executed a deed for the land to R, who paid the purchase money to the grantor, who had no knowledge of the alteration of his deed. The Court refused to recognize R as having any right to intervene in a sci. fa. sur mechanic's lien, arising out of the building operation.[30]

[29]Forder's Estate, 4 W. N. C. 128.
[30]Pace v. Yost, 10 Kulp. 538.

# MOOT COURT

## WRIGHT v. MORSE

**Contract—Infant's Liability—Ratification**

### STATEMENT OF FACTS

The plaintiff sues for the price of a horse sold by him to the defendant when he was but twenty years old. On his twenty-first birthday, the defendant sold the horse at a profit of twenty-five dollars. He at once spent the proceeds on a pleasure trip. On his return he learned for the first time that he, in the absence of a ratification, could have avoided liability for the price.

Campbell, for the plaintiff.

Joblin, for the defendant.

### OPINION OF THE COURT

JESELSOHN, J. It is a well known doctrine of the common law that an infant's contracts are voidable at his option upon his reaching majority. An exception to this well known rule is when the articles supplied are necessaries. The question then arises, what are necessaries? Lord Coke has said an infant's necessaries are "his necessary meat, drink, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he might profit himself afterwards."

Was the horse necessary for the infant's subsistence in the case at bar? It surely was not. If it was, why did he sell it and use the proceeds for a pleasure trip? It is true that a horse may be classed as a necessary in some cases, as for an invalid; but it may not be so termed when it is purely for pleasure.

The general rule is that an infant cannot avoid his contracts until he reaches majority. He lacks the legal discretion to do the act of avoidance. It is admitted that the defendant did not have the legal discretion to avoid his contract, and for this reason his sale of the horse is not considered a sufficient ratification.

It is a well known rule that an act of ratification must be done understandingly. The act must also show an intention, on

the part of the one ratifying, to be thereby bound. Johnston v. Farnier, 69 Pa. 449, holds that "to constitute a binding ratification of an infant's contract, such ratification must be made with deliberate purpose of assuming a liability from which the person knows himself to be discharged by law." The rule has been stated in Whitney v. Dutch, 14 Mass. 460, as follows: "All that is necessary is, that the infant expressly agree to ratify his contract, not by doubtful acts, . . . . but by words, oral or in writing, which import a recognition and a confirmation of his promise." The mere acknowledgment of a contract, without a promise to be bound, expressed or implied, is not sufficient. Some cases have gone so far as to say, that in order to sustain an action against a person of full age on a promise made by him when an infant, there must be express ratification, as by saying, "I ratify and confirm," or, "I agree to pay the debt."

Curtin v. Patton, 11 S. and R. 305, holds: "To make a contract, entered into by a minor, binding upon him when becoming of age, it must appear, that after his arrival at full age, he confirmed the contract by some distinct act, with full knowledge that it would be void without such confirmation." It was also held in Hatch v. Hatch's Estate, 60 Vermont 170: "Where the declaration or the acts of an individual, after becoming of age, fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement, executory on his part, having been made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification; provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable".

If Morse had intended to bind himself, he would not have spent the money for his pleasure as soon as he sold the horse.

Since the facts show that the defendant was entirely unaware of his non-liability and since the Pennsylvania doctrine clearly is that he must be so aware, we give judgment for the defendant.

## OPINION OF THE SUPREME COURT

The purchase of the horse was voidable by the minor, upon his attaining majority.

On his 21st birthday, he sold the horse. He was then an adult, his birthday being the first day of his 22d year. 22d Cyc. p. 512.

Was the sale a ratification of the previous purchase? It was an assertion of ownership, and that ownership, if it existed, was the consequence of the previous purchase.

The former minor was ignorant when he sold the horse, that he could have returned it and avoided payment of its price. Does this ignorance make the sale not a ratification? There are two cases in which an obligation assumed by an infant for the accommodation of another was held capable of repudiation, notwithstanding a ratifying act, in the absence of knowledge that he could repudiate the obligation. Curtin v. Patten, 11 S. and R. 305. Hindy v. Margaritz, 3 Pa. 429. In this case the contract was not made for the accommodation of another. "The better considered rule", says 22 Cyc. p. 603, "appears to be that as the late infant must be presumed to know his legal rights, it is not necessary to a ratification of his contract made during infancy, that the act or promise relied on should have been done or made with actual knowledge that he was not bound."

Morse retained the horse till he became 21 years old. He then sold it at a profit of $25. It is abhorrent to say that he does not need to pay for it. If he squandered the money, he did so as an adult.

In Johnston v. Fournier, 69 Pa. 449, a partition was made by the guardian of a minor. On his reaching age, the minor conveyed the land that had been allotted to him as his purport. "What," asks Sharswood, J., "can be a more unequivocal and conclusive assent and ratification by an infant after majority of a partition made by the guardian than a sale and conveyance of the land allotted to him, clear of the encumbrance which would have otherwise attached to it, reciting the very partition as valid which he now claims to avoid?

When Morse sold the horse he warranted his title, that is, he affirmed that it was his. We think he must pay for it.

Reversed with v. f. d. n.

## LORING v. RAILROAD COMPANY

**Negligence—Railroad Crossing — Driver of Vehicle — Imputed Negligence**

### STATEMENT OF FACTS

The plaintiff's wife was killed by the collision of a train on defendant's road with an automobile in which she was riding as an invited guest. The automobile stalled on a sharp hill just across the crossing and the road being too narrow to permit turning, the driver was compelled to back across defendant's double tracked road. The car was struck on the second track. The whistle was not blown nor the bell rung for the crossing.

Loftus, for plaintiff.

Jester, for defendant.

### OPINION OF THE COURT

GOLDBERG, J. After a careful consideration of the facts of the case at bar, we find that two questions present themselves. First, if the driver of the vehicle was negligent, would his negligence be attributed to the wife of the plaintiff, and thus bar a recovery? Second, whether any negligence whatever can be imputed to the driver, the facts of the case not showing whether he stopped, looked and listened?

As a general rule the rights and duties of the public and a railroad company at a public crossing are mutual and reciprocal, and both are charged with the mutual duty of keeping a careful lookout to avoid inflicting or receiving an injury; the degree of diligence to be used on either side being such as a prudent person would exercise under the circumstances at the particular time. A traveler is bound to use ordinary care in approaching a crossing and observing the approach of trains. The railroad company must use care in giving proper and timely warning of the approach of such trains. 33 Cyc. 923.

There is no question as to the negligence of the railroad company in this case, since the train approached a public crossing and failed to blow the whistle or ring the bell. The facts do not show that the driver stopped the car before backing across the tracks, or that he was on the lookout for approaching trains. But, supposing he was negligent in failing to do what the law re-

quires, can we attribute his negligence to an invited guest, who had no control over him?

In 7 Am. and Eng. Ency. 446-447, it is said that where the question is whether the person injured is chargeable with the contributory negligence of a driver or person with whom he was riding as a guest by special invitation, there has been, and still is, much conflict among the authorities; but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of the one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person. The Pennsylvania authorities there cited are: Borough of Carlisle v. Brisbane, 113 Pa. 544; Dean v. Pa. R. R. Co., 129 Pa. 514; Carr v. Easton City, 142 Pa. 139.

Though there are some decisions to the contrary, the great weight of authority, including that of the courts of Pennsylvania, is to the effect that the negligence of the driver of a private conveyance will not be imputed to a person riding with him and who has no authority or control over him. 29 Cyc. 549; Little v. Telegraph Co., 213 Pa. 229; Jones v. R. R. Co., 202 Pa. 81; Finnegan v. Foster Township, 163 Pa. 135.

What possible negligence could we attribute to this invited guest? What control had she over the driver? Surely, he knew that he had just crossed a railroad crossing, and also knew when his machine stalled that he was going to back down over the crossing. Was it the guest's duty to call his attention to the fact that he was going to cross a crossing? Supposing she did call this to his attention, would that free her from all negligence on her part? What more could she possibly have done? Supposing she had done the above, and still the driver failed to heed her warning, would it be her duty to leap from the machine in order to be free from negligence? We think not. It was not her duty to call his attention to the fact that the railroad crossing was so near, as the facts clearly state they had just passed over the crossing, and surely the driver knew that it was not very far away.

In the case of Jones v. R. R. Co., 202 Pa. 81, an omnibus drawn by four horses and containing more than twenty people reached the crossing of the defendant's road as a train approached it. A collision ensued in which eight of the passengers were killed and as many more injured. The driver exercised no care whatever to avoid danger. The court held that the negligence

of the driver of the omnibus could not be imputed to the passengers.

The case at bar is in every respect similar to the case of Robinson v. R. R. Co., 66 N. Y. 11, where a woman accepted an invitation to ride in a buggy with a person who was entirely competent to manage the horse. It was held that if the defendant company was negligent and the plaintiff free from negligence herself, she might recover from the company although the driver of the buggy might have been guilty of negligence which contributed to the injury.

There was no evidence whatever in the case at bar that Mrs. Loring knew that the driver was reckless and unskillful, or that she saw, or by the exercise of reasonable care at the time could have seen the danger when backing down the hill, as there was no warning of an approaching train.

In Mann v. Weiand, 81½ Pa. 243, it was held that the negligence of the driver of a private vehicle could not be imputed to a companion riding with him, who has no control or authority over the driver or his team, in case such companion is injured in a runaway of the horses frightened by the attacks of vicious dogs belonging to a third person. This doctrine was followed in Walsh v. Altoona and L. V. E. Ry. Co., 232 Pa. 484.

As to the negligence of the driver the facts make no comment, and there is no evidence to show whether he stopped, looked and listened before attempting to cross the tracks. The law is well settled that where there is no evidence to show that a person did or did not do his duty before crossing, viz., stop, look and listen, the presumption is that he exercised all the necessary care. 7 Am. and Eng. Ency. 439; P. R. R. Co. v. Weber, 76 Pa. 157. It is also settled that where there is no evidence showing that the railroad company has been negligent in any way, that it too is entitled to the presumption that it has done its duty. Terry v. D. L. and W. R. R. Co., 60 Pa. Super. Ct. 455; Hanna v. P. and R. Ry. Co., 213 Pa. 157. But the case at bar clearly shows that the railroad company was negligent in failing to give proper warning of the approaching train, and hence is not entitled to the presumption of having exercised proper care. On the other hand, there is no evidence to show that the driver was negligent; therefore he is presumed to have exercised due care.

In view of the above decisions, we render a judgment in favor of the plaintiff.

## OPINION OF THE SUPERIOR COURT

Let us suppose that the accident would not have occurred but for the negligence of the driver of the automobile. Would such negligence prevent a recovery, were the action brought by Mrs. Loring? The cases quoted abundantly by the learned court below show that it would not. The driver's negligence is not imputed to the invited guest.

Was Mrs. Loring herself negligent? It does not appear that she did or omitted to do something which care dictated the doing or omitting of but for the doing or omission of which the collision would not have occurred.

But can one assume that the driver was negligent? Negligence is not assumed without proof. In the absence of evidence, we must postulate that the driver stopped, looked and listened, before he backed upon the track. We must further assume that he neither saw nor heard the approaching train, on looking and listening.

The train gave no usual signal of its approach. The bell did not ring, the whistle was not blown. No description of the track, of the con our of the country, is given, from which it might be inferred that the bell and whistle would not have been heard, if they had been sounded in time to avert the collision. The jury then was justified in thinking that the failure to ring and whistle was the cause of the accident. The omission to ring and whistle was negligent. The defendant, then by its negligence, caused the collision. The decision of the learned court below must be affirmed. Affirmed.

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## ESTATE OF HARRIMAN

**Wills—Charitable Gifts—Effect of Later Will—Act of April 26, 1855 P. L. 328**

## STATEMENT OF FACTS

Harriman made a will January 7, 1914, in which he gave three legacies to charities. This will was attested by credible witnesses. On June 5, 1916, he made another will, wherein he expressed the purpose to revoke the first will. He however repeated the same legacies. This will had two attesting witnesses. Harriman died on June 27, 1916. The three legatees claim the

legacies. The court decided that the legacies are void. Appeal by legatees.

Van Scoyoc, for the appellant.

Goldberg, for the appellee.

OPINION OF THE COURT

DE RENZO, J. The Act of Assembly, April 26, 1855, P. L. 328, P. and L. Dig. 937 provides: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the same time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto, shall be void and go to the residuary legatee or devisee, next kin or heirs, according to law: provided, that any disposition of property within said period, bona fide made, for a fair and valuable consideration, shall not be hereby avoided."

In the case at bar, the testator by will, made valid devises to three charities, then subsequently revoked the said will, and in its place made a will which in itself was valid, being duly attested. The question therefore arises whether a charity which has been named as beneficiary under a will continues to be such by the incorporation in a subsequent will of the same provisions as in the former will. In other words, when a subsequent will repeats provisions of a former will, is the whole of the former will revoked by such subsequent will, because the testator has indicated the intention that the former be revoked by the making of the subsequent will? If the former will is not revoked as to those provisions which were repeated in the subsequent will, the Act of April 26, 1855, supra, will not apply.

The Pennsylvania cases indicate that wills may be impliedly or expressly revoked. Price v. Maxwell, 28 Pa. 23, holds that when two wills are in some respects inconsistent, the latter revokes the former only in so far as they are inconsistent with each other, unless there is an express clause of revocation. It is indicated in that case that where different executors are appointed in the second will, the inconsistency is such as will bring the case within the operation of the Act of 1855, supra. This view was adopted in Teacle's Estate, 153 Pa. 219. While in the present case there is no indication that new executors were appointed, yet the facts state that on June 5, 1916, he made another will wherein he expressed the purpose to revoke the

first will. We therefore adopt the view that he expressly revoked the first will instead of putting the case on the ground of an implied revocation, as in the case of Price v. Maxwell, supra.

This case is to be distinguished from Hamilton's Estate, 74 Pa. 69, a case wherein the testator executed a codicil to the effect that should he die within a calendar month from the time of execution of the later will, then the former will should govern the bequest to charities. The court accordingly held in carrying out the expressed intention of the testator that his wish should govern, and the charity prevailed. Appeal of Carl, 106 Pa. 635, holds that a testator may, by a codicil executed within a calendar month before his death, diminish the bequest to a charity without avoiding the bequest altogether. On the other hand it was held in Lightner's Appeal, 57 Super. Court 469, that a testator could not, by a codicil executed within a calendar month before his death, increase a bequest to the charity, but that the charity should receive the same as provided by the will itself. This case is easily distinguished from Manners v. Philadelphia Library Co., 93 Pa. 165, a leading case in Pennsylvania. Dr. Rush made a devise to a charity and provided in his will for the furnishing of books of an atheistical tendency in the library. The heirs contended that a devise for an immoral purpose and one contrary to the laws and sentiments of Pennsylvania must fail. Also that the library could not claim, as residuary devisee, property acquired subsequently to the limit provided by the Act of 1855, supra, viz., within a calendar month of his decease. Justice Paxson delivered the opinion of the court, wherein he took the view that the words used by Dr. Rush, as to the books of an atheistical or infidel tendency, were merely directory and not mandatory, and that the funds could be applied according to the doctrine of cy pres. He further held that the Library Co., as residuary devisee of the land, could properly lay claim to the land acquired by Dr. Rush during the last month of his life, and that the view was not in conflict with the Act of 1855 supra, inasmuch as no instrument was necessary to limit the property to the charity. In Lightner's Appeal, supra, the charity claimed by virtue of an instrument executed during the last month of the testator's life. In this connection see Appeal of Carl, 106 Pa. 635.

In Sloan's Appeal, 168 Pa. 422, where a codicil executed within a calendar month of the decease of the testator did not revoke the devise to the charity, the testator in the codicil said he was revoking and annulling the bequest, but in reality the full intention as gathered from the four corners of the instrument was merely to postpone the time that the other charity was to take

the bequest. It was the testator's intention all the way through that the charity should ultimately take this bequest. In reason we are of the opinion that we could follow Sloan's Appeal, supra, and say that here it was the testator's intention all the way through that the charities should get the legacies provided by the testator. But we do not feel that we would be fortified by authority in applying the rule of Sloan's Appeal, supra, to this case. A codicil is an addition to a will and revokes it pro tanto. A later will is of as great force as the original will; where the testator expressly revokes the former then the two cannot be read together.

Gregg's Estate, 213 Pa. 260, shows how far the courts go in construing strictly the Act of 1855, supra. There it lacked from two to five hours of being a full month from the time of making the will until the testator died, with the consequent result that the charity could not gain the bequest.

There is no doubt in the mind of this court but that the manifest intentions of testators are very often defeated because of the operation of an Act of Assembly, but it is a principle in the law of wills that the intention of the testator is not to be looked at alone but whether he has expressed his intention in a valid manner. Here the testator complied with the statute in the execution of his will, but because of a subsequent event, his desire cannot be made operative by the courts in the face of a rule made by the Legislature which sets a mandatory rule of law before us, and leaves nothing for the discretion of the court.

Appeal dismissed.

## OPINION OF THE SUPERIOR COURT

For two years and a half, prior to his death, the testator has expressed in the form of a will, his intention to bestow certain of his property upon three charities. The object of the Act of 1855, in requiring that the will bestowing charitable gifts should be made a calendar month before death, was, to prevent testamentary dispositions occasioned by the feebleness of mind and body, which frequently precedes death; and by the importunities of ghostly persons who so frequently operate on religious minds in their last days and weeks.

Had the first will not been repealed, the three charities would have received the bequests mentioned in it. While the testator in his second will declares that he revokes the earlier, he shows quite plainly that he revokes only parts of the earlier.

The charitable bequests are repeated exactly as they stand in the earlier will.

We should be strongly disposed to hold that the revocation of the bequests if they have in fact been revoked, was what is sometimes called a "dependent relative revocation." Page, Wills, p. 307. The testator revoked the legacies but on the assumption that the repetition of them would be effectual. If that supposition was inaccurate, the revocation did not operate.

Nevertheless, we feel constrained to submit to what seems coercive authority, and, therefore the appeal is dismissed.