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NOTES

DELIVERY OF DEEDS TO BE EFFECTIVE ON DEATH OF GRANTOR

Although the main purpose of this note is to discuss the various views concerning the handing over by a grantor of a deed of realty to a third person to be handed over to the grantee upon the death of the grantor, the grantor reserving the power to recall the deed in the meantime, the writer feels that it is advisable, before discussing this problem, to summarize the rules relating to delivery.

Delivery is essential to pass title.¹ If a deed has not been delivered, it is void ab initio and, as proof of the delivery is a matter in pais, parol evidence is properly admissible to show that the transaction is wanting in that essential. This is true unless the grantor has approved the delivery or is estopped from denying it, and may be asserted against a purchaser for a valuable consideration without notice.² Delivery may be made by words alone, or acts alone, or by words and acts together, but there must be a manifested intention to pass title.³ A secret intention is not sufficient and a manual investiture is not necessary.⁴ However, the grantor cannot retain the right to retain possession of the deed.⁵ It is a question of fact for the jury to determine.⁶ Particularly is this true where delivery is solely a matter of oral proof.⁷ The Statute of Frauds has no application to delivery.⁸

The putting of an executed deed into evidence puts the burden of going ahead with the evidence upon the one claiming there has been no delivery. This brings into play various presumptions. If the deed is in the possession of the grantor, there is a presumption of no delivery.⁹ However, if the grantor has reserved a life estate, this presumption should not apply as he needs the deed to prove that he has an estate. If the deed is in the possession of the grantee, there is a presumption of delivery.¹⁰ The attestation clause, if it contains a recital of delivery and is signed, creates a presumption of delivery.¹¹ Mere acknowledgment creates a presumption of delivery.¹² Hence acknowledgment plus recordation creates a presumption of delivery.¹³ The act of the grantor leaving the deed for recordation (of course, it has to be acknowledged) creates a strong presumption

¹Appeal of Louisa Duriand, Trustee, 116 Pa. 93 (1887); Cragin's Estate, 274 Pa. 1 (1922).

²Van Amringe v. Morton, 4 Wharton (Pa.) 382 (1839).

³Kanawell et al. v. Miller et al., 262 Pa. 9 (1918); Lewis v. Merryman, 271 Pa. 255 (1921).

⁴Rigler v. Cloud, 14 Pa. 361 (1850).

⁵Eckman v. Eckman, 55 Pa. 269 (1867); Appeal of Louisa Duriand, (supra).

⁶Critchfield v. Critchfield, 24 Pa. 100 (1854); Boardman v. Dean, 34 Pa. 252 (1859).

⁷Lewis v. Merryman, (supra).

⁸Dayton v. Newman, 19 Pa. 194 (1851).

⁹Cummings et al. v. Glass, 162 Pa. 241 (1894); Kanawell v. Miller, (supra).

¹⁰Cable v. Cable, 146 Pa. 451 (1891).

¹¹Kohn et al. v. Burke et al., 294 Pa. 282 (1928).

¹²Blight v. Schenck, 10 Pa. 285 (1849).

¹³Long v. McHenry, 45 Pa. Super. Ct. 530 (1911); Kille v. Ege et al., 79 Pa. 15 (1875).

of delivery.¹⁴ Long possession of the deed by the grantor has been held sufficient to rebut the presumption raised by acknowledgment.¹⁵ Ordinarily the date of the instrument is adopted as the date of delivery. But the date of acknowledgment controls over the date of the deed. Thus, if the date of acknowledgment and the date of the deed are different, the presumption arises of delivery on the date of acknowledgment.¹⁶

There are various situations in delivery of deeds in which third persons are involved. The grantor may make delivery to a third person for the grantee. If he intends title to pass immediately, it passes and it is immaterial whether or not the third person is the agent of the grantee.¹⁷ Similarly, handing to the agent of the grantee is no more conclusive on the grantor than handing to the grantee himself. It need not be a delivery.¹⁸

A document under seal is delivered in escrow by the promisor or grantor when he puts it out of his possession without reserving a power of revocation, and with the expressed intent that the promise shall become a contract under seal, or that title shall pass, upon the happening in the future of some condition not expressed in the document, and shall not become a contract under seal, or title shall not pass, until that time. The condition must be something other than the promisor's or grantor's future desire or intention. Normally the escrow contingency is to be performed by the grantee.¹⁹ The putting of the deed into escrow is irrevocable; no precedent enforceable contract is necessary.²⁰ The usual situation involves a third person called an escrow. The Restatement of Contracts, section 101 says, "Delivery may be made either unconditionally or in escrow to the promisee or to any other person." In Pennsylvania, if the condition is external to a deed of land, it cannot be delivered conditionally to the grantee but rather becomes effective immediately.²¹ In *Eaton v. New York Life Insurance Company of N. Y.*,²² the Supreme Court observed that "the same considerations of public policy which exclude evidence of the conditional delivery of a deed to the grantee named therein would seem to call for the exclusion of evidence of a delivery 'in escrow' of an insurance policy to the insured." However, it was held in that case that a sealed insurance contract can be handed to the insured and the

¹⁴*Boardman v. Dean*, 34 Pa. 252 (1859); *Bush et al v. Genter*, 174 Pa. 154 (1896); *Lewis v. Merryman*, (supra).

¹⁵*Devall v. Glover*, 250 Pa. 417 (1915); *Leahey v. Leahey*, 309 Pa. 347 (1932).

¹⁶*Brolaskey v. Furey*, 12 Phila. (Pa.) 428 (1878).

¹⁷*Eckman v. Eckman*, (supra); *Blight v. Schenck*, (supra); *Diehl v. Emig et al.*, 65 Pa. 320 (1870); *Chess v. Chess*, 1 Pen. & W. (Pa.) 32 (1829).

¹⁸*Sears v. Scranton Trust Co.*, 228 Pa. 226 (1910).

¹⁹See *Landon v. Brown*, 160 Pa. 538 (1894) which intimates that it is not a pure escrow transaction if the condition is one to be performed by the grantor, or if the deed must await the lapse of time or the happening of some contingency that is certain to happen.

²⁰*Eaum's Appeal*, 113 Pa. 58 (1886).

²¹*Simonton's Estate*, 4 Watts (Pa.) 180 (1835); *Weisenberger v. Huebner*, 264 Pa. 316 (1919); *Loughran v. Kummer*, 297 Pa. 179 (1929).

²²315 Pa. 68 (1934).

promisor can still show by oral testimony the conditions to be applied. Hence, in the case of a sealed contract there may be conditions external to the instrument which prevent it from taking effect until the condition is performed even though it is handed to the promisee. Although there is no case on delivery in escrow of an unsealed deed,²³ it well may be argued that, since the tendency is to narrow the rule, an unsealed deed may be delivered conditionally to the grantee.

Where a deed, fully executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor in making such deposit reserves no power to recall the deed, the deed is effective as a conveyance of the title as of the date when the deed is deposited. This at most shows an intention to reserve a life estate. It is not an escrow transaction as there is no conditional intent, the condition being one which is certain to happen. Title passes immediately. The grantor has a life estate; the grantee has an executory limitation which springs up at the death of the grantor.²⁴ In this type of case a third person must be used or else a life estate be reserved in the deed. If the deed is handed to the grantee, it is immediately effective and the parol evidence rule prevents the proof of the condition.²⁵ Since the grantor does not reserve the power to recall the deed, there is not an intent to make a testamentary disposition of the property as, when one makes a will he intends to make an instrument which can be revoked. This essential element of a will, revocability, is lacking.

The situation where the grantor hands a deed to a depositary to be handed to the grantee at the death of the grantor, and the grantor reserves a power to recall it, has caused the courts to disagree as to its efficacy. Logically, the reservation of a power to recall by the grantor is consistent only with the theory that the depositary is his agent since he holds the deed subject to the grantor's direction and control. Consequently the death of the grantor revokes the agency and the depositary no longer has any authority to hand the instrument over to the grantee.²⁶ However, the great weight of authority²⁷ base their decision upon the intention of the grantor and hold that there is no delivery, reasoning as follows: Delivery is the present intent to pass title²⁸ and the grantor must intend to relinquish all right of control over the deed itself; reservation of the power to recall is incompatible entirely with the intention to relinquish all right of control over the deed and is inconsistent with a present intent to pass title; therefore, there is no valid delivery.

²³Seal is not necessary: 1919, P.L. 91 as amended by 1925, P.L. 404.

²⁴*Brown v. Mattocks*, 103 Pa. 16 (1883); *Dreisbach v. Serfass*, 126 Pa. 32 (1889).

²⁵*Leiser et al, Executors et al. v. Hartel*, 315 Pa. 557 (1934).

²⁶*Ball v. Foreman*, 37 Ohio St. 139 (1881).

²⁷Alabama, Arkansas, California, Illinois, Indiana, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin.

²⁸The distinction should be noted between an intention to pass a "present interest" and an intention to pass "title" presently.

Although widely followed, the rule has not escaped criticism. Mayfield, J., although concurring in the opinion in *Seeley v. Curtis*²⁹ which adheres to the majority rule, points out wherein, in his opinion, the application of the rule tends to bring about injustice. Arguendo, he says:

"The rule is . . . a mere snare or trap in which to catch honest and innocent grantors who desire to dispose of their property honestly and economically. The invocation of the rule defeats the honest will and intention of the grantor, and his property thus given to those whom he did not desire to receive it. . . . It allows the will of the grantor expressed in the most solemn form, and in writing, to be defeated by the slightest parol proof that, at the time of the delivery to the depository, he intimated that he might thereafter call for them, and, if he should do so, that the delivery should not be perfected. The slightest parol proof is thus allowed to defeat the most solemn form of written evidence as to title, and to do so years thereafter, even after the deeds have been recorded and the grantees have sold to bona fide purchasers. . . . There is no reason or justice in such a rule; and, the only excuse of its existence having ceased, the rule itself ought to cease. . . . It is a relic of feudalism, a substitute for, but an imitation of, livery of seisin. The rule is at war with our customs, habits, common understanding and common sense. It has never tended, and will never tend, to promote justice; its very object and purpose is to defeat the will and intention of the grantor in the honest and economical disposition of his property. . . ."

As has been intimated, there is a minority view³⁰ holding that the delivery is valid; that, upon the handing over of the deed by the depository to the grantee, the time of the vesting of the title relates back to the first handing over by the grantor to the depository. Iowa and Pennsylvania are the only states definitely holding to this view. The reasoning of the Iowa Court is expressed in the opinion in *Davis v. Brown College* by Faville, J.:³¹

"Logically there seems to be no escape from the conclusion that if such grantor, instead of placing the deed in his own box and under

²⁹180 Ala. 445, 61 So. 807 (1913).

³⁰*Belden v. Carter*, 4 Day (Conn.) 66, 4 Am. Dec. 185 (1809). But see *Grilley v. Atkins*, 62 Atl. (Conn.) 337 (1905) where it is said this is opposed "to the overwhelming weight of authority and it would not probably be followed in this state today." *Wall v. Wall*, 30 M ss. 91 (1835). But see *Weisinger v. Cock*, 7 So. (Miss.) 495 (1890) which is in accord with the majority rule, though not expressly overruling *Wall v. Wall*. *Lippold v. Lippold*, 83 N.W. (Iowa) 809 (1900); *Stephens v. Rinehart*, 72 Pa. 434 (1872); *Hartman's Estate* (No. 2), 320 Pa. 331 (1935).

³¹222 N.W. (Iowa) 858, 862 (1929). For a criticism of this reasoning see "The Iowa View Concerning Delivery of a Deed to a Depository with Reservation of the Power to Recall," 14 Iowa L.R. 461.

his immediate control, places it in the hands of a third party, reserving the right to recall it, but fails to do so, and the extrinsic evidence shows an intention that title should pass under the deed unless it was so recalled, this also constitutes a good delivery. In either case the grantor has a right and the physical ability to destroy the instrument, and if delivery is good in one instance it would appear to be good in another. . . . It is more reasonable to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it effect because the intention might have been changed."

In Pennsylvania the case was put squarely before the Supreme court in *Hartman's Estate* (No. 2).⁸² There the grantor executed and acknowledged a deed, in which she expressly reserved a life estate, to the grantee; the grantor handed the deed to the depositary to be handed to the grantee after the death of the grantor, if she did not recall it; the grantor then made a will, containing a clause revoking all prior testamentary dispositions, in which she devised the same land to a devisee; the grantor did not recall the deed and upon her death it was handed to the grantee; the devisee took exception to the distribution by the executor; the auditor and lower court held that there was a valid delivery of the deed. Before the Supreme Court, the appellant argued: FIRST, that delivery is a matter of intent to pass title and that it is essential that the right to control the deed should pass from the grantor;⁸³ that the question of delivery must be examined in reference to the point of time of delivery⁸⁴ or before;⁸⁵ that delivery is complete when a deed is acknowledged before a proper officer as being signed, sealed and delivered without an act, expression or writing indicating an intent to qualify this formal act,⁸⁶ but that here the grantor qualified her formal act by reserving the power to recall the deed; that Pennsylvania, by quoting with approval from *Cook v. Brown*,⁸⁷ a leading case for the majority view, previously approved that view.⁸⁸ SECOND, that, since the grantor reserved the power to recall the deed, the grantor reserved such control as to make the depositary his agent; that the specific devise in the will, of which the depositary had actual knowledge, revoked

⁸²Note 30.

⁸³Eckman v. Eckman, (supra); Cummings v. Glass, (supra).

⁸⁴Blight v. Schenk, (supra).

⁸⁵Cragin's Estate, (supra).

⁸⁶Lewis v. Merryman, (supra).

⁸⁷34 N.H. 460.

⁸⁸The following paragraph from *Cook v. Brown* is quoted with approval in *Cammerron v. Gray*, 202 Pa. 566, 569 (1902) and *Sears v. Scranton Trust Co.*, 228 Pa. 126, 140 (1910): "So long as a deed is within the control of the grantor, there is no delivery. Whether in the hands of a third person, or in the desk of the grantor is immaterial, since in either case he can destroy it at his pleasure. To make delivery good and effective, the power of dominion over the deed must be parted with . . . and if the grantor died without parting with his control over the deed it has not been delivered during his life, after his decease no one can have the power to deliver it."

his authority to hand over the deed to the grantee and, if not this, then death revoked his authority. THIRD, that the instrument must take effect, if at all, as a will;³⁹ that, here, the instrument was revoked by the subsequent will. The appellee argued: FIRST, that, in this situation, the grantor need not part with the power to recall the deed and quoted from the opinion of Sharswood, J., in *Stephens v. Rinehart*⁴⁰ as follows:

"A having signed, sealed, and acknowledged a deed conveying a tract of land to B, took up the deed in the absence of B and said to C: 'Take this deed, and keep it; if I never call for it, deliver it to B after my death: If I call for it deliver it up to me'. C took the deed. A died soon afterwards, having never called for it, and then C delivered it over to B: it was held that this was the deed of A presently; that C held it as trustee for B; that the title became consummate in B by the death of A; and that the deed took effect by relation from the time of the first delivery."

SECOND, that the power to recall or revoke having never been exercised, it was precisely as if it had never existed.⁴¹ THIRD, that the delivery being valid, it was not necessary for it to take effect as a will. The Supreme Court held that the land passed by the deed; that the handing of the deed to the depository was a good delivery. Barnes, J., quotes the auditor's opinion as follows:

"It is to be noted that, while the deed was in the hands of Mr. Milliken (depository) during the lifetime of the testatrix (grantor), it was held by him not subject to the performance of any condition, but merely to await the lapse of time or the contingency of its being called for by the grantor. Under those circumstances, when it was delivered by the trustee, the time of the vesting of the title relates back to the first delivery to him. . . . *Stephens v. Rinehart*, 72 Pa. 434."

Hence, it can be said with certainty that such is a valid delivery in Pennsylvania.

What is the position of creditors of the grantor? The Act of 1931⁴² provides that deeds wherein it shall be the intention of the parties executing the same to convey land, are fraudulent and void as to any subsequent bona fide holder of any judgment, duly entered in the Prothonotary's office of the county in which the lands are situated, without actual or constructive notice, unless such deeds

³⁹*Turner v. Scott*, 51 Pa. 126, 133 (1866); *Frederick's Appeal*, 52 Pa. 338 (1866)—deeds proved as wills.

⁴⁰72 Pa. 434 (1872).

⁴¹*Lines v. Lines*, 142 Pa. 149, 167 (1891); *Dickerson's Appeal*, 115 Pa. 198, 210 (1887)—both trust cases.

⁴²P.L. 558, No. 191 No. 1, 21 P.S. 351 amending Act of 1925 P.L. 613.

shall be recorded before the entry of the judgment under which such subsequent judgment creditor claims. Thus, since the time of the vesting of the title relates back to the time when the grantor handed the deed over to the depositary, the unrecorded deed, in point of time, comes before all judgment creditors after that date. But if the judgment is duly entered, the Act of 1931 protects the judgment creditor. Of course, if the judgment creditor has actual notice, or if the deed is recorded, he is not protected. Upon the death of the grantor all his debts become a lien upon his property for one year. But, since the Act of 1931 specifies judgment creditors and omits any mention of these lien creditors,⁴⁸ creditors who got their lien because of the death of the grantor probably will not be protected over such a prior unrecorded deed.

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MURDER IN THE FIRST DEGREE IN THE PERPETRATION OF FELONIES: DEFINITION OF THE FELONIES

An interesting question in the Pennsylvania law of homicide involves the precise definitions of the five enumerated felonies a murder in the perpetration of which becomes murder in the first degree. The Criminal Code of 1860 provides that:

"All murder which shall be . . . committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree . . ."¹

An amendment, enacted in 1923,² makes minor changes in the wording and adds kidnapping to the list of felonies.

The question may be illustrated by a hypothetical case: a man commits murder in the course of burning down the house he occupies but does not own. Has he murdered in the commission of "arson"? His burning of the house which he occupied was not arson at common law,³ nor by the Code of 1860,⁴ but became arson by statute in 1881.⁵ It was arson at the time of the commission of the crime.

⁴⁸Act of 1901 said "judgment or other lien creditors."

¹Act of March 31, 1860, P. L. 382, §74.

²Act of May 22, 1923, P. L. 306, §1.

³C. J. 553; *Rex v. Holmes*, Cro. Car. 376, 79 Eng. Rep. 928; *Rex v. Schofield*, East P. C. 1028; *Rex v. Breeme*, East P. C. 1026; and see *C. v. Gentzler*, 15 Pa. Dist. 934; *C. v. Bruno*, 316 Pa. 394.

⁴See discussion of this point in *C. v. Bruno*, 316 Pa. 394, at 400, 175 A. 518, at 520-21, and authorities cited. Although no Pennsylvania case so holds directly, there is little doubt that this is the law, as is set forth in the dicta in the Bruno case, based on the general rule as to statutory reiteration of substantially the same definitions of crimes as obtained at the common law, and upon authorities from other states having similar statutory provisions.

⁵Act of June 10, 1881, P. L. 117; *C. v. Levine*, 82 Pa. Super. 105.