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TRANSFERRING TITLE TO LAND BY DEED.

JAMES W. SIMONTON *

The early common law method of conveying possessory freehold interests in land was by a ceremony called feoffment¹ which symbolized the delivery of the seisin of the land by the feoffor to the feoffee.² In time it became the custom to make a sealed document called a charter of feoffment, in order to have better evidence of what had occurred, but execution and delivery of the charter of feoffment was not the conveyance and did not pass title, but the charter was only evidence and as evidence it was not even regarded as conclusive, though as a practical matter it probably was conclusive.³

After the passage of the Statute of Uses in 1536 conveyances dependent wholly or in part on this Statute superseded feoffment. Some of these new conveyances could be made orally, but in due time, legislation was passed which made a deed essential. As conveyances now were by deed instead of by feoffment, and the title necessarily passed at some time during the process of making and delivering the deed, it came to be settled that the time of passing of title was at the time of the delivery of the deed.⁴ In early continental law the manual transfer of a written conveyance of land was looked upon as the symbolical transfer of the land,⁵ but

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¹ "Feoffment is a species of the genus gift," II POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW, 82.

² For an account of the ceremony and its effect see III HOLDSWORTH, HISTORY OF THE ENGLISH LAW, 221 *et seq.* Also see III POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW, 82-86.

³ 9 HOLDSWORTH, HISTORY OF THE ENGLISH LAW, 164.

⁴ "A deed takes effect only from this tradition or delivery; for if the date be false or impossible the delivery ascertains the time of it. And if another party seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reasoning the signing also, and makes them both his own. . . ." II BLACKSTONE, 306-7. See also CHESHIRE, REAL PROPERTY, 595.

⁵ This was probably due to the influence of the Roman law where means of making conveyances in fact in this way had been found though the theory differed. Hence as Pollock and Maitland state "It was a world in which ownership was apparently being transferred by documents that the barbarians invaded." (Vol. II, p. 89). It is very easy where the charter of feoffment had become important, to pass to modes of conveying land wherein the document passed the title.

here the instrument, unlike the charter of feoffment, was an essential part of the conveyance. The handing over of this essential writing was regarded as a ceremony passing the title. This idea that the manual transfer of the document was the effective act, was adopted into the English law not only as to deeds of grant, but as to all sealed instruments and even as to promissory notes and unsealed written contracts.⁶ Hence as to a deed the delivery became the final act essential to its operation as a conveyance. Before delivery the alleged deed was merely written words on paper—after delivery the deed was evidence of the conveyance or passing of the title, but the actual transfer of the title rights to the land occurred at the point where delivery of the deed became complete.⁷

Since title passes at the instant of completed delivery, what is it that then occurs? Judges and lawyers have too often looked upon title as a thing (incorporeal it is true) which is capable of being passed from hand to hand,⁸ and which the fee simple owner may transfer as a whole, or may split from it one or many pieces and transfer the pieces to different individuals. This tendency to look upon title as a thing has had its effect in producing technical doctrines some of which have persisted, though they should have disappeared long ago. Title is not a thing, but a relation which the person we call owner, bears to the land owned. If A has a fee simple in Blackacre, this means that A bears a relation to Blackacre which the courts will recognize and protect, which gives A the group of rights, powers, privileges and immunities which make up normal fee simple ownership.⁹ A may make any use of the land the law does not forbid; A may transfer all or part of his relation to others in the manner provided by law; A may exclude others from the land to the fullest

⁶ See TIFFANY, *REAL PROPERTY*, 2d ed. 1737-9.

⁷ CHALLIS, *REAL PROPERTY*, 3rd ed. 107; TIFFANY, *REAL PROPERTY*, 2nd ed. 1738.

⁸ It seems very difficult to get away from such reasoning. There is much technical reasoning in the cases really based on the assumption title is a thing. The effect of such reasoning on the covenant of warranty is discussed in 29 W. Va. L. QUAR. 265-8.

⁹ See Bigelow, "Natural Easements," 9 ILL. L. REV. 541.

extent the law allows; all this the courts will recognize and protect if A so desires. Whenever one has possession of a tract of land and the law will not permit any one to oust him now or in the future then one has fee simple ownership.¹⁰ This sort of ownership is acquired by adverse holding for the period set in the statute of limitations. The fee simple relation to certain land once acquired cannot be lost by abandonment, but may pass from the owner only by reason of a conveyance in legal form, or by reason of the running of the statute of limitations, or in some other manner provided by law. The relation once acquired may be transferred to another by a deed properly executed and duly delivered.¹¹ By this means A may place B in A's place in relation to Blackacre. B thus will acquire the relation-rights toward the land which A had. In this transfer the delivery of the deed is the effective act.

What constitutes a legal delivery of the deed? Since the delivery of the deed was once looked upon as a ceremony passing the title, it is probable that the manual handing over of the instrument to the grantee or to his agent was once essential, but if so that has long since been abandoned, though it may have left in its wake some little technical peculiarities which still trouble us. But such manual delivery presupposes the physical presence of the grantee or of his agent at the place of delivery and perhaps also an acceptance of the deed by the grantee. If the grantee or his agent be present, the delivery and the acceptance will coincide. It is only when we concede the grantor may deliver a deed though the grantee is not present, that the question whether acceptance is essential arises. The necessity of an

¹⁰ If A has possession of Blackacre and no one can bring suit or enter under a better right, then it is clear that A has fee simple title. There is no magic about title. If courts will protect A's possession fully that means A has title. It is immaterial for what reason this state of affairs has come about.

¹¹ What form the conveyance may take has been largely determined by the courts but legislatures have required writings. Formerly courts permitted various forms of conveyances to pass title for example, under certain circumstances an exchange of tracts of land passed title to both. BLACKSTONE 323.

acceptance will be discussed below. Delivery soon came to have a technical legal meaning.¹² The importance of the intent of the grantor to deliver the deed steadily grew, until at present cases may be found from which it may be argued that if the deed be properly executed and the intent of the grantor to have it operate as a present conveyance be shown nothing more is essential.¹³ In fact there is controversy as to whether proof of intent to deliver without more is sufficient, or whether some slight act or acts in addition on the part of the grantor are still necessary to make a valid delivery.¹⁴ Certainly if there are words coupled with slight acts consistent therewith the delivery may be held good. The grantor need not part with the possession of the document, and it is not necessary that the grantee be aware of the delivery.¹⁵

If delivery is the final act which completes the conveyance, then it seems to follow that acceptance by the grantee or by his agent is no longer essential. In England that is certainly true, but the grantee has the privilege of disclaiming when he discovers what has been done.¹⁶ In this country the necessity of acceptance by the grantee is strongly insisted upon in some jurisdictions,¹⁷ and if so, then acceptance by the grantee must be the final thing which

¹² "Signing and sealing a deed are insufficient to pass the interest to the grantee without delivery. This does not mean mere physical delivery, but a delivery accompanied by words or conduct signifying the grantor's intention to be bound by the provisions of the deed." CHESHIRE, REAL PROPERTY, 595.

¹³ *Roberts v. Security Co. Ltd.*, 1 Q. B. 11 (1897); *Fryer v. Fryer*, 77 Neb. 298, 109 N. W. 175 (1906); *Moore v. Hazelton*, 91 Mass. 102 (1864).

¹⁴ "The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." DEVLIN ON DEEDS, 3rd. ed. § 202.

¹⁵ In most cases where the question of delivery arises the court is seeking to find whether this intention to deliver is present. Of course there must be a proper deed duly executed. But though the court may be speaking of acts of delivery, yet these acts are usually considered as bearing on the intent of the grantor. Too frequently one may be misled by the fact a deed has been handed over to the grantee. That merely signifies intent. It raises a presumption of delivery for that is the usual meaning of such act, but this presumption may be rebutted.

¹⁶ *Thompson v. Leach*, 2 Ventris 198 (1691); *Mallott v. Wilson*, 2 Ch. 494 (1903); *Standing v. Bowring*, L. R. 31 Ch. D. 282 (1885).

¹⁷ *Welch v. Sackett*, 12 Wis. 243 (1860); *Hibbard v. Smith*, 67 Cal. 547, 4 Pac. 473 (1885); *Parmelee v. Simpson*, 5 Wall. 81 (1866).

completes the conveyance. It has been suggested that this notion has been derived from the erroneous idea that a conveyance is a contract, instead of a mere device for transferring the grantor's title relation or title rights.¹⁸ Clearly then the English view that acceptance is not essential to the effectiveness of the conveyance is preferable, and it is in accord with the law in the states which permit a delivery of a deed to a grantee who is not aware of the conveyance. Unfortunately the decisions even in such states are filled with language which indicates that acceptance is essential. But the cases which squarely raise the question are those where the deed is made and delivered without the knowledge of the grantee. Here the courts often say acceptance will be presumed where the conveyance is beneficial to the grantee, a statement which gives courts great latitude, but which certainly permits delivery without acceptance by the grantee. A presumption that the grantee will accept when he learns the facts is not an acceptance, and obviously the court cannot well presume the grantee has accepted before he is aware of the conveyance.¹⁹ There is much in Mr. Tiffany's statement that the language of many courts indicate acceptance is requisite, while the decisions hold that it is not.²⁰ Seemingly the courts do not clearly get the idea that the conveyance is a grant to the title rights in land and is not a contract between the grantor and grantee. It seems so much a contract transaction that they are apt to assume acceptance is essential.

Two common types of cases which present the question as to the necessity of acceptance of a conveyance, are those where the grantor gives the deed to a third person with

¹⁸ TIFFANY, *REAL PROPERTY*, 2nd ed. 1792. That a conveyance is not a contract see ANSON, *CONTRACTS*, 13th ed. 3; WILLISTON, *CONTRACTS*, § 487.

¹⁹ "If there is no acceptance, no rule of law, whether or not designated a presumption, can create an acceptance. The only conclusion, it is submitted, to be drawn from the decisions upholding a beneficial conveyance even in the absence of acceptance, is that acceptance is not necessary in the case of such a conveyance. The adoption of the double fiction, that acceptance is necessary, and that it exists though confessedly it does not exist, has, it is conceived, no reason whatsoever of policy or convenience in its favor." TIFFANY, *REAL PROPERTY*, 2nd ed. 1789-90.

²⁰ TIFFANY, *REAL PROPERTY*, 2nd ed. 1788.

directions to deliver it to the grantee after the grantor's death, and the cases where the grantor executes and records the deed as a present conveyance without the grantee's knowledge. In the first class of cases the grantee frequently does not learn of the existence of the deed until after the grantor's death, hence if he must accept to effectuate the conveyance his acceptance will come too late.²¹ A majority of the courts, probably including our own, hold the conveyance valid,²² dodging the acceptance issue by saying acceptance will be presumed. It may be presumed the grantee will accept when he learns of the conveyance but it seems foolish to say *it is presumed he has accepted*, and this would be a necessary assumption if acceptance is requisite. All these cases hold acceptance is not required. In the latter class of cases even where the grantor later tries to revoke and for this purpose destroys the deed, the conveyance has been sustained though the grantee meanwhile died without learning of its existence.²³ But why should courts say acceptance will be presumed where the conveyance is beneficial to the grantee?²⁴ Why not permit the grantee to choose for himself whether he desires the land, with attached conditions? The reason probably is that the courts adopted the idea in order to dodge the acceptance issue in cases where it happened the deed was purely one of gift.

There seem to be no cases in this state squarely holding that acceptance by the grantee is essential to a conveyance,

²¹ Clark v. Creswell, 112 Md. 339, 76 Atl. 579 (1910); Munoz v. Wilson, 111 N. Y. 295 (1888); Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874 (1894). To say acceptance is presumed here is to say no acceptance is necessary.

²² Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201 (1898); Lang v. Smith, 37 W. Va. 725, 737, 17 S. E. 213 (1893) (dictum); Davis v. Ellis, 39 W. Va. 226, 19 S. E. 399 (1894) (dictum).

²³ Mitchell v. Ryan, 3 Oh. St. 377 (1854.) The same result is reached where the grantee is *non compos mentis* or an infant. Turner v. Turner, 173 Cal. 782, 161 Pac. 980 (1916); Miller v. Meirs, 155 Ill. 284, 40 N. E. 577 (1895).

²⁴ Certainly acceptance cannot be presumed to have taken place before the grantee knows of the deed, and if it is presumed he will accept then in case of delivery to a third party to be delivered over after death of the grantor the acceptance will obviously be too late. Why continue to needlessly encumber our law with such fictions and inconsistencies?

though there are dicta to that effect.²⁵ However, in most of these cases in which dicta are found the court was considering the matter from the standpoint of the grantee, and recognizing his power of disclaimer,²⁶ but in some of them the court is evidently somewhat puzzled about the matter, being aware of decisions holding the conveyance valid where there had been no acceptance.²⁷ It would improve the law if all notions of the necessity of acceptance were eliminated. Some fictions would disappear and this is always of advantage. The cases are liberal as to what constitutes a valid delivery of a deed. It need not be handed over to anyone for the benefit of the grantee but the grantor may retain possession, so that the law on this point ought not be clouded with uncertainty as to whether or not it must be accepted. Greater clarity will be attained by getting away from the notion that a conveyance of land is a contract, and by keeping in mind that title to land is not a thing which passes from hand to hand, but is a bundle of rights, powers, privileges and immunities—the legal relation of the person to specific land.

On the whole, however, our court deals with delivery of deeds in a modern and enlightened manner, with the exception of one ancient doctrine which is still settled law. It will be admitted the law ought to operate justly, though

²⁵ *Richardson v. Hardman*, 97 W. Va. 573, 125 S. E. 442 (1924); *Downs v. Downs*, 89 W. Va. 155, 108 S. E. 875 (1921); *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983 (1913); *Reel v. Reel*, 59 W. Va. 106, 54 S. E. 47 (1906); *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874 (1894); *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591 (1894).

²⁶ "On authority we may say that acceptance is not a part of delivery, but that delivery makes the deed good against the grantor vesting the estate in the grantee; but such delivery may be avoided by disclaimer or disavowal of the deed by the grantee, and thereupon the delivery is avoided, and the estate reverts to the grantor by remitter. . . ."

"While acceptance is necessary it need not be expressed, as it may be implied, and will be implied from many circumstances. . . . The language of the books is that acceptance of the deed is necessary to its operation. Perhaps it would be better to say that dissent by the grantee must be shown; for it is not stating the law too broadly to say, that in all conveyances beneficial to the grantee the assent of the grantee is presumed until his dissent be shown. . . ." *Guggenheimer v. Lockridge*, 39 W. Va. 457, 461, 19 S. E. 874 (1894). The first paragraph of the above excerpt is certainly supported by authority yet the court is evidently somewhat puzzled by acceptance. But it is correct to say that acceptance of the deed is not necessary but that dissent or disclaimer by the grantee may be made.

²⁷ *Guggenheimer v. Lockridge*, 39 W. Va. 457, 461, 19 S. E. 874 (1894).

being operated by human beings perfect justice will not be attained. But justice ought not be prevented by a rule of law with nothing to recommend it but hoary age. A recent West Virginia case presents an interesting contrast with a recent Virginia case. In the former²⁸ a testator devised land to his youthful wife for life or until she married, with remainder to Peter Rouss if living at the termination of the life estate, provided Peter then pay \$2000 to each of six named legatees. The widow desired to remarry and yet keep the life estate. She induced Peter to give her a deed conveying her an estate for life in the land to take effect when she secured from the six legatees a written agreement to postpone payment of the money by Peter until her death. This arrangement, if carried out, would make Peter's remainder vested instead of contingent and would enable the widow to have the life estate absolutely. Unknown to Peter she filed a renunciation of her husband's will about two weeks before Peter entrusted the deed to her hands. She then married one of the six legatees, never secured the written postponement of the payments she promised to get and left Peter liable to pay \$2000 to each of five persons, the sixth one who married the widow having generously signed the agreement. The widow thus got a husband, the very large personal estate of her deceased husband, and a life estate in the land including a fine residence. Peter got a present liability to pay \$10,000 and a vested remainder in land following the death of a woman likely to outlive him. Peter felt aggrieved and sued but was assured by the court that he had no remedy either at law or in equity, even though he had acted pursuant to a contract with the widow.²⁹ One

²⁸ Rouss v. Rouss, 90 W. Va. 646, III S. E. 586 (1922).

²⁹ It is true Peter expected to convert a remainder contingent on his living until the life estate terminated into a vested remainder which would take effect at the death of the widow. Perhaps the court thought this unethical but if so it was not commented upon. If it could be termed slightly unethical certainly the widow's conduct seems positively fraudulent.

It is interesting to note that where a deed has thus been delivered to take effect on the happening of a condition, if the condition fails a court of equity will not set aside the transaction, even where there was a contract between the parties as was the case here. No fraud was proved at the time the deed was delivered and the court said there was only failure of the promise to get the writings which formed the consideration. Hence the only way to get relief was to show the deed never took effect.

would suspect the widow acted throughout under expert legal advice. A layman might think Peter had been defrauded but if so he was defrauded legally!³⁰ In the Virginia Case³¹ the defendant had entered into a sealed contract to sell a farm and promissory notes were given to him by the complainant for part of the purchase price. The sealed contract was made and delivered on an oral agreement by the defendant that it was to be effective only in case the Corporation Commission approved an increase in the capital stock of a corporation, and that the defendant then subscribed for a certain amount of such stock. Contrary to the expectations of the parties the Corporation Commission refused approval, so the stock could not be issued, but the defendant later brought suit to collect one of the promissory notes and a bill was filed to enjoin such collection. The Virginia court admitted parol evidence that the contract was delivered to take effect on a condition which had never happened, and gave relief. The West Virginia court followed a doctrine which has been established law since Whiddon's Case³² decided in 1596, and *Williams v. Green*³³ decided in 1602, but with nothing else to recommend it. The Virginia court in an exhaustive and well reasoned opinion laid the ghost of Whiddon's Case after three hundred and twenty-five years and let us hope the ghost will never walk in Virginia again. But in West Virginia the grip of the doctrine seems immovably bedded in the legal fabric.³⁴

To an intelligent layman the rule that a delivery of a deed to the grantee to take effect upon a condition is an

³⁰ That the widow had a preconceived fraudulent design was not proved. The result however is just as bad as if she had. She certainly did act very unethically before the end and one cannot help suspecting she had expert legal advice and the whole thing was planned. If not she was very lucky or very wise. It is so easy to say she really intended to get the legatees to sign if possible but after getting the deed she was under the law perfectly free to keep the land without making an effort to get them to sign. Many frauds are perpetrated in this way.

³¹ *Whitaker v. Lane*, 108 Va. 317, 104 S. E. 252 (1920).

³² Cro. Eliz. 520.

³³ Cro. Eliz. 884.

³⁴ See the line of cases collected in 34 W. VA. L. QUAR. 194. There are a number of decisions all within the past twenty-five years. They very clearly indicate this type of case arises frequently today and that a remedy is needed.

absolute delivery, and the condition is void, would seem unjust. Though courts have repeatedly recognized its injustice for many years few courts in this country have brushed it aside, and it is not to the credit of our courts that these cases are so few.³⁵

Here we have one of the best examples of the survival of a primitive doctrine through the operation of the doctrine of *stare decisis*, though no reasonable excuse for it has existed for centuries, and probably none ever did exist. We have persisting in our law a strange exception to the now established doctrine that the intent of the grantor is the controlling element in delivery of a deed, for here his intent is disregarded and the contrary of his intent is rigidly enforced against him, and he is even denied relief in equity. The fact that a doctrine is old is no reason for discarding it, for an ancient doctrine may now be supported by good and valid modern reasons which justify its retention, though the early reasons for its adoption no longer exist. Let us then examine the ancient and the modern reasons given as bases for this ancient rule.

Whiddon's Case merely stated that delivery of a deed cannot be averred to be in the party himself as an escrow, without stating why. *Williams v. Green* said it could not be allowed for "a bare averment without any writing would make every deed void". Coke says "for the delivery is sufficient without speaking any words (otherwise a mute man could not deliver a deed) and tradition only is requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect." * * *³⁶ To Coke the tradition is so significant that the words are of no effect and presumably he would always disregard the words. This is the descendent of the civil law notion heretofore mentioned which came into the common law after the passage of the

³⁵ *Inman v. Quiery*, 128 Ark. 605, 194 S. W. 858 (1917); *Roundtree v. Smith*, 150 Ill. 492, 38 N. E. 680 (1894); *Mitchell v. Clem*, 295 Ill. 150, 128 N. E. 815 (1920); *Elliott v. Murray*, 225 Ill. 107, 80 N. E. 77 (1906); *Haviland v. Haviland*, 130 Ia. 611, 105 N. W. 354 (1905); *Whitaker v. Land*, *supra*; *Burnett v. Rhudy*, 137 Va. 67, 119 S. E. 97 (1923); *McKinney v. Buford*, 81 Okla. 166, 197. Pac. 430 (1921).

³⁶ COKE, *LITT.* 38a.

Statute of Frauds, the notion being that the act of handing over the paper passed title just as did the ceremony of livery of seisen, and the act or ceremony could not be rendered null merely by speaking words to the contrary. This is the "primitive formalism" of which Wigmore speaks⁸⁷—the original reason for the rule that a delivery to the grantee on condition is an absolute delivery. This sort of reasoning is no longer valid and to our courts, accustomed as they are, to holding that the words accompanying the delivery of a deed are most significant, and that little in addition to words is essential to delivery of a deed, this old reasoning is not understandable. Consequently they have shown diligence in searching for more reasonable bases for the doctrine, and after three centuries of such search if any such reasons exist we may fairly presume they have been found. Let us examine the reasons now given for the rule.

The reason most commonly given and the one which seems most satisfying to the courts, judging from its popularity, is that to admit evidence that the delivery was made to the grantee on a condition which has not happened, would violate the parol evidence rule, that is, would vary the terms of a complete formal written instrument.⁸⁸ A court never yet has been able to point out any term of the instrument which such evidence, if admitted, would vary. The instrument contains nothing whatever about delivery. The grantee has possession of a writing which in form is a deed, and a presumption of delivery arises because he is grantee and has possession.⁸⁹ The evidence if admitted would merely rebut this presumption and it certainly is a rebuttable presumption. The delivery of a deed is always proved by evidence extrinsic to the instrument unless such delivery depends on

⁸⁷ WIGMORE, EVIDENCE, § 2405. "A conditional delivery to the grantee in escrow, however, has come down to us traditionally as a complete act, the condition being vain. But this is an arbitrary distinction; no reason and no policy justifies it. In England, the older rule, as handed down in Coke's treatises, has for more than two generations been repudiated". *Id.*, § 2408.

⁸⁸ See long discussion in *Dorr v. Middleburg*, 65 W. Va. 778, 65 S. E. 97 (1909). Nearly all the cases now base the doctrine on the parol evidence rule.

⁸⁹ *Ward v. Ward*, 43 W. Va. 1, 26 S. E. 542 (1896); *Newlin v. Beard*, 6 W. Va. 110 (1873).

a presumption which is not rebutted. In all other situations where a question of delivery is involved, parol evidence can be introduced, but here it cannot "because of the parol evidence rule." In fact where the delivery of the deed to the grantee on condition is not alleged in the pleadings and the question arises at the trial, the court would first have to admit parol evidence and then find from this evidence that the delivery was to the grantee on condition, and then strike out this very evidence because its admission violates the parol evidence rule. In other words parol evidence is admitted to prove that evidence not admissible. To carry this out logically the court then, having struck out the evidence, should not be able to find the deed was delivered on condition, and the delivery therefore absolute. In a case involving a deed in exactly the same form, the grantor could prove by parol that he handed the deed to the grantee to examine; that he handed it to the grantee believing it would take effect only when recorded; or any other set of facts showing that it was not handed to the grantee as his deed, and in this manner he could rebut the presumption of delivery arising from the grantee's possession.⁴⁰ But he cannot by parol prove that he handed it to the grantee to take effect only if the grantor returned from a certain journey; or when the grantee paid a sum of money; or when the grantee secured and delivered to the grantor certain releases or on any other contingency.⁴¹ The parol evidence rule seems to be an excuse and not a reason.

Another reason sometimes given why a conditional delivery to the grantee is necessarily absolute, is that "Since the grantee cannot act as agent of both himself and the

⁴⁰ In *Whitaker v. Lane*, 128 Va. 317, 344-5 the court lists a lot in analogous cases where parol evidence has been admitted.

⁴¹ The Virginia court has criticised the rule and in West Virginia are two cases involving bonds which practically do away with it. See *Newlin v. Beard*, 6 W. Va. 110 (1873), and *Stuart v. Livesey*, 4 W. Va. 45 (1870). But in *Dorr v. Middleburg*, *supra*, the court was able to brush these decisions aside. Seemingly in some manner the conclusion has been reached that the doctrine applies only to deeds of real estate and not to bonds, notes and the like, though *Whiddon's Case* and *Williams v. Green*, involved the latter type of instrument.

grantor for the purpose of a second delivery title must necessarily have passed by the first delivery". A delivery of a deed is sometimes made to a third party to deliver to the grantee if a certain event happens; the first delivery being the one to the third party and the second delivery being to the grantee after the condition has happened.⁴² In some manner it is argued that this conditional delivery to the grantee is a form of such a delivery in escrow so quite triumphantly the court can point out that the man cannot deliver to himself as agent for the grantor. Of course he could be treated as agent of the grantor to deliver to himself. There is in fact no difficulty in so considering him, if necessary, but why continue to simulate this situation to a delivery in escrow just because Whiddon's Case so treated it three hundred and twenty-five years ago? It is not intended to be a delivery in escrow, but is intended to be a delivery to the grantee to take effect on the happening of some condition and not otherwise.⁴³

This is the whole array of reasons for the above doctrine which three centuries have produced. Judges have condemned the rule but followed it. In West Virginia it was destroyed in cases similar to Whiddon's Case and *Williams v. Green*, only to have the court discover that the rule only applies to deeds of real estate, whereupon it again rises triumphantly. Its vitality is astonishing. It is submitted that this old doctrine ought to be eliminated, and the law made more nearly to accord with justice and common sense. A man ought not be so negligent as to deliver a deed to the grantee to take effect on a condition, but experience has shown that from time to time the layman will thus entrust a document to the grantee, and if he does so, why have a legal trap for him. The fact our Court of Appeals has

⁴² This is largely relied upon by the court in *Dorr v. Middleburg*. But just why this must be simulated to a delivery in escrow when plainly it is not what is usually understood by that term, the writer has never been able to understand, unless perhaps if a court once makes the assumption then it properly follows it can give a reason for holding the deed absolute.

⁴³ A court assumes a delivery in escrow is a delivery to some agent to be delivered to the grantee on the happening of a condition.

passed upon the question five times in less than twenty years indicates such deliveries are not at all uncommon. If evidence were admitted to show the delivery was on condition, it is quite easy to adequately protect the grantee. He has the advantage that arises from possession of the deed and all that is necessary is that the grantor be required to prove the facts he relies upon by clear and convincing evidence.