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## Real Property--Deeds--Delivery to Grantee on Condition

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is a privilege in which courts often indulge, and where the equity and justice are obvious, as in this case, no exception should be taken. The discretion given to the Board of Directors by the legislature provided the very lobb hole through which it was possible to meet the exigencies of a changed society, and thus to permit the government in this instance to function.

—MOSE EDWIN BOIARSKY.

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REAL PROPERTY—DEEDS—DELIVERY TO GRANTEE ON CONDITION.—It is disconcerting to the ordinary man unlearned in law to discover that a transaction which seems to him natural and reasonable has been construed by the courts into something quite different from what he had intended. Such is the case where one executed a deed to land and gives it to his grantee with the understanding that it is to take effect only upon the happening of some condition. The courts to his astonishment refuse to recognize his intention, but attribute an utterly foreign meaning to his act, a meaning drawn from an old and technical rule of the common law the reason for which, if any ever existed, has long since vanished. He finds little consolation for his unjust treatment in being informed that it is the law that though he intended a conditional delivery, his act nevertheless amounts to an absolute delivery. A good example of such an injustice based on this ancient legal formula is found in the case of *Rouss v. Rouss*.<sup>1</sup> Defendant, in that case, a devisee under her husband's will of a life estate on condition that she did not remarry, persuaded plaintiff—who was remainderman in fee following said widow's life estate under the will, contingent upon his paying six \$2,000 legacies to nephews and a niece of testator on termination of said life estate—to execute a quitclaim deed of a life estate in her favor free from the condition as to remarriage. She secured the deed upon her promise not to use it until she should

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<sup>1</sup> 90 W. Va. 646, 111 S. E. 586 (1922).

obtain an agreement signed by the six legatees to postpone payment of the legacies until after her death. Having secured but one name to the agreement and failing in an attempt to get the other five legatees to sign, she recorded the deed, renounced the will, and then married the legatee who had signed. As a consequence she got her husband's personal estate, a second husband, and an unconditional life estate in the real property, while plaintiff has \$10,000 to pay in legacies due on the remainder and must await her death to get possession of the property. The court held that delivery of the deed to the grantee was absolute.

In the above holding the West Virginia court again followed the technical common law rule that there can be no delivery in escrow to the grantee. The result seems unjust to the grantor. The court follows *Dorr v. Midelburg*,<sup>2</sup> and *Heck v. Morgan*,<sup>3</sup> the latter containing merely a dictum on the point. To the same effect is *Gaffney v. Stowers*<sup>4</sup> which was not cited in the principal case. There it was held that an oil and gas lease complete on its face, cannot be delivered as an escrow to the grantee, such delivery being absolute. In a still more recent case, *Henley v. Swan*,<sup>5</sup> the court without discussion laid down the same rule. Thus in a space of fourteen years the subject has five times come before the court which tends to show the frequency with which men have used this type of transaction, as doubtless men not learned in the law will continue to use it.

What sound principle supports this doctrine? The courts generally lay down as the basis for the rule an old statement taken from SHEPPARD'S TOUCHSTONE<sup>6</sup> to the effect that, "If a man deliver a writing sealed to the party to whom it is made, as an escrow to be his deed upon certain conditions, etc., this is an absolute delivery of the 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." Courts have been adhering to a conception of delivery which they repudiate in other situations.

"This crude conception of manual transfer has been su-

<sup>2</sup> 65 W. Va. 778, 65 S. E. 97 (1909).

<sup>3</sup> 88 W. Va. 102, 106 S. E. 413 (1921).

<sup>4</sup> 73 W. Va. 420, 80 S. E. 501 (1913).

<sup>5</sup> 93 W. Va. 49, 115 S. E. 864 (1923).

<sup>6</sup> 1 SHEP. TOUCH. (BY ATHERLY) 50.

perceded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being sufficient delivery if an intention appears that it shall be legally operative, however that intention be indicated."<sup>7</sup> Again, Professor Tiffany says that this idea of physical transfer rather than intention being the operative force springs from the "primitive formalism" which still clings to the law of deeds.<sup>8</sup> It was the authority and vogue of Coke's and Sheppard's writing to which Professor Wigmore attributes the responsibility for the suppression of the more progressive view. He says it is an arbitrary distinction, justified by neither reason nor policy.<sup>9</sup> In every other instance intention is the controlling factor in delivery. The grantor may hand the deed to the grantee to take to his attorney for inspection without effecting a delivery.<sup>10</sup> If the grantee gets possession of the instrument from the hands of the third party to whom it has been handed as an escrow, without performance of the condition no title passes.<sup>11</sup> Also it has been held that where the grantor hands a deed to the grantee to hand to a third party there is no delivery.<sup>12</sup> In these instances the tradition was not controlling, the court looking to the intention with which it was made. Yet the very opposite view is invoked in cases where the conditional delivery is to the grantee. Miller, J., in *Dorr v. Midelburg*,<sup>13</sup> lays down as a reason for the doctrine that title must necessarily pass from the first delivery, since the grantee cannot act as agent of both himself and the grantor for purposes of second delivery. One is impelled to inquire why? Another reason offered is that parol evidence is inadmissible to vary or contradict a written instrument, and consequently parol evidence is inadmissible to show that a deed absolute on its face is conditional. Delivery being a matter of intention, to be gained from the acts and words of the parties, is necessarily proved by parol evidence. If admissible to prove delivery there is no reason for excluding it as to conditional delivery,

<sup>7</sup> TIFFANY, REAL PROPERTY, (2d ed.) vol. 2, 1737.

<sup>8</sup> TIFFANY, REAL PROPERTY, (2d ed.) vol. 2, §462.

<sup>9</sup> WIGMORE, EVIDENCE, vol. 4, §2405.

<sup>10</sup> *Curry v. Colburn*, 99 Wis. 319, 74 N. W. 778 (1898).

<sup>11</sup> *White v. Core*, 20 W. Va. 272 (1882).

<sup>12</sup> *Cherry v. Herring*, 83 Ala. 458, 3 So. 667 (1888); *Brown v. Reynolds*, 37 Tenn. (3 Sneed) 639 (1858); *Fairbanks v. Metcalf*, 8 Mass. 230 (1811).

<sup>13</sup> *Supra*, n. 2.

and some courts have so held. *Inman v. Quirey*.<sup>14</sup> The plain answer to the objection is that the parol evidence is admitted to prove there is no deed and it in no way varies any term of the instrument. See *Pym v. Campbell*.<sup>15</sup>

In *Newlin v. Beard*<sup>16</sup> and *Stuart v. Livesay*<sup>17</sup> the court held that a note may be delivered to the obligee to take effect on the happening of a condition. In *Hicks v. Goode*<sup>18</sup> a conditional delivery of a bond to the obligee was upheld. Courts have not been prone to break away from the old rule in the case of deeds though there is a modern tendency in that direction. In *Whitaker v. Lane*<sup>19</sup> the Virginia court after an exhaustive review of the authorities repudiated the doctrine of its prior decisions and admitted parol evidence to show conditional delivery of a sealed contract. This case was followed by *Burnett v. Rhudy*<sup>20</sup> where a conditional delivery of a deed to the grantee was sustained. The Illinois<sup>21</sup> and California<sup>22</sup> courts when confronted with a hard case held that there had been no delivery at all, which would seem to give effect to the condition. In the latter the court said that it is not sufficient that there be mere delivery of possession, but that there must be the intention to deliver. In the light of this modern tendency to break away from a rule unsound in principle and in its application working such obvious injustice as in *Rouss v. Rouss*<sup>23</sup> the West Virginia court might have seen fit to discard it though in its holding the court is entirely in accord with the weight of authority in this country. But certainly this is a technical rule which has far outlived its usefulness, if it had any, and its destruction would be an improvement of our real property law.

—MARY FRANCES BROWN.

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<sup>14</sup> 128 Ark. 605, 194 S. W. 858 (1917).

<sup>15</sup> 6 E. & B. 370 (1856).

<sup>16</sup> 6 W. Va. 110 (1873).

<sup>17</sup> 4 W. Va. 45 (1870).

<sup>18</sup> 12 Leigh 479 (1842).

<sup>19</sup> 128 Va. 317, 104 S. E. 252 (1920).

<sup>20</sup> 137 Va. 67, 119 S. E. 97 (1923).

<sup>21</sup> *Stanley v. White*, 160 Ill. 605, 43 N. E. 729 (1896); *Mitchell v. Clem*, 295 Ill. 150, 128 N. E. 815 (1920).

<sup>22</sup> *Kennedy v. Parks*, 137 Cal. 527, 70 Pac. 556 (1902).

<sup>23</sup> *Supra*, n. 1.