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## Deeds--Delivery--Presumption Of

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DEEDS — DELIVERY — PRESUMPTION OF. — C died and among papers found in his possession was a deed dated March 13, 1894, by which C conveyed to grantees land, together with personal property. This writing was signed and acknowledged by C before a notary public on March 13, 1894. On the same day the grantees executed a power of attorney to C, appointing him to act as their agent in taking care of the real and personal property they acquired by the deed. This writing was also found among C's papers after his death, signed by the grantees and acknowledged before the same notary public. The deed was recorded but the power of attorney was not recorded. *Held*, that where the grantors and grantees are present at the execution of a deed by which the grantor conveys real and personal property to the grantees for a valuable consideration, and the deed is found in the papers of the grantor after his death, occurring many years after their date, a constructive delivery of the deed is shown. *Reed v. Gunter*, 133 S. E. 123 (W. Va. 1926).

The primary and perhaps controlling question which the case presents is, was there a delivery of the deed? It is settled law that delivery is an essential part of the execution of a deed. It does not take effect until there is a delivery to the grantee. *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351. In the primitive legal systems "delivery" imported the actual transfer of the physical control of the object from one to the other, and under our present law an actual transfer is required in order to constitute a valid parol gift of chattels. W. Va. Code, c. 71, §1. When written instruments became a permissible method of conveying land, the manual transfer of the instrument was regarded as in effect, a symbolical transfer of the land, analogous to livery of seisin. The crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression "delivery," as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being sufficient delivery if an intention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 this intention be indicated. 2 TIFFANY REAL PROPERTY (2nd ed.) p. 1737.

West Virginia cases hold that a delivery does not neces-

sarily involve a manual transfer of the instrument. The delivery may be actual or constructive. If the parties meet to make a deed, read, sign and acknowledge it, this as a general rule, amounts to a delivery. *Glade Coal Co. v. Harris*, 65 W. Va. 153, 63 S. E. 873; *Campbell v. Fox*, 68 W. Va. 486, 69 S. E. 1007; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356. In the principal case there was a meeting, a signing, and an acknowledgment of the deed, but the grantor kept the deed in his possession and among his papers. He also remained in possession and control of the conveyed premises for a period of thirty years without accounting to the grantees. The fact that the deed was found among the private papers of the grantor raises a presumption that the deed was never intended to pass title, and that presumption is strengthened by the fact that the grantor remained in possession and exercised dominion over the property inconsistent with the theory that he has conveyed his land to the grantees named in the deed.

This presumption against delivery is overcome by the circumstances surrounding the transaction, the meeting of the grantor and grantees for the purpose of executing the deed, and the execution and delivery of the power of attorney. West Virginia cases hold that when parties meet for the purpose of making a deed, read, sign and acknowledge it, the conveyance is as effective as if the deed had been actually delivered, and the fact that the grantor retains possession of the instrument is immaterial. Delivery is a matter of intention and under the circumstances suggested, unless there appears an intention not to deliver, an intention to deliver will be presumed. The possession of the land by the grantor and the acts of ownership are not inconsistent with the theory that he has conveyed the land because of the granting of the power of attorney. The presumption is that he was acting under the powers conferred by that paper, and not as owner.

The holding in *Reed v. Gunter* is consistent with the holdings in the earlier West Virginia cases. Our courts have departed from the original doctrine of manual transfer and have stretched "delivery" so far that the expression is now a misnomer. Other jurisdictions, however, have gone further than the West Virginia courts. The case of *Garnons v. Knight*, 5 Barn. & C. 617, sustains the proposition that the

signing, sealing and saying that it is his act and deed is a good execution of the deed by the grantor, though he keeps possession of it. West Virginia requires that the grantor and the grantees be present at the execution, but *Garnons v. Knight* says there is delivery although the grantee is not present. *Fletcher v. Fletcher*, 4 Hare 67, goes further than that. It says that delivery is not needed. The fact that there was no delivery in that case did not affect the validity of the deed.

—H. C.