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Manual Transfer of Deed to Grantee on Parol Condition - Buchwald v. Buchwald Et al.

MANUAL TRANSFER OF DEED TO GRANTEE ON PAROL CONDITION

Buchwald v. Buchwald et al.[1]

In this case a father-in-law attempted to make an absolute conveyance upon an oral condition. The grantor wished to avoid the possibility of his son's wife claiming an interest in the land in the event that his son should fail to survive him. To prevent this contingency he delivered the deed to his son subject to the oral condition that it was not to become operative unless he predeceased his son; and in the event anything should happen to the son, the father was to procure the deed and destroy it. The grantee placed the deed in a safe to which the father had access, but deposited it in his own personal drawer to which the father never went. There was insufficient evidence to show that the grantor had any other control over the instrument than to remove it in the event that he should survive his son. The deed was not recorded until after the grantor's death,

[23] Definite decrees have been used in situations of similar difficulty. (1) Collins v. Wayne Iron Works, 227 Pa. 326, 76 A. 24 (1910). Here the court was asked to abate a noise nuisance caused by the operation of the defendant's iron works. The court said: "In a case like the present where the annoyance arises from the conduct of a business which is not a nuisance per se, a strong effort should be made to conserve the rights of all parties, and an important question is: Can the noise by any reasonable means be so moderated as to accord with the degree of quietness the plaintiff has a right to enjoy; and if it can, by what means." The court looked at the testimony and enjoined the use of noisy machinery during hours when the plaintiffs would be likely to be at rest, and also restrained the use of the machinery while the windows in the plant were open, for the noise was much more objectionable when the windows were in such a position. (2) Peragallo v. Luner, 99 N. J. Equity 726, 133 A. 543 (1926) *supra circa* n. 14, where, after an actual investigation had been made by a court official to determine the extent of the disturbance, the use of the defendant's bowling alleys was enjoined only during the hours that the plaintiff restaurant owner was apt to have his heaviest trade. (3) Gilbough v. West Side Amusement Co., 64 N. J. Equity 27, 53 A. 289 (1902) *supra circa* n. 11, where the court restrained the defendant from permitting noise on its premises during the time when the annoyance was most disturbing to the plaintiffs.

[1] 199 A. 800 (Md. 1938).

and immediately upon its being recorded the grantee's brothers filed this bill of complaint, alleging that they were the decedent's heirs and that the grantor had died intestate. It was claimed there was no valid delivery inter vivos, and being ineffectual as a deed, the transaction had not complied with the requirements of a valid will. Charges of incapacity and fraud were disregarded, and the case was decided on the question of whether there had been a valid delivery during the grantor's lifetime. The Chancellor found that there had been no effective delivery of the deed, that it was ineffective as a will, and was therefore void, and decreed accordingly. From that decree the grantee appealed. *Held:* Affirmed.

The defendants contended that the grantor did not retain any control over the deed during his lifetime, but alleged that it had been delivered to the grantee and was in his control and possession from the day of its execution until the death of the grantor. The question on appeal was whether a deed manually and physically transferred by the grantor to the grantee subject to the conditions (1) that it is not to be recorded during the grantor's lifetime, and (2) that the grantor might, if the grantee predecease him, retake and cancel it, passed to the grantee an indefeasable title to the land described therein.

The question of an oral condition to a deed absolute on its face has been a paramount issue for the past century, and since the issue is still unsettled there is little wonder that uncertainty resulted when the *Buchwald* case presented itself to the Maryland Court. A solution might have been to accept the majority view that such a delivery of a deed to the grantee is absolute.[2] The Court chose, however, to disregard the fruits of others' labor and proceeded to determine the case entirely on the question of intent to deliver. This approach failed to recognize an important result which may be effected by a conditional delivery orally expressed. If there had been an attempt to distinguish between a conditional delivery and no delivery at all, the result would not have provoked this criticism, for it has long been recognized that even where the possibility of oral conditional delivery is recognized as conveying a presently operative estate, it is exceedingly difficult to draw the line between a conditional delivery and no delivery at all. It was probably this difficulty which caused the Court

[2] 21 C. J. 874; Wipfler v. Wipfler, 153 Mich. 18, 116 N. W. 544, 16 L. R. A. (N. S.) 941, 943 (1908).

to avoid the issue of a conditional delivery to the grantee, and to proceed to cite cases dealing with proof of no delivery,[3] in complete disregard of the fact that a conditional delivery *can* act as a delivery, though the effect of the latter is to vest an immediate estate in the grantee as expressed on the face of the deed.

The Court failed to consider the distinction between a conditional delivery to the grantee and a physical transfer of the deed with "no present intent" that it shall become presently operative. In fact it went so far as to state that Mr. Tiffany had confused no delivery at all with a conditional delivery. Quite the contrary, it was Mr. Tiffany who properly distinguished the two, when he made the statement[4] that "conditional delivery must be to some person other than the grantee", because if the grantor "intending to make a conditional delivery, hands the instrument to the grantee, there is necessarily an absolute delivery". The same author said:[5]

> "Such a transfer to a third person if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does such a transfer to the grantee himself, if the transfer is not with such intention, *but is for another purpose, for instance, to enable him to examine the instrument.* . . . It being conceded that even a voluntary transfer of the instrument by the grantor to the grantee does not involve a delivery if not with the intention that the instrument shall be legally operative, it necessarily follows that the instrument cannot be regarded as having been delivered merely because the grantee has acquired possession thereof without the grantor's consent."

Again,[6] Mr. Tiffany recognizes that a delivery can be made with "present intent" to convey on a condition shown orally which acts as an absolute conveyance; and elsewhere,[7] he recognizes that there is no delivery where there is "no present intent" to convey.

This question of intent to make a delivery was set forth very clearly in the cases of *Ball v. Sandlin*[8] and *Gould v.*

[3] Krask v. Carson, 150 Md. 659, 133 A. 306 (1926); Hearn v. Purnell, 110 Md. 458, 72 A. 906 (1909); Renehan v. McAvoy, 116 Md. 356, 81 A. 586, 38 L. R. A. (N. S.) 941. None of these cases was in direct point.

[4] Tiffany, Real Property, Sec. 462.

[5] *Ibid*, Sec. 461.

[6] *Ibid*, Sec. 462.

[7] *Ibid*, Sec. 461.

[8] 176 Ky. 537, 195 S. W. 1089 (1917).

Wise.[9] The former case held that though there was a presumption of intent where the grantee is in possession of the deed, such presumption may be rebutted. This is an application of the parol evidence rule, which holds that oral testimony cannot modify, contradict, or vary the terms of a written instrument, but it can be introduced to show that there never was any contract. This is permitted because facts showing the delivery of a deed or the execution of a contract cannot be shown on the instrument itself,[10] whereas desired conditions can be readily incorporated in the instrument.[11]

In *Ball v. Sandlin* the deed was delivered for safe keeping and there was "no present intent" that the deed should become presently operative, and there was therefore no valid delivery. In the case of *Gould v. Wise* possession was obtained without the consent of the grantor, and it was evident that both manual transfer and "present intent" were lacking; nor could the grantee pass a good title to a third party. The Court of Appeals cited cases on the subject of delivery,[12] but did not cite those which dealt with a conditional delivery.[13] This was, in effect, stating that it is impossible for an absolute estate ever to vest in the grantee where oral testimony can show that there was a conditional delivery. The true test of delivery is not the time at which the grantor intended that title should pass to the grantee, but whether in parting with possession the grantor intended that the deed should divest himself of title.[14] It is, then, immaterial whether there is a condition or not, for in either case the deed becomes operative immediately as expressed on its face. The Maryland Court cited several of the cases which hold that when a condition is proved title passes immediately, as expressed on the face of the deed.[15] A fact which must be realized is that there

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[9] 97 Calif. 532, 32 Pac. 576, 33 Pac. 323 (1893).

[10] Contrast with this the practice under the law of certain Continental countries whereby the delivery must be made in a prescribed manner before an official and a description of the steps is written on the instrument itself.

[11] Ballentine, *Delivery in Escrow and the Parol Evidence Rule* (1920) 29 Yale L. J. 826.

[12] Roup v. Roup, 136 Mich. 385, 99 N. W. 389 (1904); Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909); Bunn v. Stewart, 183 Mo. 375, 81 S. W. 1091 (1904).

[13] Note (1921) 5 Minn. L. R. 287 cites numerous cases on conditional delivery.

[14] Hansen v. Hansen, 82 Cal. App. 786, 256 Pac. 290 (1927); Harjo v. Willibey, 138 Okl. 212, 281 Pac. 265 (1929).

[15] Labor v. Labor, 136 Mich. 255, 99 N. W. 4 (1904); Dyer v. Spaden, 128 Mich. 348, 87 N. W. 277, 92 Am. St. R. 461 (1901).

is a difference in a manual delivery with "no present intent" to convey, and a manual delivery with a "present intent" to convey at a future time or on the happening of an event, which is a conditional delivery.

The facts of the *Buchwald* case show that there was a manual transfer, and that the grantor had the intent to pass title to the grantee in the future. They also show that the grantor voluntarily gave up all control of the deed and reserved the right to retake it *only* in the event that the grantee predecease him; this was the delivery of a deed on the condition that it was not to become operative in the event that the son should die first. The basic question is this: if it is possible to prove a "present intent" that the deed shall operate to vest title in the grantee only on the happening of an event in the future, shall this operate to prove that (1) there was no delivery at all, or (2) there is a valid condition upon which the deed may become effective, or (3) absolute title vested in the grantee immediately?

The fact that there had never been a Maryland case in point involving a conditional delivery to the grantee gave the Court almost unlimited discretion in determining the view to be adopted. The unquestioned weight of authority is that a deed cannot be delivered on condition to the grantee himself, but that the deed becomes absolute, and the condition is thereby rendered null and void.[16] This view was well explained in the early case of *Lawton v. Sanger*,[17] which recognized three types of delivery: (1) "no present" intent that the deed operate to pass title immediately or in the future, in brief a pure manual transfer ineffectual to transfer title, (2) a "present" intent that the deed operate to convey title at a future time upon the happening of condition, (3) a "present" intent that the deed pass title immediately.

So long as there is intent that the title shall pass to the grantee at "sometime", and the grantor parts with control of the deed, it becomes impossible to prove that there was "no delivery"; for the true test of intent for delivery is whether the grantor intended to divest himself of title and not whether he intended to pass title immediately to the grantee.[18] The latter happens regardless of what his intention may be so long as there is a valid de-

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[16] *Supra*, n. 2.

[17] 11 Barb. 349 (N. Y. 1851).

[18] Hansen v. Hansen, *supra* n. 14; Harjo v. Willibey, *supra* n. 14; Dawson v. Lindsey, 223 Ala. 169, 154 So. 662 (1931); Burke v. Burke, 141 S. C. 1, 139 S. E. 209 (1927).

livery of a deed absolute on its face. In other words, an oral condition showing a "present intent" that the deed operate to convey at a future time or upon the happening of an event must always act to convey an absolute title in the grantee immediately. This effect is inevitable because of the application of the parol evidence rule to the nature of a deed. As we have stated before, oral testimony cannot vary, modify, or contradict written instruments, though it may be used to show that there was no instrument, as between the parties. A deed is unlike a contract or bond for it is possible in the deed to create an immediate interest to commence in the future, i. e., a springing use. In a contract a condition would not necessarily change its terms; but in the case of a deed conveying a fee simple absolute on its face, to show an oral condition would be to prove that there was an executory interest instead of a fee simple absolute, in violation of the parol evidence rule.

The rule does, however, allow oral testimony to show that there was no delivery at all.[19] For these reasons a deed absolute on its face must be either no deed because of no delivery, or a valid deed operative immediately from the time of delivery. An exception to this rule is in the case of a delivery to a third party in escrow. Escrow is described by Ballentine[20] as a substitution for the incorporation of the condition on the face of the deed, and operative as an exception to the parol evidence rule.

In applying this exception it is very important to distinguish a condition certain to happen and one not certain to happen. In the former an immediate trust is created and no memorandum is required by the Statute of Frauds in order to enforce the contract of escrow; while in the latter there is a mere executory contract, and the weight of authority allows the grantor to revoke the contract of escrow at any time before the happening of the condition, unless there is some writing other than the deed itself.[21] Thus it may be seen in the last case that parol evidence may be introduced without conflicting with the rules of real property, and so it need not be described as an exception in that instance.

Returning to the *Buchwald* case, it is to be particularly noted that the court in its dictum stated that a deed absolute on its face cannot be deposited with the grantee in escrow, and that it becomes a delivery which operates to

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[19] Ball v. Sandlin, *supra* n. 8.

[20] *Supra* n. 11.

[21] Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916).

vest title in the grantee immediately,[22] which is a situation identical with the *Buchwald* case. Then it proceeded to decide the case without considering this dictum, arriving at what may be called a very erroneous minority view.[23] The Court attempted to prove that if there was a conditional delivery to the grantee there was in effect no delivery before the grantor's death, which left the appellant with no valid claim. It was here that the Court erred, for they failed to recognize the second type of delivery, i. e. "present intent" that the deed become operative in the future. They held that this acted as no delivery at all for it did not vest immediate title in the grantee, but previously they had spoken of a conditional delivery in escrow to the grantee which acted to vest absolute title in him immediately. "Present intent" may be to vest title in the grantee at present or in the future, and in either case there is a valid delivery, but the title vests immediately in spite of the intent as to time. This is so because of the fact that an oral conditional delivery to the grantee always acts as an absolute delivery,[24] for the reasons stated above.

Aside from the majority rule, which has been adopted by nearly every American jurisdiction, there are three other views. The second and leading minority view, which the Maryland Court cited and apparently followed, is that where a deed is delivered directly to the grantee with "present" intent that it shall become operative in future or on the happening of an event, there is no delivery, and this may be shown by parol evidence.[25] In the case cited above it must be noted that three justices dissented on the ground that such delivery to the grantee on condition should vest absolute title, relying on previous Illinois authorities and the application of the parol evidence rule to deeds.

The third view is equally erroneous, giving the condition effect and allowing it to vest absolute title on the happening of the event. This view was reached in *Whitaker v. Lane*[26] on the theory that a deed was different from a simple contract only in the fact that a seal was attached. It then disregarded the parol evidence rule in its application to deeds and allowed the condition to be shown, but it had failed to take cognizance of the fact that a deed absolute

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[22] 21 C. J. 874.

[23] Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945 (1906).

[24] Weldon v. Lawrence, 76 Cal. App. 530, 245 Pac. 451 (1926); Totten v. National Ben Franklin Fire Ins. Co., 110 N. J. E. 354, 160 A. 572 (1932); Wipfler v. Wipfler, *supra* n. 2.

[25] *Supra* n. 23.

[26] 128 Va. 317, 104 S. E. 252, 11 A. L. R. 1157 (1920).

on its face was being changed to a springing fee by parol evidence. However, another error nullified the effect of the first, for the court had been dealing with nothing more than a sealed contract to convey land rather than a deed, and as pointed out above a parol condition may be shown on a contract, for no estate has as yet been conveyed and the terms are not changed.

The fourth view is one which has been adopted only in England,[27] and has been given acclaim in this country by Professor Wigmore.[28] These cases give the conditional delivery to a grantee in escrow the same effect as a conditional delivery to a third person in escrow. This conclusion is not the result of any consideration of the effect of parol condition on an absolute deed, but rather of an attempt to remove what is called "an arbitrary and unjust distinction" between a deed delivered to a third person in escrow and one delivered to the grantee on the same conditions.

As one may see, these minority views are all based on very erroneous hypotheses and their results are far from being desirable. Certainly it is more desirable to consider the grantor and to give some weight to his intention to convey an estate, rather than to hold after his death that his conditional intention must have no effect. Such a ruling results in vesting the property in heirs whom the decedent may have intended to exclude. But this is not the paramount reason for giving effect to the delivery and for disregarding the effect of the condition. To allow parol conditions to show that there was no delivery at all, when in fact there was a delivery with "present intent" to pass title absolutely or conditionally, would be to submit titles to open attack forever, and the benefit of recording would be lost.[29] The Maryland decision is one which cannot be justified unless it could be proved that the grantor retained more control over the deed than that expressed by the conditional delivery. The discussion as to what might constitute a valid delivery was very satisfactory, but whether the rules were properly applied to the immediate case seems open to question.

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[27] Pym v. Campbell, 6 E. & B. 370 (Q. B. 1856); Hudson v. Revett, 5 Bing. 368 (C. P. 1829).

[28] 5 Wigmore, Evidence (2nd Ed. 1922) Sec. 2408.

[29] Discussed in Bigelow, Introduction to the Law of Real Property, 585.