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Delivery of Deed by Grantor to Grantee on Oral Condition - Chillemi v. Chillemi

DELIVERY OF DEED BY GRANTOR TO GRANTEE ON ORAL CONDITION

Chillemi v. Chillemi[1]

The parties to this action, husband and wife, purchased certain property in Bethesda, Maryland, in January 1946. In September of that year the husband who was employed in the War Department, was ordered by the government to go on a possibly dangerous mission to Japan and China. Because of the uncertainty of his return and despite the parties' discordant marital life, the husband consented to execute deeds conveying to his wife the property held by them as tenants by the entireties. This conveyance was on condition that the wife would not record the deeds until such time as he "should have been reported missing, killed, or had failed to return" and that if he should return the deeds would be destroyed or returned to him. The husband's stay in the Far East was shorter than anticipated and he arrived home in December 1946 at which time he requested return of the deeds. The wife refused and instead caused the deeds to be recorded. The parties ceased to live together as man and wife and the husband filed suit in the Circuit Court for Montgomery County to enjoin his wife to reconvey the property to him and her as tenants by the entireties. The lower court declared the deeds null and void, accepting the oral evidence. The Court of Appeals affirmed, holding that it is the intention of the grantor of a deed that determines whether the delivery of the deed is absolute or conditional even though the delivery is made by the grantor directly to the grantee and the condition be only an oral one.

After many years of discussion and much litigation on the subject, the effect of a conditional delivery of a deed, complete on its face, directly by the grantor to the grantee is still in question.[2] The courts faced with this question have decided it by choosing one of four views held on the subject. The first, and without question the view most generally held in this country, is that a deed cannot be delivered to the grantee on an oral condition and that

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[1] 78 A. 2d 750 (1951).

[2] Ballentine, *Delivery in Escrow and the Parole Evidence Rule*, 29 Yale Law Journal 826 (1920); Tiffany, *Conditional Delivery of Deeds*, 14 Columbia Law Review 389 (1914).

such a delivery is absolute with the parole condition being treated as having no effect whatever.[3]

The second view, which has been taken by some of the American courts, holds that if there is a conditional delivery and the grantor's intent is that delivery should not take effect immediately, there is then in fact no real delivery.[4] The courts taking this stand allow the fact of non delivery to be shown by parole evidence.

The third view takes the position that the conditional delivery does not represent any delivery at all until the condition has been fulfilled. However, when the condition has been met the delivery is then treated as being absolute and the deed becomes immediately operative.[5]

The fourth and final view on this question treats conditional delivery of a deed by grantor directly to the grantee the same as if the delivery had been made to a stranger to hold in escrow for the grantee.[6]

While the view referred to first has been said by renowned writers to be a relic of the primitive formalism which attaches some peculiar efficacy to the physical transfer of the instrument as involving a symbolical transfer of the property,[7] that view still certainly represents the predominating opinion on the subject in this country. The reasoning of the courts so holding is apparently predicated on their belief that any recognition of an oral condition might lead to the unsettling of titles and land records. An effort to break away from this so called "primitive formalism" has lead to the development of the other views referred to.

Since there were divergent views on the subject it was not strange to find the Maryland Court of Appeals undecided as to which doctrine it would apply when it was faced with this situation for the first time in *Buchwald v. Buchwald.*[8] In that case a father wished his son to have certain realty but wanted to preclude the son's wife having any claim on the property if the son predeceased the father. To accomplish this end he delivered the deed to his son on

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[3] 21 C. J. 874 and 26 C. J. S. 251; Wipfler v. Wipfler, 153 Mich. 18, 116 N. W. 544 (1908); Mays v. Shields, 117 Ga. 814, 45 S. E. 68 (1903); Sweeney v. Sweeney, 126 Conn. 391, 11 A. 2d 806 (1940); Chaudoir v. Witt, 170 Wis. 556, 174 N. W. 925 (1919); 16 L. R. A. (N. S.) 941.

[4] Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69 (1906); Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909).

[5] Whitaker & Fowle v. Lane, 128 Va. 317, 104 S. E. 252 (1920).

[6] *Supra*, n. 2; 9 WIGMORE, EVIDENCE (3rd ed. 1940), Sec. 2408.

[7] WIGMORE, *op. cit, supra*, n. 6, Secs. 2405, 2408; 4 TIFFANY, REAL PROPERTY (3rd ed. 1939), Sec. 1049.

[8] 175 Md. 115, 199 A. 800 (1938).

condition that it be held in a safe and not be recorded until the father's death and that if the son predeceased his father he would then retake and destroy the deed. In deciding this case, the Court of Appeals said that there could not be a delivery of a deed to the grantee in escrow and quoted with approval 21 C. J. 874:

> " 'A deed absolute on its face cannot be deposited by the grantor with the grantee therein named to be held by the latter in escrow; such a deposit becomes a delivery which operates to vest absolute title in the grantee immediately'."

The Court then went on to say that there cannot be a valid delivery of a deed to the grantee named in it on a condition not expressed in the instrument. However, after stating these rules they went on to say that manual tradition is insufficient and that transfer must be with intent that the deed shall presently become operative and effectual. They then found that the deed had been given to the son for safekeeping and without intent that it become presently operative and that this was not a present grant but an attempted testamentary disposition of property and there had been no effective delivery. Thus while citing authority for the first and most widely accepted view, the Court actually ended up applying the second view which treats such a delivery as no delivery.

The courts have broken away from the old theories of the inviolate character of all written documents merely because they are in writing. It is now generally accepted that the rule prohibiting parole evidence to modify a simple written contract doesn't exclude evidence to show that the written instrument was delivered subject to a condition. The Virginia case of *Whitaker & Fowle v. Lane*[9] contains a comprehensive discussion with reference to whether parole evidence may be admitted to show that even a sealed instrument was delivered subject to an oral condition. It further illustrates the trend in American thought on the subject to apply to sealed contracts the same rules applied to unsealed contracts. This case completely disregarded the effect of a seal and held that a parole condition that it shall not be effective except upon fulfillment of a larger transaction of which it is a part, may be attached to a sealed contract for the purchase of realty.

However, the courts have been in most jurisdictions reluctant to apply the same thinking to a deed. Yet, at the

[9] *Supra*, n. 5.

prodding of Wigmore and Tiffany[10] it appears that at least some courts are departing from the old and established rules. As illustrative of this trend we are referred to a Tennessee case where a mother executed and delivered to her son a deed to contain property.[11] The son died before his mother leaving all his property to his wife who caused the deed to be recorded. The court found that there had been a conditional delivery with an intent that the deed not take effect until after the mothers death. In setting aside the deed the court said:

> "The rule seems well settled in Tennessee that it is the intention of the grantor of a deed or the maker of a note that determines whether a delivery of an instrument is absolute or conditional even though delivery be made to the grantee of the deed or the payee of the note."

The Tennessee court therefore represents those jurisdictions which state that the intention of the grantor is conclusive and will govern.

It seems from the instant case that Maryland has now taken a similar position and has definitely cast aside the majority view that a purported conditional delivery directly to the grantee is an absolute delivery.

The courts in this country are in accord with the principle that it may be shown that a deed was delivered without any intent that it take effect, for example, where a deed has been delivered to a party merely for purposes of examination and without intent that title pass.[12] These courts are in fact looking at the intention of the grantor and determining that there has been no delivery at all. It seems strange therefore that in the same jurisdictions it must be held that a deed can't be manually transferred with a conditional intent without being an absolute delivery even though the parties did not so intend. Thus, where a deed is handed to the grantee only for purposes of examination the courts will look to the act of delivery and find no intent to pass title. They consider all of the circumstances and in effect say that the delivery is really an act which expresses no intent that the deed be valid from that time on. Although you might expect that these courts would be also equally willing to say that a deed delivered subject to a condition is merely evidence of an intent that

[10] *Supra*, n. 7.
[11] Tanksley v. Tanksley, 145 Tenn. 468, 239 S. W. 766 (1922).
[12] Curry v. Colburn, 99 Wis. 319, 74 N. W. 778 (1898).

the deed not take effect until an event has occurred, they have been reluctant to do so. However, of their failure to apply such reasoning Tiffany has said:

> "That the mere physical transfer of the instrument should, in any jurisdiction, be allowed to override the grantor's explicit declaration of intention that the instrument shall not be immediately operative, is a striking illustration of the persistence of the primitive formalism before referred to."[13]

The Maryland Court, in deciding the instant case, must have had this squarely in mind and seems clearly to have adopted the philosophy of Wigmore and Tiffany in their approach to the problem. They refused to apply the law which had been set out in *Buchwald v. Buchwald*[14] and unequivocally said that there is no logical reason why a deed should not be held in escrow by the grantee as well as by a stranger. The Court held the ancient rule to be inapplicable to present day conditions and stated that conditional delivery:

> ". . . is purely a question of intention, and it is immaterial whether the instrument, pending satisfaction of the condition, is in the hands of the grantor, the grantee, or a third person."[15]

In thus holding that the intention of the grantor will alone determine the effect of a delivery, Maryland has broken away from the strict views entertained by most other jurisdictions on this problem and has apparently accepted the theories of Wigmore and Tiffany. It remains to be seen whether this modern approach will lead to the unsettling of titles and undermining of the certainty of our recording system as some writers and many other jurisdictions contend.

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[13] *Supra*, n. 2, 391.
[14] *Supra*, n. 8.
[15] *Supra*, n. 1, 753.