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Ben Holt

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will continue for an indefinite period. Payments upon or proper acknowledgement of the debt will prevent the statute of limitations running; the debt may remain enforceable for an indefinite period of time and the mortgage lien apparently will be extended accordingly as against all who are not purchasers for value and in good faith. The longer a mortgage is kept off the record, then, the more advantageous the position of the mortgagee, insofar as concerns duration of his lien.

In order to prevent this anomalous situation, the Montana Court, in the absence of legislative action, would be compelled to overlook the wording of Sec. 8267, which by its terms applies only to a recorded mortgage. A proper solution of the problem is action on the part of the Montana legislature.

William F. Browning.

CONSTRUCTIVE DELIVERY OF DEEDS DEPENDENT UPON DEATH OF GRANTOR

In *Carnahan v. Gupton*,[1] recently decided by the Montana Supreme Court, an owner of an undivided one-half interest in certain land, after executing deeds to his nephew and the latter's wife, placed the deeds in his safety deposit box, to which he alone had access, in an envelope addressed to the grantees, and wrote his nephew informing him of these acts and instructing him that the deeds would be delivered to him upon presentation of the letter to the depositary bank after the grantor's death. The bank had notice of this arrangement. The grantor continued until his death to farm the land and to render annual accounts to his co-owner. After the death of the grantor, his administrator delivered the deeds to the grantees, who recorded them, but the other heirs brought suit to have them declared invalid. *Held*, the deeds had not been delivered, were formally insufficient as a will, and so were without legal effect.

Authorities are agreed that "a grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."[2] The concept of delivery, however, is one of uncertain and varying content. This, of course, is due to the fact that the term is used, not to indicate a physical act, but to describe a legal result. While all Courts, including the Montana court in the principal case, doubtless recognize that fact, nevertheless much of the confusion in the application of the concept may be charged to failure of the Courts to make clear whether it is relinquishment of control over the instrument or over its legal effect, or both, which they consider essential to delivery. The usual statement is simply that the grantor must

[1] 96 P. (2d) 513 (Mont. 1939).
[2] Sec. 6843, R. C. M., 1935; 4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1033.

part with control over the deed.[3] But the Courts may reasonably be expected to be articulate as to why decisive importance is sometimes given to control over the document, as was true in the principal case, whereas in other cases this factor is regarded as virtually immaterial.

There is a tendency to minimize the importance of actual manual delivery.[4] The prevailing attitude was well stated by the Montana Court in *Hayes v. Moffatt*[5]: "There is no universal test applicable to all cases whereby the sufficiency of delivery may be established; there may be a legal delivery without manual delivery, and there may be no delivery although the instrument is placed in the hands of the grantee. The intention of the parties is the essence of delivery and is the crucial test where constructive delivery is relied upon." Thus, on the one hand, the mere fact that the grantor retains possession of the deed does not invalidate delivery, as where he has it merely for safekeeping,[6] or where he as well as the grantee has access to it.[7] Recording of the deed,[8] signing and sealing in the presence of the grantee,[9] recitals in the attestation clause,[10] and acknowledgement,[11] raise presumptions of delivery in some jurisdictions; and where the grantor acquiesces in the grantee's taking possession, paying taxes, and otherwise treating the property as his own, circumstances tend to show a delivery.[12] These presumptions may, however, be rebutted by other facts or presumptions, such as the presumption of nondelivery raised when the deed is found in the possession of the grantor.[13] On the other hand, possession of the deed by the grantee raises only a presumption of delivery,[14] and there may be no delivery even though there has been a complete manual transfer of the instrument, as where the grantee has obtained the deed by fraud,[15] or where it has been given to the grantee for safekeeping.[16] While

[3] 1 DEVLIN ON DEEDS (3d Ed.), Sec. 260a; Bury v. Young, 98 Cal. 446, 33 Pac. 338 (1893); Shipley v. Shipley, 274 Ill. 506, 113 N.E. 906 (1916).

[4] WALSH, PROP. (2d Ed.), Sec. 335; Moore v. Hazleton, 91 Mass. 102 (1864); Vought v. Vought, 50 N. J. Eq. 177, 27 Atl. 489 (1884).

[5] 83 Mont. 214, 271 P. 443 (1928).

[6] Stone v. Daily, 181 Cal. 571, 185 P. 665 (1919).

[7] Wilson v. Wilson, 32 Utah 169, 89 Pac. 643 (1907).

[8] 4 TIFFANY, REAL PROP. (3d Ed), Sec. 1044; Robbins v. Rascoe, 120 N. C. 79, 38 L. R. A. 238 (1897).

[9] 4 TIFFANY, REAL PROP. (3d Ed), Sec. 1041; Wallace v. Berdell, 97 N. Y. 13 (1884).

[10] TIFFANY, REAL PROP. (3d Ed), Sec. 1042; Hall v. Sears, 210 Mass. 185, 96 N. E. 141 (1911).

[11] 4 TIFFANY, REAL PROP. (3d Ed), Sec. 1043; Wilmarth v. Hill, 55 S. D. 410, 226 N.W. 557 (1929).

[12] Rodemeier v. Brown, 169 Ill. 347, 48 N.E. 468 (1897).

[13] 4 THOMPSON, REAL PROP., Sec. 3887; Springhorn v. Springer, 75 Mont. 294, 243 Pac. 803 (1926).

[14] 4 THOMPSON, REAL PROP., Sec. 3887; Stewart v. Silva, 192 Cal. 405, 221 Pac. 191 (1923).

[15] Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509 (1916).

[16] Ball v. Sandlin, 176 Ky. 537, 195 S.W. 1089 (1917).

the grantor may make an actual manual transfer to the grantee which would not constitute a delivery, yet the grantor may not make a conditional delivery to the grantee, for the instrument takes effect discharged of any condition.[17] This is regarded by some as a striking instance of a survival of a formalistic doctrine, originating in primitive modes of conveyance.[18] In an analogous situation, negotiable instruments generally may be delivered to the payee on conditions good between the parties,[19] and it is not apparent why the same should not be true in the case of deeds.

Inasmuch as manual delivery is not required under either common law or the Montana statutes, it is difficult to see why the lack of it was so emphasized in the principal case. Sec. 6848, R.C.M., 1935, provides that "though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: (1) when the instrument is, by the agreement of the parties at the time of execution understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or, (2) where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed." The decision, of course, was that there was no delivery in the legal sense, i.e., that an intention to give the deeds presently operative effect was not sufficiently manifested. But the fact remains that retention of control over the document was the only plausible ground for refusal to find the requisite intention and the only ground relied upon by the Court. The intention of the parties being the essence of delivery,[20] however, the grantor's intent to make a delivery in the principal case might have been shown by his letter to the grantee and the notice given to the bank. The case can hardly be said to have depended upon the fact that the notice given by the grantor was only that the grantee could get the deeds upon the grantor's death, and not that the deeds passed the fee to the grantee at once, for there is the possibility that a life estate may have been impliedly reserved in the grantor,[21] or that the intent may have been that a fee *in futuro* should be created in the grantee.[22] While the intent of the grantor must be to convey a present interest to the grantee,[23]

[17]Sec. 6845, R. C. M., 1935; Wilson v. Jinks, 63 Ind. App. 615, 115 N.E. 67 (1917).

[18]18 MICH. L. REV. 314 (1920).

[19]R. C. M., 1935, Sec. 8423 (N. I. L., Sec. 16); Baroch v. Greater Mont. Oil Co., 70 Mont. 93, 225 Pac. 800 (1924); BRANNON'S NEG. INST. LAW (6th Ed), pp. 254-266.

[20]4 THOMPSON, REAL PROP., Sec. 3858; WALSH, PROP. (2d Ed.), Sec. 335; Hayes v. Moffatt, *supra*, note 5.

[21]1 DEVLIN ON DEEDS (3d Ed.), Sec. 280; Bury v. Young, *supra*, note 3.

[22]4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1054; Osgood v. McKee, 343 Ill. 470, 175 N.E. 786 (1931).

[23]4 THOMPSON, REAL PROP., Sec. 3858; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544 (1910).

otherwise it is testamentary,[24] this does not mean that the fee must pass at once, for it is essential only that the deed operate to create an executory future interest.

The decision in the principal case may have been required by Sec. 6848, R.C.M., 1935, *supra,* which provides that the grantee must be "entitled to immediate delivery." The question again arises as to whether manual delivery or legal delivery is meant. Do the quoted words mean that the grantee must have the right to immediate possession of the instrument, or that the grantee must be entitled to the status of a grantee of a delivered instrument? It is arguable that the clause can hardly refer to a right to immediate possession of the document, since there would be no such right unless there had already been a legal delivery, and if there had already been a legal delivery, it would be immaterial whether there were a right to the document, i.e., the problem would have been already solved. On the other hand, it is difficult to give any effect to the provision unless it is held to refer to possession of the instrument. The Montana Court has not, however, relied upon this theory that the grantee must be entitled to possession of the instrument, and the statement above quoted that the intention of the parties is the crucial test implies rejection of such a theory.

If a grantor delivers a deed to a third party absolutely as his deed, though it is not to be delivered to the grantee until the grantor's death, the deed is valid.[25] Thus, if the grantor in the principal case had given the deed to a bank official, instead of placing it in his own safety deposit box, and the circumstances had otherwise been the same, the delivery would have been upheld. In *Plymale v. Keene*[26] the Montana Court held there was a good delivery when the grantor placed the deeds in an envelope and gave them to the cashier of a bank to be delivered to the grantee upon the grantor's death. In *Martin v. Flaharty*[27] the grantor executed a deed, the grantee executing at the same time a life lease to the grantor, and the grantor gave the deed and lease to a bank with instructions to redeliver to the grantor upon request, or, in case of her death without having made such a request, to deliver to the grantee. The Court held that, the grantor having died without requesting redelivery, the deed was valid. This case, if still law, is logically inconsistent with the principal case, since the delivery there was expressly revocable. "A delivery which the grantor can, at his option, treat as not a delivery, is incomprehensible, and in so far as the conveyance may still be subject to the grantor's control, in the sense that he may treat it as a legal nullity, it must be

[24]Williams v. Kidd, 170 Cal.. 631, 151 Pac. 1 (1915).
[25]4 THOMPSON, REAL PROP., Sec. 3872; Plymale v. Keene, 76 Mont. 403, 247 Pac. 554 (1926); Smith v. Smith, 173 Cal. 725, 161 Pac. 495 (1916).
[26]Cited in note 25.
[27]13 Mont. 96, 32 Pac. 287 (1892).

considered that there has been no delivery.'"[28] The fact that the instrument in the principal case remained under the control of the grantor does not make it any more testamentary than where the grantor expressly reserves the right to recall it. Authorities generally recognize this, but repudiate the result reached in the *Martin* case rather than that reached in the principal case.[29] However, even if the *Martin* case be not accepted, there is still a possibility of upholding delivery in the principal case, since possession of the instrument does not necessarily imply revocability or control over the title.

"The fact that the grantor reserves possession, use, enjoyment or profits of the property during his life does not make the instrument a will.'"[30] When the grantor hands a deed to a third person to be given to the grantee upon the grantor's death many Courts hold that there is an implied reservation of a life estate.[31] The Montana Court in the principal case rejected this theory on the question-begging ground that there could be no implied reservation of a life estate because there had been no delivery. It is more properly criticized in that the execution of a deed purporting to create only an estate in fee simple shows no intent to create two estates, and further, that it gives to delivery a function, that of determining what estates are created, to which it is not entitled.[32] Another theory finding acceptance in the cases is that a deed so delivered is a present grant of a future estate,[33] the fee simple remaining in the grantor, upon whose death the prospect of an estate ripens into a vested estate in the grantee. This theory may be applied in Montana under Sec. 6729 and 6735, R. C. M., 1935, providing for creation of a freehold estate *in futuro*. The Montana Court in *Plymale v. Keene* implicitly recognized both theories by quotations from other Courts. Clearly, then, continued use of the land by the grantor was not decisive in the principal case and the Court wrongly stressed it. The grantor would have had that right under either of the above theories.

When the grantor reserves a life estate by the terms of the deed, although he retains possession of the instrument, it is frequently held that a presumption of nondelivery does not arise because there is no object in such a reservation unless the instrument is to operate before the grantor's death.[34] Tiffany, however, points out that it may as well be said that any instru-

[28]4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1050.
[29]4 THOMPSON, REAL PROP., Sec. 2905; 1 DEVLIN ON DEEDS (3d Ed.), Sec. 260a.
[30]1 DEVLIN ON DEEDS, (3d Ed.), Sec. 309a; 4 THOMPSON, REAL PROP., Sec. 3870; Plymale v. Keene, *supra*, note 25.
[31]4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1054, Bury v. Young, *supra*, Note 3; Prustman v. Baker, 30 Wis. 644, 11 Am. Rep. 592 (1872).
[32]4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1054.
[33]*id.*; Osgood v. McKee, *supra*, note 24.
[34]18 C. J. 414; Singleton v. Kelly, 61 Utah 277, 212 Pac. 63 (1923).

ment in the form of a conveyance *inter vivos*, as distinguished from a will, is presumed to have been delivered, even though still in the grantor's possession, since the very form of the instrument indicates an intention that it shall operate before the grantor's death.[35] This criticism is perhaps not fully justified, for a deed with an express reservation of a life estate would seem to be a better indication of the grantor's intent to convey a present estate than is a deed, absolute on its face, found in the grantor's possession after his death. The decision in *Martin v. Flaharty*, in which the grantee executed a life lease to the grantor, perhaps may be supported on this ground, although the express power to revoke would still seem fatal.

By way of summary, then, it may be said that, while the principal case is supported by the weight of authority,[36] it seems doubtful on principle, and is difficult to reconcile with *Martin v. Flaharty.* The decision must be supported, if at all, on the ground that an objective standard is properly required in order to prevent fraud and perjury against a deceased grantor, rather than upon the effect of retention of the instrument as amounting to control over its legal operation, or upon the view that an instrument so retained is necessarily testamentary in character.

Justice Angstman in a concurring opinion in the principal case criticized the result reached as defeating the wishes of the deceased with respect to the disposition of the property at his death, and expressed the view that while there was little reason for the rule followed, any change desired should emanate from the legislature.

Ben Holt.

DO PROPERTY TAXES CONSTITUTE PERSONAL LIABILITY IN MONTANA?

The Montana Supreme Court not long ago held that, inasmuch as taxes cannot be collected by civil action, one who by mistake pays taxes upon land of another cannot, by means of a personal judgment, obtain restitution from the latter unless ratification of the payment is shown. The decision suggests interesting questions as to the nature of tax liability, the remedies

[35]4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1039.

[36]8 R. C. L., "Deeds", Sec. 60, p. 995; Note to Jackson v. Jackson, Ann. Cas. 1915C, pp. 378, 380; note to Munro v. Bowles, 54 L. R. A. 882, 883; Moore v. Trott, 156 Cal. 353, 104 Pac. 578 (1909); Noble v. Tipton, 219 Ill. 182, 76 N. E. 151 (1905). *Contra*: Belden v. Carter, 4 Day 66, 4 Am. Dec. 185 (Conn., 1810); but Grilly v. Atkins, 78 Conn. 380, 62 Atl. 337 (1905) stated that rule would probably not be followed today; Davis v. John E. Brown College, 208 Ia. 480, 222 N.W. 858 (1929); but see Orris v. Whipple, 224 Ia. 1157, 280 N. W. 617 (1938), where the Iowa court announced its intention "to return to the long and well established rule and be in step with our sister states."