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CONDITIONAL DELIVERY OF A DEED TO THE GRANTEE

An issue that frequently confronts the courts in litigation involving transfers of land is whether or not there has been a delivery of the deed. To further complicate matters, grantors, either by necessity or inclination, often attempt to render the legal effectiveness of their deeds dependent upon the occurrence of some event not mentioned in the deed itself. Usually the grantor who wishes to postpone or condition the full legal effect of his deed by an event not mentioned in the deed itself, will transfer the instrument to someone other than the grantee. This third person will hold the instrument until the event has occurred, or the specified condition has been performed. An arrangement such as this is commonly called a delivery in escrow. It frequently happens, however, that the grantor will transfer a deed to the grantee and attempt to condition the deed’s effectiveness in some way. What is the legal result of this act when the condition is oral? This note will attempt to supply the answer.

In considering this topic it will be helpful to recall the usual requirements that must be observed when transferring land. Ordinarily, all conveyances of freehold or leasehold interests in land must be in writing in order to comply with the Statute of Frauds. The deed is the instrument that satisfies this requirement. In order for the deed to be legally effective there are two requirements that must be met; execution and delivery. The former may include signing, sealing, attesting, and acknowledging the instrument, depending on the jurisdiction in which the deed was executed. These are necessary in order to make the deed legally effective by delivery. The delivery phase will be discussed more fully than execution in order to provide a basis for understanding the more specialized problem of conditional delivery.

The requirement that there be delivery of a deed before it can become legally operative is one of ancient origin. Whether its inception be attributed to livery of seisin or the manual transfer of written documents, the transfer served the same function. The transfer of the document or the piece of sod, as was done in the case of livery of seisin, symbolized a transfer of the land itself. The requirement of manual transfer of the document representing title came to us as the

2 3 American Law of Property 301 (1952).
3 4 Tiffany, op. cit. supra note 1, sec. 1038; 9 Wigmore, Evidence sec. 2405 (3rd ed. 1940).
symbol of finality in conveying interests in land. Without manual transfer, the deed would be inoperative. This primitive approach has now been abandoned and the question of delivery is generally one of intention. Delivery takes place if it appears that the grantor intended that the deed should become legally operative, and that he abandoned dominion and control over it, even though he retained possession of the instrument. Conversely, the deed may be placed in the hands of the grantee without passing title, if there is no intention that title shall pass. To the extent that the term delivery conveys the impression that a deed must be manually transferred, it is misleading. The modern approach is to use the term delivery in the sense of a completed legal act and not a physical one.

Delivery, used in the sense of a legal act, may be classified as either absolute or conditional. When the grantor manifests an intention that his deed shall become operative immediately to transfer the ownership of the land, and that he is abandoning all dominion and control over it, the delivery may be properly classified as absolute. On the other hand, when the deed is delivered "with strings attached" the delivery is conditional. To be more specific about this latter transaction the thoughts of the grantor may follow these lines: "I intend to part with control over this deed and further intend that this instrument shall have some legal effect, but I am suspending the conveyance of the interest which this instrument purports to create until the condition that is specified has been performed or a particular event has occurred." Having formed this intention the grantor might do one of two things. He may deliver the deed to a third person to be held by him until the condition has been performed or the event has occurred. This is the so-called delivery in escrow, already mentioned. When the grantor chooses this method of furthering his designs he is generally successful. However, if he attempts to effect his intention by delivery

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4 Wigmore, op. cit. supra note 3, sec. 2405.
5 4 Tiffany, op. cit. supra note 1, sec. 1034.
6 26 C.J.S. 233 (1941); The essentials of a valid delivery are set fourth in Noffsinger v. Noffsinger, 303 Ky. 344, 197 S.W. 2nd 785, 786 (1946). "It is an elementary principle that a deed must be delivered in order to become operative as a transfer of the ownership of the land, but manual delivery by the grantor to the grantee is not essential ... It may be delivered to a third person with intention that the grantee shall have the benefit of the deed or it may be retained by the grantor and delivery be consummated if the grantor expresses an intention that the title shall pass and indicates by acts or words that he is holding the instrument for the benefit of the grantee. The controlling factor is the intention to make delivery, and this intention may be inferred from the grantor's acts and words and from the circumstances surrounding the execution of the instrument."
7 Elrod v. Schroader, 261 Ky. 491, 88 S.W. 2d 12 (1935); 4 Tiffany, op. cit. supra note 1, sec. 1034.
8 30 C.J.S. 1208 (1942).
to the grantee, the result may be frustration instead of fulfillment. This is the situation that will be examined in detail, keeping in mind that the deed is absolute on its face, but the condition oral.

It is the prevailing view in this country that delivery to a grantee of a deed absolute on its face vests title in the grantee although the grantor wishes to postpone the operative effect of his deed by an oral condition. There is, however, authority contrary to the majority position, and the trend would seem to be toward allowing the grantor to prove the oral condition upon which delivery is made. In some cases courts will conclude that a delivery, although appearing to be conditional, is actually no delivery at all, thereby avoiding the issue of conditional delivery to the grantee.

The majority rule rests basically on three grounds, excluding the possible variations. First of all is stare decisis. Secondly, there is the familiar cry that to allow proof of oral conditions would open the door to fraud and encourage the fabrication of evidence. The running mate of this reason is the argument that there would be no safety in accepting a deed under most circumstances. Thirdly, there is the parol evidence doctrine that forbids the admission of oral evidence to vary or alter the terms of a written instrument. Are these reasons sufficient to permit a positive rule of law to overcome the intentions of the grantor? An analysis of the various reasons demonstrates that the answer to this question is no.

The first reason mentioned was stare decisis. Of course this is a valid ground for making a decision, but it is by no means compelling. This is particularly true in this instance when it is recalled that the general requirement for manual transfer of a deed grew out of the primitive respect for overt acts. It would not be fair, however, to the

9 Collins v. Dye, 94 F. 2d 799 (9th. cir. 1938); Wells v. Wells, 252 Ala. 390, 41 So. 2d 564 (1949); Takacs v. Takacs, 317 Mich. 72, 26 N.W. 2d 713 (1947); In re Humes's Estate, 272 P. 2d 999 (Mont. 1954); 11 A.L.R. 1174 (1921); 26 C.J.S. 251 (1941); 4 TIFFANY, op. cit. supra note 1, sec. 1049.
11 As an indication of the trend toward the minority view it is significant that conditional delivery to the obligee has been recognized in cases involving written contracts and negotiable instruments. See 11 A.L.R. 1174 (1921); BRUTTON, BILLS AND NOTES 214 (1943); Ballantine, Delivery in Escrow and the Parol Evidence Rule, 29 YALE L.J. 826, 833 (1920).
12 See 9 Wigmore, op. cit. supra note 3, at 25 n. 12.
13 See Chillemi v. Chillemi, supra note 10, 78 A. 2d at 753.
15 Ibid.
16 J. M. Robinson, Norton & Co. v. Randall, 147 Ky. 45, 48, 143 S.W. 765 770 (1912); Takas v. Takas, supra note 9, 26 N.W. 2d at 717.
courts that follow this rule to say that they concur in the primitive reverence for the symbolic act, because most courts do recognize that the controlling factor is the intent of the grantor when the issue is whether or not there has been an absolute delivery.\(^7\)

To say the majority rule must stand because any other position would open the door to fraud involves a patent inconsistency. A deed may be handed to a grantee without effecting any delivery whatsoever. Why cannot the instrument be transferred to the grantee without effecting more than a conditional delivery? It is submitted that there is no valid answer.

The remaining objection to adoption of the minority view is the parol evidence rule. This objection seems untenable when it is remembered that a transfer of land cannot be accomplished merely by execution of a deed. A deed's effectiveness to transfer land is dependent upon delivery. This is a matter in pais and cannot be shown in the deed itself.\(^8\) Delivery is the second and final step in making the deed legally operative, and proof of delivery or lack of it, when absolute delivery is in issue, must constantly be made by parol evidence.\(^9\)

Similarly, there is no reason why a conditional delivery cannot be shown by oral evidence, since there is no intent that the deed is to become legally operative until the performance or occurrence of the specified condition.\(^10\) Of course it must be recognized that there is a strong policy against having conveyances of land rest any more than is necessary on parol evidence. Against this policy, however, is the equally compelling one that a person should be free to dispose of his property under such reasonable conditions as he may wish to impose. Delivery of a deed to a grantee under an oral condition does not seem to be so unreasonable that courts should frustrate the grantor's wishes.

By considering several Kentucky cases, other important topics connected with the problem of conditional delivery may be illustrated. The additional problems to be raised are: (1) conditional delivery where there is an oral stipulation that the deed shall become operative only in the event the grantor predeceases the grantee and (2) the distinction between a condition precedent and a condition subsequent.

Before focusing attention on these problems, the development of the law concerning conditional delivery in Kentucky will be briefly reviewed. As in most other states, the question of whether or not there has been a delivery in a question of intention to be gleaned

\(^{17}\) 4 Tiffany, op. cit. supra note 1, sec. 1034.

\(^{18}\) Ballantine, supra note 11, at 826.

\(^{19}\) Ibid.

\(^{20}\) See 9 Wigmore, op. cit. supra note 3, sec. 2408, where it is noted that the rule preventing conditional delivery to the grantee is an arbitrary one.
from the words or acts of the grantor. The issue of the conditional delivery of an instrument relating to land first arose in connection with a deed of mortgage. During foreclosure proceedings, one of the signers of this mortgage alleged that the mortgagee orally agreed that the mortgage would not be enforced against the signer unless consent was obtained in writing. The Kentucky Court of Appeals disposed of the problem handily by saying:

... If it [the oral agreement] was made at the time of the delivery of the instrument, the sum of the matter is that the instrument was delivered in escrow to the plaintiff [mortgagee] and was to be held by the plaintiff upon the condition stated. But the rule is well settled that an instrument cannot be delivered as an escrow to the plaintiff. The delivery must be to a third person.

In conclusion the court said that to uphold such agreements would be to allow parol evidence to destroy the effect of the instrument.

Kentucky was off to a fast start with the traditional rule. However, the Kentucky Court of Appeals refused to extend this doctrine to a case where the grantor handed a deed to the grantee merely for safekeeping. The court found that there was no intent to make even a conditional delivery. This decision was undoubtedly correct and in accord with the requirement that the manual transfer of the deed be accompanied by an intent to pass title.

Apparently the first case in Kentucky involving the delivery of a deed of land to the grantor with an oral condition attached was City National Bank of Cairo, Illinois v. Anderson. The deed was transferred by the grantor to the grantee on condition that the deed should not be recorded, and, upon failure of the grantee to pay the purchase price when due or within a reasonable time, the deed and the land should be surrendered to the grantor. The purchase price was never paid and the deed was surrendered to the grantor. It was held that the title to the land was vested in the grantee and the surrender of the deed was insufficient to return the title to the grantor.

In the case of Hood v. Nichol, the court found it necessary to consider the effect of a manual transfer of a deed to the grantee where the intent of the parties to the instrument was that the deed should not become operative as a conveyance unless the grantor predeceased the grantee. The parties raising the issue contended that

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22 J. M. Robinson, Norton & Co. v. Randall, supra note 16.
23 Id. at 48, 143 S.W. at 770.
24 Ball v. Sandlin, 176 Ky. 537, 195 S.W. 1089 (1917).
25 189 Ky. 487, 225 S.W. 361 (1920).
26 236 Ky. 779, 34 S.W. 2d 429 (1930).
the transfer of the deed constituted a delivery in escrow which vested title in the grantee. It was held that the grantor had not become divested of the property by the execution and manual transfer of the deed.

The basis of this decision is not clear. Was the decision based upon a failure of delivery, or was it decided that a conditional delivery could be made to the grantee without the condition being ineffective? In one part of the opinion the language indicates that a conditional delivery of a deed may be made to the grantee. After citing a number of cases which the court says cannot be reconciled with the traditional rule in the Anderson case, the court says the results of the cited cases,

... are uniformly to the effect that, if there be no intention of presently passing the title, and if the intention is that title is not to pass until something else be done or takes place, the manual transfer of possession of a deed to the grantee will not constitute such a delivery as to vest title in the grantee.27 (Italics supplied by writer.)

Although the cases cited in the opinion turn on the question of whether there has been a delivery of any type, the language of the court indicates that a grantor may place a deed in the possession of the grantee with the intention of postponing the passage of title "until something else be done or takes place." This type of transaction is what we have defined as a conditional delivery. Another indication that the decision is based on the theory of a failure of the condition that was to make the deed operative is the effort to distinguish this case from the Anderson case.28 The condition in the Anderson case was interpreted to be a type of defeasance or condition subsequent in contrast to the condition precedent in the Hood case.

On the other hand, there is language in the opinion to the effect that there had not been a delivery of any type. After stating the argument in support of the rule that there can be no delivery in escrow to a grantee, the court states:

... if the word 'delivery' in the statement of this proposition means something more than the mere intrusting of the manual possession of the instrument to the grantee without any intention of presently passing the title, we have presented a different state of case than that disclosed by this record.29

This statement seemingly implies that the court considers the transfer here to be little more than a transfer to the grantee for inspection or safekeeping. The court evidently feels that the distinction between

27 Id. at 800, 34 S.W. 2d at 438.  
28 Id. at 801, 34 S.W. 2d at 438.  
29 Ibid.
delivery in escrow to the grantee and intrusting the manual possession of the deed to the grantee is too fine to merit a practical difference.\textsuperscript{30} After stating that no one would contend that intrusting a deed to the grantee for the purpose of having it examined by his attorney would be such a delivery as to pass title, the court says: “The reason, of course, is that there is no intention of presently passing the title.”\textsuperscript{31} Still referring to the situation where a deed is given to the grantee for inspection and in answer to the argument of fraud that supports the majority rule, the court continues:

... Where is the opportunity for fraud any greater or less in that kind of a case than in the kind of case where the manual possession of a deed is intrusted to the named grantee, but with no intention of ever passing the title unless within a period which is bound at some time to come to an end, a condition is fulfilled or not? ... Only in the element of time ... 

In spite of ambiguity, the cumulative effect of the language in the 

\textit{Hood} case indicates that the grantor may transfer a deed to the grantee with an accompanying oral condition without vesting title in the grantee until the condition has been satisfied.\textsuperscript{32} Disregarding the language of the opinion, it must be recognized that many jurisdictions have concluded that there was no delivery on facts similar to those in the 

\textit{Hood} case.\textsuperscript{33} The cases from other jurisdictions relied on in the 

\textit{Hood} case take that position.\textsuperscript{34} The rationalization of these cases seems to rest on the theory that a deed transferred to the grantee on condition that the grantor predecease the grantee is an attempt by the grantor to make a testamentary disposition of the property. Since the deed does not comply with the statutory requirements for wills, it is ineffective for that purpose. Furthermore, since the grantor is attempt-

\textsuperscript{30}\textit{See 1 Williston, Contracts sec. 212. (Rev. ed. 1936).}
\textsuperscript{31}\textit{Supra note 26 at 801, 34 S.W. 2d at 438.}
\textsuperscript{32}\textit{This conclusion is supported by dictum in Ratcliffe's Guardian v. Ratcliffe, 242 Ky. 419, 422, 46 S.W. 2d 504, 506 (1932). After referring to the Hood case the court stated: “But the circumstances indicated that there had been only a conditional or contingent delivery, and it was held that title did not pass because of the absence of an intention to presently pass the title.” In Smith v. Feltner, 256 Ky. 325, 76 S.W. 2d 25 (1934) the grantor executed a deed in which his father was named grantee. The deed was manually transferred but was not to be effective unless the grantor was convicted of a criminal charge for which he was going on trial. He was not convicted and the court concluded that there had not been an effective delivery of the deed. Although the facts would seem to support a holding in accord with the writer's conclusion of the Hood case, the decision of the court wasn't on the ground of conditional delivery. The court states that the grantor did not surrender control of the instrument and this precludes rationalizing the decision on the basis of conditional delivery.}
\textsuperscript{33}\textit{Spero v. Bove, 70 A. 2d 562 (1950); 141 A.L.R. 305, 308 (1942); 56 A.L.R. 746, 749 (1922).}
\textsuperscript{34}\textit{Supra note 26 at 800, 34 S.W. 2d at 438.}
ing to make a testamentary disposition of the property involved, he does not have the requisite intent to make a valid present delivery.\textsuperscript{35} Therefore, there is no delivery whatsoever.

This conclusion appears logical, but a conclusion just as logical, with the added feature of being in accord with the intention of the grantor, may be reached if the problem is approached through the concept of conditional delivery. If the grantor transfers a deed to the grantee to convey title only in the event that the grantor dies before the grantee, and the grantor parts with full dominion and control over the deed, why not treat the transaction as a conditional delivery instead of an attempted testamentary disposition? If the transaction is in fact a conditional delivery, then the grantor has no right to revoke. If the condition occurs, then the wishes of the grantor will be satisfied. If the condition does not occur, the deed is rendered inoperative and the grantor is entitled to have the deed surrendered.\textsuperscript{36} It seems that the grantor in the *Hood* case was without power to revoke the deed during his lifetime; therefore, no reason is apparent why this reasoning is not applicable to the situation in that case.

The *Hood* case raised one other problem in connection with the conditional delivery of deeds. The court characterized the condition in the *Anderson* case as a condition subsequent thereby distinguishing the case under consideration. Is this a valid distinction? It is submitted that it is. Of course the difficulty comes in determining whether the condition is precedent or subsequent. Once that determination is made, application of the legal theory is relatively simple.

There are at least two valid reasons for distinguishing between a condition precedent and a condition subsequent. In a situation where the condition is subsequent, the parol evidence rule is applicable. To allow proof by parol of a condition qualifying the operation of a deed which has been delivered and has become effective would result in the alteration of the terms of the written obligation which is plainly what the parol evidence rule seeks to prevent.\textsuperscript{37} The second reason is perhaps more imperative. Assuming that the condition subsequent would be of the same nature as that in the *Anderson* case, that the deed and land would be surrendered if the grantee failed to pay the purchase price, the condition could not operate to revest title in the grantor once it had become vested in the grantee. It would be necessary for

\textsuperscript{35} E.g., Coles v. Belford, 289 Mo. 97, 232 S.W. 728 (1921); Chaudoir v. Witt, 170 Wis. 556, 170 N.W. 932 (1919).

\textsuperscript{36} See Chillemi v. Chillemi, *supra* note 10, where the same explanation would seem to apply.

\textsuperscript{37} 9 Wigmore, *op. cit. supra* note 3, sec. 2435 (b).
the grantee to execute and deliver a deed in order to accomplish such a result.\textsuperscript{38}

In the opinion of this writer there is no theoretical reason for preventing a grantor from transferring a deed absolute on its face, to a grantee, and attaching an oral condition precedent to the complete effectiveness of the deed. Nor is there any substantial practical objection since manual possession of the deed carries with it a presumption of delivery with intention of passing title.\textsuperscript{30} In Kentucky the rule is apparently established that a grantor may make a conditional delivery to the grantee.\textsuperscript{40} The term "apparently" is intended to be used with all the uncertainty that the word can possibly connote. This note is not an invitation to grantors in Kentucky to make conditional deliveries of deeds to their grantees. As a practical matter, this practice is always hazardous to a certain extent. However, if the Kentucky Court of Appeals follows the principles laid down in the \textit{Hood} case, such a transaction would probably be upheld.

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\textsuperscript{38} McHargue v. McHargue, 269 Ky. 355, 107 S.W. 2d 278 (1937).
\textsuperscript{30} Hood v. Nichol, \textit{supra} note 26 at 797, 34 S.W. 2d at 436.
\textsuperscript{40} Hood v. Nichol, \textit{supra} note 26.