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Delivery of Deeds

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DELIVERY OF DEEDS

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"THERE is no presumption of the delivery of a deed where it is not recorded until long after its date * * *." The foregoing words were taken verbatim from page 442 of the opinion of the Supreme Court of Colorado, written by Mr. Justice Campbell, in the case of Larison vs. Taylor, decided March 19, 1928, and reported in 83 Colorado Reports at page 430.

The result of this decision is far reaching. If the statutory presumption of the delivery of a deed which is created by its acknowledgment before a proper officer and by recording it is to be destroyed by the lapse of considerable time between the date of its execution and the date of recording, we must discontinue the common practice of placing deeds of conveyance in escrow pending payment by the purchaser of the balance of the purchase price under a written contract for the purchase of real property if the final payment is not to be made until a "long time" after the execution of the deed, unless we provide some means of making record proof of final delivery.

In the above mentioned case a widow sued her married daughter to have canceled and discharged of record a warranty deed to said daughter as grantee, which deed the widow had executed on April 11, 1919, but, as she claimed, had never been delivered. The defendant (the grantee) recorded the deed on June 1, 1925, or slightly more than six years subsequent to its execution. The Supreme Court held that where the delivery of a deed is placed in issue, the burden of proving the delivery is upon the party claiming under the deed, and that "there is no presumption of the delivery of a deed where it is not recorded until long after its date".

For all practical purposes, title examiners and others interested in real property titles must henceforth require record proof of the delivery of deeds appearing in the chain of title where a "long time" has elapsed between the date of execution and the date of recording. Until the Supreme Court or the legislature has defined what is not a "long time" as a matter of law, or where the line lies between a "long time and a

short or reasonable time, title examiners and persons affected by this rule will be forced to make their own estimate as to what is a reasonable time within which to record such an instrument and thereby preserve the presumption of delivery of the same arising out of its proper acknowledgment and its being placed of record. A longer time may be allowed to record an instrument executed in California affecting lands in Denver than would be allowed to record an instrument executed in Denver affecting lands in Denver. The principles responsible for the statutes affecting the presentation of checks to banking houses as provided in the Negotiable Instruments Law may be considered in deciding this question.

Many lawyers have been accustomed, when representing a purchaser of real estate under an installment payment contract, to require that the seller place in escrow a warranty deed in favor of the purchaser of the premises, the same to be delivered to him upon payment of the final installment of the purchase price. Very often such contracts run over a period of many years, and yet, in view of this decision, it is doubtful if such a purchaser's title is marketable if he has recorded a warranty deed a long time subsequent to its execution with nothing of record to establish the reason for the delay and the regular delivery of the deed. A marketable title being one which is established by the records alone without additional proof and aided only by proper presumptions of law, no title is marketable which is based upon a deed as to which there is no presumption of delivery in view of this case and the decisions therein mentioned.

How may we draw escrow agreements involving deeds to be delivered a long time subsequent to the execution thereof so that the delivery will be properly established of record? The following method is suggested. The escrow agreement should provide that in the event of the delivery of the deed to the grantee, the escrow holder should make an affidavit to the effect that he had delivered the deed to the grantee in accordance with the terms of the escrow agreement and following full performance of the terms of the contract of sale. The escrow agreement should further provide that the execution and recording of said affidavit should constitute conclusive evidence of the delivery of the deed to the grantee in

accordance with the terms of the escrow agreement. The contract of sale, of course, should set out the terms of the escrow and the escrow agreement itself might be embodied in the contract of sale. An affidavit is not conclusive evidence unless made such by an agreement between the parties whose interests are involved. To record the affidavit of an escrow holder in the absence of such an agreement making said affidavit conclusive evidence would be an empty gesture. Without an agreement making the affidavit of the escrow holder conclusive evidence it seems that a new deed or a new acknowledgment attached to the old deed must be obtained. If a new deed cannot be obtained from the grantor because of his refusal to execute the same or on account of his death, a quiet title decree should be required.

To recapitulate: The 1927 Statute makes the acknowledgment and recording of a deed prima facie evidence of delivery. In the above mentioned case the Supreme Court has held that this presumption fails where a long time expires between the date of execution and the date of recording the deed, and that the burden of proving delivery is upon the one claiming under the deed where delivery is placed in issue. If the burden of proving delivery is upon the one claiming under the deed and he is not aided by any presumption of law, then oral or written evidence of delivery must be produced by him and the title is not marketable until proper record proof of delivery is made. It is difficult to determine whether any curative statutes change the above rule where many years have elapsed since the date of recording the deed, but space does not permit me to discuss those principles in this article.

The case of Phelps vs. Phelps, 71 Colorado, at page 343, illustrates the possible practical application of the doctrine of Larison vs. Taylor. In the Phelps case, the father executed a warranty deed in favor of his children for a ranch property upon which he resided, and delivered it to his attorney absolutely and unconditionally with complete instructions to deliver the same to his children upon his death. He then continued to exercise control and dominion over the ranch until he died some months later. Upon his death the attorney delivered the deed to the children, whereupon the grantor's widow brought this quiet title suit to establish her statutory

right to one-half of said premises upon the theory that the delivery was not complete until the deed was handed by the attorney to the children after the death of the grantor, because the grantor continued to exercise dominion and control over the premises in question after the execution of the deed and until his death, and because there was no acceptance of the deed by the grantees and consequently no delivery during the life time of the grantor. The lower Court and the Supreme Court of Colorado agreed with this view and the widow was allowed her statutory one-half. In this connection the following portion of the opinion is interesting:

"It is urged, however, that inasmuch as the conveyance was beneficial to the grantees, their acceptance will be presumed, and with such acceptance the title vested in them. But that presumption obtains only where the facts are known. Where the facts and 'the attendant circumstances are shown, the question must be determined from them; there is no room for presumption.' Knox vs. Clark, 15 Colo. App. 356, 62 Pac. 334.

"In the case cited the question was further discussed, and the court pointed out that if 'between the date of a deed and its acceptance, rights of third parties attached to the property, those rights will be superior to and prevail over the title of the subsequently assenting grantee'.

Further discussing what constitutes an acceptance by the grantee, the court said:

" 'The difficulty arises where one party undertakes to make a conveyance to another without the latter's knowledge, and without any previous understanding that the act should be done. The filing of the deed by the grantor for record, does not, of itself, constitute a delivery. If the recorder is the agent of the grantee to receive the deed, then, of course, his acceptance would be the act of his principal. But where the latter has no knowledge that such an instrument was contemplated, or that it was made, he can have no agent to receive it; *and until, after acquiring knowledge of its existence, he in some way signifies his approval of the act, there is no delivery of the deed.*'

"The rights of the widow attached under the statute at the instant of her husband's death, and the acceptance of the deed thereafter by the grantees named in it was subject to the rights of defendant in error."

If a title examiner had examined this title a few days or a few weeks following the date this deed was recorded and if a long time had elapsed between the date of execution of the deed and the date of recording, he would have refused to pass the title until proper record proof was made of delivery, and an investigation would have disclosed the facts and protected

the person for whom he was examining. On the other hand, if he had not raised this question, the widow would not have been estopped to assert her claim even as against a so-called innocent purchaser for value if she had proceeded with due diligence, because she could have maintained that the long period of time between the date of the execution of the instrument and the date of recording gave notice of non-delivery so that the purchaser was not an innocent purchaser for value. "A knowledge of facts sufficient to put a prudent person upon inquiry is constructive notice of all facts which might have been ascertained by such inquiry or investigation." Tibbetts vs. Terrill, 44 Colo. 104.

It would be interesting to know how many deeds are now reposing in the hands of private or corporate escrow holders awaiting delivery upon the death of some individual or upon the payment of the last installment of the purchase price which will not be made until a "long time" after the date of the execution of the instrument. It would be interesting to know how many deeds are reposing in the private vaults of husbands and wives or other persons, which deeds the parties intend to record prior to or following the death of the grantor and in any event a "long time" after the execution of the instrument. The title examiner, however, must report the title to property affected by such deeds to be unmarketable, unless record proof of delivery appears.