# Case and Comment

## CONVEYANCING – EXECUTING DEED – DELIVERY – ESCROW.

The recent case of **George v. Cyr**[1] decided by Mr. Justice Bridges raises some interesting problems in the conveyancing field. The relevant facts, briefly stated, are as follows:

One C. Beaulieu and three other persons were co-owners of property situate in the City of Edmundston. On July 27, 1955, instructions were given by them to their solicitor to prepare a deed from them as grantors to Cyr as grantee. Beaulieu signed and sealed the deed on August 1, 1955, the other grantors doing likewise on July 27, August 1 and August 10. On August 15, George recovered a judgment against Beaulieu, and issued an execution thereon on the same day, placing it in the hands of the sheriff. The latter seized Bealieu's interest in the property on August 18, which he sold at auction on August 25 for $50.00. (This amount seems unjustifiably low, considering that the market value of the interest was something in excess of $2,000.) The interest ultimately came into the hands of George. After Beaulieu signed the deed it was left with the solicitor. The purchase price had not been paid nor had all the parties signed. It was contended by the defendant that Beaulieu delivered the deed on August 1. If such were the case, he had no interest for the sheriff to seize. If not, when the execution was handed to the sheriff the property interest of Bealieu became bound under section 5 of the Memorials and Execution Act.[2]

In order to effect the transfer of property by deed, three requisities are essential: signing, sealing and delivering. The first two of these are what might be called the physical acts of execution. On the facts as set out above the question of delivery only arises.

Some general comments as to what constitutes delivery, and how it is effected, would, no doubt, first be in order. How important is this mythical thing styled delivery (in its technical sense)? The answer to this question is best illustrated by the following statement:

> "After a deed is written and sealed, if it be not delivered, all the rest is to no purpose."

Thus it can be concluded if a deed be not delivered, it cannot be operative as a conveyancing instrument.

In ordinary parlance the expression "delivery of a deed", would admit of only one interpretation, namely, the giving or

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1. Unreported.
2. R.S.N.B., 1952, c. 143.

the handing over of the instrument to some other person. In the legal technical sense, as this expression is used in conveyancing law, physical action is immaterial. As used in this latter sense, the term delivery, would seem, on the authorities to mean the intention of the grantor, as evidence by words or actions, to divest himself of control over, but not necessarily possession of the property described in the instrument, and to be immediately bound thereby. The principle has become firmly entrenched in our law that physical delivery is not only not necessary, but even if the grantor retains possession of the deed, or subsequently destroys it without it ever having been seen by the grantee, the transfer is still effectual.[3] Blackburn, J., in **Xenos v. Wickham,** said:[4]

> "no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing of the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient."

The proposition that intention is the dominant element in ascertaining whether or not there has been delivery has been accepted by the Supreme Court of Canada in **The Trust and Loan Company of Upper Canada v. Ruttan.**[5] This aspect of the execution of a deed has been most admirably summarized by Rose, J. in **Re Metropolitan Theatres Ltd.,**[6] as follows;

> "In order that a deed shall be effective it must be 'delivered', that is to say, the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein. While he need not part with the possession of the document he must intend to be bound by it."

In **Foundling Hospital v. Crane,**[7] Farwell, S. J. said:

> "There are two sorts of delivery, and two only known to the law, one absolute, and the other conditional that is an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated is a complete delivery, cadit quaestro; if it did not then it must be either an escrow or a nullity."

In view of the facts and the decision in the case, the word nullity must be taken as including a deed given to a third party to hold for the convenience of the grantor.

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3. **Zivicher v. Zivicher,** 29 S.C.R. 527.
   **Thomas v. Thomas,** [1939] 4 D.L.R. 202 (N.B.).
4. **Xenos v. Wickham,** L.R.Q.H.L. 296 at 312.
5. 1 S.C.R. 564.
6. (1917) 40 O.L.R. 345 at p. 347.
7. [1911] 2 K.B. 367 at 377.

If it had been decided that there was an unconditional delivery by Beaulieu at the time he signed and sealed the deed, there could be no further discussion. If such had been the case, he would have had no interest for the sheriff to seize under the execution. He would have had nothing further to say with regard to the property. As was said by Hall, J. in **Edwards v. Poirier,**[8] ". . . . and it must follow that upon unconditional delivery the grantor lost all authority". It is beyond question that Beaulieu ever intended to be irrevocably bound at the time he signed the instrument.

Was there here a delivery of the deed as an escrow? Before considering this possibility, it should first be ascertained what constitutes an escrow, and what is necessary to create it. This can best be answered in the words of Gwynne, J. in **O'Conner v. Beaty:**[9]

> ". . . . no form of words is necessary to constitute a delivery as an escrow, but that all facts attending the execution are to be looked at, and that if it can reasonably be inferred from those facts that the instruments were not intended to take effect as deeds until a certain condition should be fulfilled and were delivered upon such an agreement, the delivery would only operate as an escrow."

It was thought at one time that in order for the delivery to operate as an escrow, the instrument must be delivered to a third party and not to the grantee or his agent. Indeed, it was so held in the New Brunswick case of **Haggerty v. O'Leary.**[10] This case must now be treated as overruled on this point by the remarks of Strong, J. in **Confederation Life Assurance of Canada v. O'Donnell.**[11] The fact that in the case under discussion the deed was in the possession of the agent of both parties will not disentitle it to be considered an escrow. If Beaulieu had delivered the deed to his solicitor as an escrow, and the condition under which it was so delivered, was subsequently performed, it is noe clear that the operative effect of the deed would date back to the time of the original delivery.[12] If such were the case, Beaulieu would again have no interest which could be bound by the execution. The learned trial judge stated that in his opinion there was no escrow. Looking at the facts, it would be extremely difficult, if not impossible to ascertain what particular

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8. [1949] 1 D.L.R. 864 (N.S.) at 867.
9. 27 U.C.C.P. 203 at p. 205.
10. 11 N.B.R. 360
11. 13 S.C.R. 218 at p. 222.
12. **Edmunds v. Edmunds** (1904), p. 362.
**Herbert v. Galilen,** 3 M.P.R. 67 (N.B.).

condition must be met to make the instrument operative as an escrow. At the time Beaulieu signed the deed the whole transaction was in a state of incompleteness. Thus, one has no alternative but to agree with the decision of the court in this regard.

The fact that the transaction was incomplete in many respects, tends to show that a complete contract had not been finalized. It is apparen on a close reading of **Dillaboudh v. McLeod**[13] and **Thomas v. Thomas**[14] that the courts are loath to conclude that a delivery was intended where there is no complete contract. When Beaulieu signed the instrument, one of the other parties had not signed, nor does it appear that the final price had been agreed upon. On the basis of this, it could only be concluded that Beaulieu signed the instrument and left it with his solicitor for his own convenience, and for the purpose of facilitating the finalization of the contract. It can thus be stated that the deed here in question comes within the third category indicated by Farwell, L. J. in **Foundling Hospital v. Crane,**[15] that is, nullity. As explained previously this included the present situation.

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13. (1911) 16 W.L.R. 149.
14. [1939] 4 D.L.R. 202 (N.B.).
15. [1911] 2 K.B. 367.