

1919

## Deeds to Take Effect after Death of Grantor

Ralph W. Aigler

*University of Michigan Law School*

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### Recommended Citation

Aigler, Ralph W. (1910-1964). "Deeds to Take Effect after Death of Grantor." *Law. & Banker* 12 (1919): 606-8.

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# DEEDS TO TAKE EFFECT UPON DEATH OF GRANTOR

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By Ralph W. Alger, Editor in Chief Michigan Law Review.

That instruments in form of wills may be effective as deeds of conveyance is clear. If a present interest is passed and execution is complete (which includes delivery), the instrument must take effect as a deed. On the other hand, if no interest is to vest until or after death of the maker and there has been no complete execution as a deed, the instrument, if operative at all, must take effect as a will. Difficulties arise when there is a fully executed deed, which, however, is to be postponed in its complete operation until the death of the grantor.

Where the grantor delivers the deed to a third party to be handed by him to the grantee on the grantor's death there is substantial agreement among the courts that such instrument is not ineffective as an attempted testamentary disposition. The cases of *Felt v. Felt*, 155 Mich. 237; and *O'Brien v. O'Brien*, 19 N. D. 813, cited by Professor Tiffany in 14 Col. L. Rev. 404, as holding the other way are explained on the ground that there had been no delivery of the deeds. The chief differences of opinion in this class of cases has been as to the time when and the extent to which such deeds divest the grantor of ownership. See 16 Mich. Law Rev. 586, where the matter is discussed.

The real difficulty arises when the grantor inserts into the deed a provision in substance that "this deed shall take effect upon the death of the grantor." In a number of cases it has been held that such provision makes the deed an attempted testamentary disposition and as such void for lack of proper execution. *Turner v. Scott*, 51 Pa. 126; *Sperber v. Balster*, 66 Ga. 317 (Cf. *White v. Hopkins*, 80 Ga. 154); *Pinkham v. Pinkham*, 55 Neb. 729; *Bigley v. Souvey*, 45 Mich. 370; *Shaul v. Shaul*, (Iowa) 160 N. W. 36. The leading American case appears to be *Turner v. Scott*, *supra*, which seems to depend not a little upon the slender foundation of *Habergham v. Vincent*, 2 Ves. Jr. 204.

In quite a number of jurisdictions deeds with provisions postponing complete operation until the grantor's death have been upheld as deed of conveyance. *Abney v. Moore*, 106 Ala. 131; *Bunch v. Nicks*, 50 Ark. 367; *Latimer v. Latimer*, 174 Ill. 418; *Kelly v. Shimer*, 152 Ind. 290; *Abbott v. Holway*, 72 Me. 298; *Lauck v. Logan*, 45 W. Va. 251. There is no common ground on which these cases proceed. Perhaps the general view is that the deed operates as a conveyance *in praesenti*, with a life estate reserved somehow to the grantor. The bold attitude of the Maine court as displayed in *Abbott v. Holway*, *supra*, is refreshing. The provision in the deed there in question was: "This deed is not to take effect and operate as a conveyance until my decease." In an action of waste against the grantor's representative for cutting trees after the delivery of the deed the court held that the deed might operate "as the

parties intended, and carry an estate to commence *in futuro* without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro*, may be regarded as existing only by way of remainder or by virtue of some undisputed covenant to stand seized."

Why should not a deed be operative to convey an estate in fee simple or any other estate upon the death of the grantor, just as well as to create such an estate the first of next July? Of course no strings can be kept on such deed, it must be beyond the legal (as distinguished from the physical) power and control of the maker, in other words, it must have been delivered. Any such reservation would either negative delivery, and there would be no deed at all, or the instrument would be ambulatory, a quality attached to testamentary dispositions. To be sure, under the common law conveyances, it was definitely established that estates of freehold could not be created to commence *in futuro*. "It has long been settled that, according to the common law, a limitation of an estate of freehold to commence *in futuro* is void." *Savill v. Bethell*, (1902) 2 Ch. 523, 540, citing *Buckler's Case*, 2 Co. Rep. 55a; *Barwick's Case*, 5 Co. Rep. 93b; *Roe v. Tranmer*, *Willes* 682, 2 *Wils.* 75. It was, however, possible to create uses, no matter how large the estate therein, *in futuro*, and when the Statute of Uses made the modes creating uses effective as conveyances there was available a ready means of accomplishing what under common law modes of conveyancing had been impossible. *Savill v. Bethell*, *supra*; *Murray v. Kerney*, 115 Md. 514. The transaction giving rise to the future use, of course, had to be complete. If, for instance, the use was to arise out of a covenant to stand seized it is obvious that the covenant must have been sealed and delivered, in other words, it must have appeared that there was a completed legal act. And all such necessary steps must have been taken in the lifetime of the covenantor; if it should appear that it was his intention that no legal act should be consummated until after his death, obviously the whole transaction would fail.

Almost all deeds of conveyance take effect or can take effect under the Statute of Uses, and ordinarily courts show the greatest liberality in upholding deeds in order to accomplish what the parties intended, whatever may be the form. Thus in *Roe v. Tranmer*, *supra*, a deed in form a common law release was upheld as a covenant to stand seized; in *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, a deed with the words "remise, release, and quit claim" was given effect as a bargain and sale; in *Murray v. Kerney*, *supra*, an instrument that looked like an attempted will was upheld as a covenant to stand seized. Independently of the Statute of Uses a deed may effect the creation of a freehold *in futuro*, the statute of the state wherein lies the land being construed as making such result possible. The Maine statute provides that "a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all his interest in it, by a deed," etc. It was under this statute that *Abbott v. Holway*, *supra*, was decided. See also *Wilson v. Carrico*, 140 Ind. 533; *Ferguson v. Mason*, 60 Wis. 377; *Miller v. Miller*, 91 Kans. 1.

Any dispositive instrument to be fully operative only on the maker's death certainly bears one of the ear-marks of a will. In view of the foregoing,

however, it seems clear that such fact cannot in itself be controlling. Where the circumstances disclose a completed legal act so far as the maker is concerned, with no express or implied power of revocation, such instrument would seem *prima facie* to be no testamentary disposition and the fact that complete operation is postponed until death should not be a sufficient circumstance to give the instrument an ambulatory character, a necessary quality of wills, *ex hypothesi* the instrument is complete and final as far as the maker is concerned and therefore cannot be ambulatory. When a court says, as did the Illinois court in *O'Brien v. O'Brien*, 121 N. E. 243, that "To constitute delivery it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over the same." an element that has no place in delivery is made an essential part thereof.

"A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is *in its own nature* ambulatory and revocable during his life." Jarman on Wills, (6th ed.) 27. Relatively slight circumstances added to the postponement of full operation until death may be sufficient to show a testamentary interest, in which case the instrument would, of course, be revocable despite apparent delivery. See *Thorold v. Thorold*, 1 Phil. 1; *Fielding v. Walshaw*, 27 W. R. 492; *Ison v. Halcomb*, 136 Ky. 523. In *Fletcher v. Fletcher*, 4 Hare Ch. 67, Vice Chancellor Wigram said: "The third question is whether the plaintiff is precluded from relief in this court, on the ground suggested, that this is a testamentary paper \* \* \* I have read the cases cited as to the instrument being testamentary \* \* \* I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one before me. This is not a case where there is a general power of revocation reserved—a general power to dispose by will notwithstanding the execution of the instrument. In the cases referred to there has been a general revocation—or something like revocation—of the party's right to deal with the property, notwithstanding the instrument; and the courts have held, that in such cases the instrument being one which was not to have effect until the death of the party—or rather, I would say, to use the language of Sir John Nicholl in one of the cases in which, until the death of the party, the instrument itself was not consummated—until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary."