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IS THE RECORDING OF A DEED EVIDENCE OF DELIVERY?

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SOME uncertainty exists in the minds of attorneys examining titles to real property in regard to the effect of a deed recorded long after execution, arising from the decision of Mr. Justice Campbell in Larison vs. Taylor, 83 Colo. 430, and the construction placed upon this decision by Mr. Albert J. Gould in his article in the September "Dicta".

It is a frequent experience to encounter a transfer of property where a year or more has elapsed between the execution of a deed and its recording. In fact, title examiners not uncommonly find that in the majority of transfers of property there has been a lapse between the execution of the deed and its recordation. Whether the "long time" rule enunciated by Mr. Justice Campbell is a proper cause of anxiety to the examiner of ordinary and reasonable prudence, and whether a month, a year, or three years is a "long time" are our present problems.

To begin with, in examining the case of Larison v. Taylor, it is pertinent to notice that this case was decided in the Supreme Court, March 19, 1928, and a rehearing denied on April 9, 1928. The 1927 State Legislature, in Senate Bill, Number 274, passed "An act concerning real property and to render titles to real property and to interests and estates therein, more safe, secure and marketable", which was approved with an 'Emergency Clause' attached March 28, 1927. This act was, therefore, in effect when the case of Larison v. Taylor reached the Supreme Court. Although this legislative Act was passed apparently to apply to all cases which involved titles to real estate, this Act was neither pleaded in the County Court, where the Larison Case was tried, nor mentioned in the decisions of the County or Supreme Courts. In view of the fact that Chapter 150, of the 1927 Session Laws was not considered in handing down the decision on this case, we may assume either that the Act was considered inapplicable to the case, or that it was overlooked.

The applicability of the Act to the Larison Case cannot be doubted, for the heading proclaims that the Act is to 'ren-

der *titles* to real property—more safe, secure and marketable', and then provides in Section 1, seventh paragraph:

"If such instrument be acknowledged in the manner herein provided and recorded in the office of the proper county clerk and recorder, *it shall also be prima facie evidence of due delivery.*"

This paragraph is merely an enunciation of the rule adjudicated in a majority of jurisdictions, as stated in 8 R.C.L. 1005:

"Delivery may be inferred from the fact of acknowledgment. Likewise, *the fact that a deed is on record is prima facie evidence of delivery and acceptance,* or, as otherwise stated, *warrants a presumption of delivery and acceptance,* so that whoever makes assertion to the contrary has the burden of proving it. Moreover, since recording takes the place of the solemn ceremonies accompanying livery of seizin at common law, it has been called *evidence of delivery of the most cogent character,* requiring the countervailing proof to be clear and persuasive."

The statement that "whoever makes assertion to the contrary (that there was no delivery of the recorded deed) has the burden of proving it" may be in direct conflict with the rule laid down by Mr. Justice Campbell that "Where delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery." However, we are not considering which party has the burden of proof, for even under the rule of Larison v. Taylor an equitable result is reached, because of the particular facts involved. In any case, however, involving title to property, even though the one seeking to establish a delivery has the burden of proof, he is still able to take advantage of the legislative sanction of a prima facie evidence of delivery in his favor, where there has been a deed recorded, and he is only bound to go forward and sustain his burden of proof in those cases where the opponent has brought in evidence to rebut his prima facie evidence. We mention this because of the statement of Mr. Justice Campbell that the County Court in hearing the Larison Case mistakenly placed the burden of proof on the wrong party, and we wish to show merely that, even though the proponent of the deed has the burden of proof, he still has the prima facie evidence of delivery to support his case where there has been a recording.

Since our contention is that recording is a prima facie delivery, it would be well to note the devolution of our present

system of acknowledgment and recording. The ceremony of acknowledging and recording a deed is wholly of statutory origin, it being unknown at common law. The oldest form of livery of seisin was superseded by the refinement of a writing executed in the presence of witnesses, but this in turn has been superseded by a form of acknowledgment contained in Section 1, Session Laws of 1927, containing the legislative fiat that

"any instrument relating—to title to real property acknowledged substantially" in the given form shall "—be prima facie evidence: First: That the person named therein as acknowledging the instrument, appeared in person before the official taking the acknowledgment, and was personally known to such official to be the person whose name was subscribed to the instrument and that such person acknowledged that he signed the instrument as his own free and voluntary act for the uses and purposes therein set forth."

"Prima facie evidence" is used, then, in the Real Property Act of 1927 in two places—first, the proper acknowledgment "is prima facie evidence of the proper execution thereof" and secondly, proper acknowledging and recording is "prima facie evidence of due delivery." The term "prima facie evidence" has been defined as meaning evidence "which suffices for the proof of a particular fact until contradicted and overcome by other evidence." Dodson v. Watson, 110 Tex. 355, 220 S.W. 771. Accordingly, the effect of the statute is not to shift the burden of proof as to delivery, but merely requires the party asserting that there has been no acknowledgment or delivery to bring in evidence to rebut the prima facie evidence of recording.

Although in Larison v. Taylor the Court merely repeated the bald statement of the rule contained in 18 C. J. 413 as to burden of proof, without allowing the defendants the benefit of their prima facie evidence as provided by the legislature, yet the facts of that case were so strongly in favor of the plaintiff as to overcome the prima facie evidence of the defendant's recording, and no evidence was brought in by the defendant to uphold his case. However, in other cases the opponent might not present such a preponderance of evidence.

Now as to the statement that "There is no presumption of the delivery of a deed where it is not recorded until long after its date" citing 18 C.J. 420 as authority, there is evidently

some error as to authorities, for Mr. Justice Campbell quotes this passage as authority with the declaration that there are a "large number of cases" following this rule. From an examination of the text it appears that there are only two cases in support of this principle, one of them being Cussack v. Tweedy, 126 N.Y. 81, 26 N.E. 1033, involving an imperfect and incomplete deed which was recorded without the signature of some of the grantors. This case arose upon the recording of the deed after a lapse of 50 years between the supposed execution and recording. In the other cited case, Bouvier-Lager Coal Land Co. v. Sypher, 186 Fed. 644, the deed in question was not presented for record until 9 years after its date, and title was not asserted by the persons claiming under the grantee for nearly 50 years after its date of execution, or 40 years after its recording. All the parties to the supposed deed had died, and also the officer before whom it was purported to have been acknowledged, and furthermore, the deed was acknowledged by an unknown person, who was not shown to have had any connection with the grantee.

We notice one characteristic common to both of these cases, that *it was not the time which had elapsed between the execution of the deeds and their recording which was objectionable, but the judgments were based in both cases on other matters.* In the Cussack case, the objectionable feature was that the deed under which the plaintiffs claimed title was lacking the signatures of several grantors, and so, irrespective of the lapse of 50 years before recording, they could not claim title to the land. In the Bouvier case the fault lay in an acknowledgment by a person other than the grantee. When the acknowledgment failed, no presumption of delivery existed, and, furthermore, the failure of the persons claiming under the deed to assert their rights for a period of 40 years influenced the court in its conclusion. It was evidence dehors the deed which really prevented recovery of the land. In both cases it is apparent that it was not the mere delay in recording which created a presumption of non-delivery.

Returning to the Larison Case, we now find that the principle enunciated by Corpus Juris, that there is "no presumption of delivery where a long time has elapsed" is entirely inapplicable to the Larison Case. In the first place, the prin-

ciple based on the two cases in Corpus Juris does not remotely apply to nor touch upon the Larison Case. A lapse of 40 or 50 years may be conceded to be a "long time", but in view of the Colorado statute as to prima facie evidence, 6 years cannot be such a "long time" as to come under the principle of the other two cases.

In the Larison case, even though there had been a recording of the deed the day after it was executed, there can be no doubt the Supreme Court would have arrived at the same conclusion. It is a maxim of law that fraud vitiates all things, and recorded deeds are no exception to the rule. The plaintiff, Larison, never had the slightest intention of delivering the deed until she died, and this having been proved and relied upon as a ground for cancelling and discharging a warranty deed, especially one obtained through fraud, would be a good reason for the decision in the Larison Case whether the deed was recorded a day after its execution or six years later, as was actually the fact. This being true, the statement that "There is no presumption of the delivery of a deed where it is not recorded until long after its date" is mere dicta, or at the most, a conclusion founded upon cumulative evidence which was not necessary for the final decision of the Larison Case. Not only was it unnecessary, but it was also inapplicable to the case, for the authorities cited in its support, if taken case by case and compared, are not comparable in any of their facts. Therefore this principle cannot stand as law, and its further recognition can only cause a vicious doctrine to become law, and this in contravention to the express provisions of our statutes, which seem to have been overlooked or disregarded.

Just how misleading this 'long time' doctrine may be, is apparent from the article written by Albert Gould, Jr. in the September, 1929, issue of 'Dicta', accepting the logical import of Mr. Justice Campbell's statement. Mr. Gould, upon the authority of this statement, maintained that an escrow agreement, or any deed, may be questioned where there has been a long delay in recordation. As a practical matter, his suggestions regarding the drawing up of escrow agreements in such a manner as to show the reasons for the lapse of time between the execution of a deed and its recordation, are ex-

cellent. However, this can only serve as a possible means of avoiding trouble in the future, and on the other hand, the lack of a clause in a deed explaining the delay does not, and should not, render that instrument any more questionable, as to delivery, under Mr. Justice Campbell's decision in the Larison v. Taylor case than it has in the past.

Since the logical import of the 'long time' doctrine should have no effect, or at the most, should be confined to cases involving fraud and deceit, or other defects in the deed besides delayed recordation, this means that the general and established rules are to have full force and effect, especially in view of Section 44, of the Real Property Act of '27, which states

> "It is hereby declared to be the policy in this state that this act and all other acts and laws concerning or affecting title to real property and every interest therein and all recorded instruments—shall be liberally construed and with the end in view of rendering such titles absolute and free from technical defects, and so that subsequent purchasers and incumbrances—may rely on the record title, and so that the *record title* of the party in possession shall be sustained and not be defeated by technical or strict constructions."

With the purpose and intent of the Legislature so precisely and exactly expressed, and the 'long time' rule shown to be generally inapplicable, it is only logical that the general rule, as expressed in the note to 54 L.R.A. 884 be given effect:

> "The general rule, undoubtedly, is that a presumption of delivery arises from the fact that a deed has been recorded, which presumption arises from the bare fact of recording. Especially where the deed is recorded by the grantor."

Of course, where the deed is recorded by the grantee, either unauthorizedly or fraudulently, lack of delivery can always be pleaded by the grantor.

To summarize, Mr. Justice Campbell's statement of the law that "There is no presumption of the delivery of a deed where it is not recorded until long after its date" should not control in ordinary cases, where there is a lapse of time between the execution of a deed and the recording thereof, for the foregoing reasons:

1. This statement of the rule taken from Corpus Juris is derived from two cases which differ from the Larison Case so fundamentally that the cases are in no way similar to it. Therefore, any rule derived from these cases cannot serve as sound authority for the rule announced in the Larison Case, nor control in determining titles to real property.

2. This rule is plainly dictum, or at the most is merely cumulative reason for deciding the case as it was eventually decided. The plaintiff in the Larison Case proved non-delivery so conclusively that she could have obtained a judgment regardless of any other proof, and it is this evidence of non-delivery that decided the case. The 'long time' doctrine did not enter into the final decision of the case, and since the case was decided on principles extraneous to this, the 'long time' doctrine is dictum, and as such is not controlling in any contingency where there has been a lapse of time between the execution and recording of the deed.

3. The legislature has expressed in a clear and concise manner the general principle that acknowledging and recording of a deed shall be prima facie evidence of its delivery.

4. Since the 'long time' rule is ineffective as to its applicability to deeds, the general rule, which is the rule announced by our legislature, governs, and the acknowledging and recording of a deed are prima facie evidence of its delivery.

IN RE SUPREME COURT LIBRARY

The following letter addressed to the Editor has been received and seems to embody a suggestion worth thinking about. Dicta invites comment on the matter.

The Supreme Court Library is the one place in Colorado where all the law on a given question can be found; it not only has the most books, but they are available when wanted, which is not always true of many of the Denver building libraries.

In the past I have, by permission, spent some evenings working there, and the ease with which work can be done at night in a well-equipped room away from street noises, in a library from which no book has been taken far away to rest on another lawyer's desk, where if a book is out it can always be found in some other series of reports, and where there is a late text on almost every subject, has made me wonder why some arrangement is not made for the use of this library in the evenings.

It seems to me that it would be worth while for the Denver Bar Association to see if some arrangement could be worked out with the Supreme Court for the use of the library at night under proper supervision paid for by the court or by the bar association.

Yours very truly,
BENTLEY M. MCMULLIN.