REYNOLDS *v.* BALDING.

Opinion delivered March 9, 1931.

1. DEEDS—DELIVERY.—Where a deed, duly executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee afer the grantor's death, the grantor reserving no control over the deed, such deed is not an attempted testamentary disposition, but is effective as a conveyance of the title as of the date when it was deposited.
2. EVIDENCE—PRESUMPTION FROM RECORD OF DEED.—The recording of a deed raises a presumption of delivery to and acceptance of it by the grantee.
3. EVIDENCE—SUBSEQUENT DECLARATIONS OF GRANTOR.—Acts and declarations of a grantor against the title of his grantee, made in the latter's absence, are inadmissible to defeat the grantee's title.

4. TRIAL—JURISDICTION OF CHANCERY—WAIVER.—Objection to the jurisdiction of the chancery court's jurisdiction was waived by failure to object at the time the cause was transferred.

Appeal from Lonoke Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

STATEMENT OF FACTS.

Evelyn Balding, a minor, by her father and next friend, George I. Balding, brought this suit against Marshall B. Reynolds, W. E. Baney, J. P. Mason, W. A. Mason, Olive E. Miles and N. M. Lathrop, to set aside and cancel, as a cloud upon the title of said minor, certain deeds executed to the lands described in the complaint. The defendants filed an answer asserting title to the lands in Marshall B. Reynolds.

The deed under which the plaintiff claims title to the lands in controversy is as follows:

"WARRANTY DEED WITH RELINQUISHMENT OF DOWER.

"Know all men by these presents:

"That I, M. E. Mason, wife and * * * no his wife, for and in consideration of the sum of one hundred dollars, paid and to be paid by * * * as follows, to-wit: * * * dollars, cash in hand, (the receipt of which is hereby acknowledged) and

"J. P. Mason is to have a lien for.....$100
"W. A. Mason is to have a lien for..... 50
"O. E. Miles is to have a lien for..... 25
"N. M. Lathrop is to have a lien for..... 5

"This deed to be in full effect after my death, E. Mason and M. E. Mason—bearing interest from date until paid, at the rate of nó per cent. per annum, do hereby grant, bargain and sell unto the said Gertrude Balding, nee Mason, and unto her heirs and assigns, forever, the following lands, situated in the county of Lonoke and State of Arkansas, to-wit: All of block 26 in town of Ward, according to the T. J. Allison survey. To have and to hold the same unto the said Gertrude Balding, nee Mason, and unto her heirs and assigns, forever, with all appurtenances thereunto belonging. And * * * hereby covenant with the said * * * that I will for-

ever warrant and defend the title to the said lands from all liens and encumbrances. It being herein expressly understood that a lien is hereby retained upon said lot or parcel of lands to secure the payment of residue of the purchase money hereinabove mentioned.

"And I * * * wife of the said * * * for and in consideration of the said sum of money, do hereby release and relinquish unto the said Gertrude Balding, nee Mason, all my right of dower and homestead in and to said lands.

"Witness my hand and seal this 26th day of March A. D., 1918.

"M. E. Mason (Seal)."

The deed was duly acknowledged on the 26th day of March, 1918, and duly filed for record on the 9th day of April, 1918.

On the 27th day of September, 1923, Mary E. Mason conveyed said land to her daughter, Olive E. Miles, by deed, which contains the following clause:

"This deed is made for the purpose of transferring the above described real estate to the said Olive E. Miles, my daughter, and for the purpose of cancelling, annulling and setting aside a provisional and conditional deed executed by myself to Gertrude Balding who is now deceased, said deed being executed on the 26th day of March, 1918, and recorded in the circuit clerk's office of Lonoke County, Arkansas, and said deed was recorded on the 9th day of April, 1918, at 10:3— o'clock A. M., in record book 72, page 578. That said deed was made by me to take effect after my decease; that the property described in the said deed has at all times been in my continuous and undisputed possession and was never delivered to Gertrude Balding or to any one for her, said deed being intended as a gift to my daughter Gertrude Balding, to take effect after my death. That said Gertrude Balding is now dead, and I hereby revoke, cancel, set aside, annul and hold for naught the aforesaid deed referred to together with all the tenements, hereditaments

and appurtenances to the same belonging, and all the estate, title, dower claim or demand, whatsoever, of the said Mary E. Mason."

On January 16, 1926, Mary E. Mason executed another deed conveying this land to Edward T. Keliher for a valuable consideration. On February 23, 1926, E. T. Keliher conveyed the property by warranty deed for a valuable consideration to Marshall B. Reynolds.

Mary E. Mason died on April 21, 1926. Gertrude Balding the grantee in the deed of March 26, 1918, was the mother of Evelyn Balding and died intestate in September, 1922. She left surviving her as her sole heir at law her minor daughter, Evelyn Balding.

According to the testimony of Marshall B. Reynolds, at the time he purchased the land and received the deed to it, he did not know that Evelyn Balding owned or claimed any interest in it. He paid a valuable consideration for the land and took possession of it through his tenant and held such possession until this suit was brought.

According to the testimony of Olive E. Miles, a daughter of Mrs. Mary E. Mason, and a sister of Gertrude Balding, her mother died on the 21st day of April, 1926. Gertrude Balding and her husband, George I. Balding, were living in the house on the property in controversy at the time the deed from Mrs. Mason to Gertrude Balding was executed on March 26, 1918, and they continued to reside there until Gertrude Balding died in September, 1922. During all of that time Mrs. Mason drew a pension and contributed the amount of it towards the living expenses of the family. Evelyn Balding was born on March 25, 1919. The deed from Mrs. Mason to Olive E. Miles was executed for the purpose of cancelling the deed from Mrs. Mason to Gertrude Balding. Two days afterwards, Olive E. Miles executed a deed to said land to her mother for the purpose of clearing the title. Her mother told her many times that she did not know how the deed came to be recorded. She said that she had never delivered the deed to her daughter, Gertrude Balding.

Her testimony was corroborated by that of her brothers, J. P. Mason and William A. Mason. All these witnesses testified that her mother kept the deed hidden away in an organ at their home and told them that she had never given it to her daughter, Gertrude Balding. She told them that she was going to keep the deed unrecorded as long as she lived. William A. Mason testified that when he told his mother that the deed had been recorded, she was greatly surprised and said that she did not know that it had been recorded. His testimony in this respect was corroborated by that of his sister Olive E. Miles.

The chancellor rendered a decree awarding the land to the plaintiff subject to the liens in favor of the children of Mrs. Mary E. Mason as follows:

J. P. Mason	$100
W. A. Mason	50
Olive E. Miles	25
N. M. Lathrop	5

The defendant, Marshall B. Reynolds, alone has duly prosecuted an appeal to this court.

Hogue & Burney, for appellant.

Jno. E. Miller, C. E. Yingling and *J. R. Linder,* for appellee.

HART, C. J., (after stating the facts). We have copied the deed from Mrs. Mary E. Mason to her daughter, Gertrude Balding, in our statement of facts, and it need not be repeated here. It is well settled in this State that, if a deed duly executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor reserves no dominion or control over the deed, the deed is not an attempted testamentary disposition, but is effective as a conveyance of the title as of the date when the deed is deposited. *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Fine* v. *Lasater,* 110 Ark. 425, 161 S. W. 1147; and *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009.

In *Sutton* v. *Sutton,* 141 Ark. 93, 216 S. W. 1052, it was held that an instrument, in the form of a warranty deed, and acknowledged as such, and so headed, conveying land to a grantee, "and unto his heirs and assigns forever," but with an habendum clause making the instrument inoperative until the grantor's death, is a deed and not a will. The court said that the limitation does not defeat the passing of the title, but does reserve possession to the grantor during his lifetime.

In the application of these principles of law, we are of the opinion that the chancellor properly held that the instrument under consideration in this case was a deed from Mrs. Mary E. Mason to Gertrude Balding, and conveyed the title from the grantor to the grantee.

It is claimed, however, that there was no delivery of the deed from the grantor to the grantee. The record shows that the deed was executed on the 26th day of March, 1918, and acknowledged on the same day. It was filed for record on April 9, 1918. The recording of the deed raises a presumption of the delivery to and acceptance thereof by the grantee. It is evidence of the most cogent character tending to show delivery. It is a solemn proclamation to the world that there has been a transfer of the title to the property from the grantor to the grantee, of which our law makes every one take notice. *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033; and *Holland* v. *Alexander,* 147 Ark. 513, 227 S. W. 778.

But, it is contended that the *prima facie* evidence of delivery by recording the deed was overcome by the repeated statements of the grantor to her other children afterwards that she had never delivered the deed to her daughter, Gertrude Balding, and by the subsequent deed which she made which contains a recitation that it is made for the purpose of cancelling the deed which she had formerly executed to Gertrude Balding on the 26th day of March, 1918, and which had been recorded on the 9th day of April, 1918. In the first place, it may be said that the execution of this later deed to her daughter,

Olive E. Miles, contains an express recitation that she had executed the first deed to her daughter, Gertrude Balding. Neither the testimony of the witnesses as to the declarations of their mother, Mary E. Mason, relative to her execution of the first deed to her daughter, Gertrude Balding, nor her subsequent recital in the deed to her daughter, Olive E. Miles, which was not made in the presence of Gertrude Balding, are admissible in evidence to defeat the deed to her. It is well settled in this State that the acts and declarations of the grantor or of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. It has always been held by this court that the declarations of a grantor against the title of his grantee, made in the latter's absence, are not admissible in evidence to defeat the title of the grantee. *Prater* v. *Frazier,* 11 Ark. 249; *King* v. *Slater,* 96 Ark. 589, 133 S. W. 173; *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; and *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009.

Therefore, we are of the opinion that the court correctly awarded the title to the land in the plaintiff. It is next insisted that the defendant, Marshall B. Reynolds, had possession of the land, and that the chancery court had no jurisdiction of the case. The record shows that the case was first brought in the chancery court and then transferred to the circuit court. Subsequently, the case was retransferred without objection by the circuit court to the chancery court. Hence, under our settled rules of practice, the chancery court had jurisdiction to try the case, and any objections to the jurisdiction of the chancery court were waived by the failure to object at the time and to save exceptions to the action of the court. *Taylor* v. *Bank of Mulberry,* 177 Ark. 1091, 9 S. W. (2d) 578, and cases cited.

It follows that the decree of the chancery court must be affirmed.