NOTE

EXECUTION OF A PUBLIC INSTRUMENT AS CONSTRUCTIVE DELIVERY

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The legal maxim of *non nudis pactis, sed traditione dominia rerum transferuntur* proclaims the fundamental principle that real rights or ownership over a thing are not transferred by mere agreement but by tradition or delivery.[1] Contracts only constitute rights to the transfer or acquisition of ownership, while delivery or tradition is the mode of accomplishing such transfer.[2] Our law does not admit the doctrine of the transfer of ownership by mere consent, but limits the effects of the agreement to the due execution of the contract.[3] Our Civil Code recognizes the principle that ownership over property is acquired not by mere consent but by tradition as shown by the following provisions:

Article 712, second paragraph states:

> "Ownership and other real rights over property are acquired and transmitted by law, by donation, by testate and intestate succession, and in consequence of certain contracts, *by tradition.*"

Article 1496 provides:

> "The ownership of the thing sold is acquired by the vendee *from the moment it is delivered* to him in any of the ways specified in Articles 1497 to 1501 x x x."

Article 1164 provides:

> "The creditor has a right to the fruits of the thing from the time the obligation to deliver it arises. However, he shall acquire no real right over it until the same *has been delivered* to him."

In this respect we differ from the American Law where delivery is not necessary for the transfer of ownership.[4] In other countries like Switzerland, Austria and Germany, registration is an essential element in the creation, transfer, modification and extinction of real rights over immovables. On the other hand, the French and Italian Codes permit transmission by mere consent.

The role of delivery in our legal system cannot therefore be underestimated; on the contrary it is of utmost significance. Its presence or absence will determine whether title passes from one person to another. It will decide whether at a given time a person is the owner of a thing or not. Consequently and as a direct incident of

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1 Fidelity and Deposit Co. v. Wilson, 8 Phil. 51.

2 Gonzales v. Roxas, 16 Phil. 51; Ocejo v. International Bank, 37 Phil. 631.

3 10 Manresa, 399-340.

4 See Williston on Sales, Sec. 259 262.

ownership, delivery will in most cases be the basis of ascertaining who should shoulder the risk of loss. Under our law, after the delivery of the thing sold, the risk of loss is borne by the buyer who has acquired ownership thereof under the maxim of *res perit domino*. Article 1504 of the Civil Code states that:

> "Unless otherwise agreed, the goods remain at the seller's risk until ownership therein is transferred to the buyer, but when the ownership therein is transferred to the buyer the goods are at the buyer's risk x x x."

The paramount importance of delivery is perhaps given more emphasis in the Codes of Chile, Uruguay and Argentina where tradition or delivery is treated under an independent Title. In the Philippines, it was sugggested by the eminent Senator Arturo Tolentino and Justice J. B. L. Reyes that the same be done but the Code Commission chose to follow the Spanish Civil Code providing for Tradition only under the Title on Sales. This does not mean, however, that only in the contract of sales does tradition play an important function. In mutuum or simple loan, contracts for a piece of work, dation in payment and other juridical transactions tradition is also the mode of transferring ownership.

Delivery may be real (actual) or constructive. Article 1477 of the Civil Code states that: "The ownership of the thing sold shall be transferred to the vendee upon the *actual* or *constructive* delivery thereof." Black defines delivery as the act by which the *res* or substance thereof is placed within the *actual* or *constructive* possession or control of another.[5] Real delivery is provided for in Article 1497 of the Civil Code which states that: "The thing sold shall be understood to be delivered, when it is placed in the control and possession of the vendee." Under this article, it is indispensable that the vendor himself must be in actual possession of the *res* or thing sold to enable him to place the vendee in actual control and possession thereof. According to Manresa, real delivery means the material delivery of the thing, which, in case of movable property is made from hand to hand, and in case of immovable property, by the exercise of certain acts commonly called the taking of possession.[6] Article 1498 to 1501 enumerate the various means of constructive delivery. One of these forms of constructive delivery is through the execution of a public instrument. Article 1498, first paragraph provides:

> "When the sale is made through a public instrument the execution thereof shall be *equivalent* to the delivery of the thing which is the object

[5] Black's Law Dictionary, Fourth Edition, p. 515.
[6] IV Capistrano, p. 49 citing 10 Manresa, p. 135.

> of the contract if from the deed the contrary does not appear or cannot be clearly inferred."

Closely related to the above-mentioned article is Article 1501 which provides:

> "With respect to incorporeal property, the provisions of the first paragraph of Article 1498 shall govern x x x."

Other forms of constructive delivery are as follows: delivery of the keys, *traditio longa manu, traditio brevi manu, constitutum possessorium,* and *quasi-traditio.*[7]

As provided in Article 1498, *supra,* the execution of a public instrument *shall be equivalent to the delivery* of the thing. Reading this provision in the light of Article 1497, *supra,* where delivery is the placing of the thing sold in the control and possession of the vendee, the necessary and logical conclusion is that the execution of the public instrument *shall be equivalent to the actual placing of the thing sold in the control and possession of the vendee.* Constructive delivery, and this includes execution of public instrument, is, according to Black, a general term comprehending all those acts which, *although not truly conferring a real possession of the thing sold on the vendee, have been held, by construction of law, equivalent to acts of real delivery.*[8] If we follow the definition given by Black, we cannot escape the conclusion that in constructive delivery although the vendor does not give actual or real possession of the thing sold yet the situation will be *as if* such actual or real possession has already been given to the vendee.

In the case of *Florendo v. Foz,*[9] the Supreme Court held that *title passes despite the lack of actual physical delivery* if the contract of sale is executed in a public instrument. In the later case of *Viegelman and Co. v. Perez,*[10] it was held that the execution of the public document *without actual delivery of the thing, transfers the ownership* from the vendor to the vendee, who may thereafter exercise the rights of an owner over the same. In these two cases, the Supreme Court made actual delivery, in other words, the placing of the thing sold in the actual control and possession of the vendee, an unnecessary and dispensable element in the transmission of title from the vendor to the vendee. The Supreme Court did not even mention whether there is need for the vendor at the time of the sale to be in actual control of the thing sold so as to effect a

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[7] III Padilla, pp. 883-889, Fourth Edition.
[8] Black's Law Dictionary, *supra.*
[9] 20 Phil. 388.
[10] 37 Phil. 678.

transfer of title. However, the cases of *Sarmiento v. Lesaca*[11] and *Addison v. Felix*[12] proclaimed a rather different ruling where the Supreme Court came out with a doctrine that in order that constructive delivery can be effected, the vendor *must be in actual control and possession of the thing sold at the time of the sale and must be able to place the vendee in actual control and possession thereof.* Failure of the vendor to fulfill those requisites will mean that he has not complied with his obligation to deliver and consequently title will not pass despite the execution of the public instrument. In the case of *Massallo v. Cesar*,[13] the Court said that a person who does not have actual possession of real property can not transfer constructive possession thereof by the execution and delivery of a public instrument by which the title to the land is transferred.

The facts of the case of *Sarmiento v. Lesaca, supra*, are as follows: On January 18, 1949, plaintiff Sarmiento bought from defendant Lesaca two parcels of land for ₱5,000; the sale was made through a public document; after the sale plaintiff tried to take actual possession of the lands but was prevented from doing so by one Martin Deloso who claims to be the owner thereof. Consequently plaintiff instituted an action to oust said Deloso but she later abandoned the action for reasons known to her only. Plaintiff then asked the defendant to change the land sold with another of the same kind and area or to return the purchase price together with all the expenses she had already incurred. Since defendant did not agree to this proposition, plaintiff filed the present action. The issue that was decided here is whether the execution of the deed of sale in a public document is equivalent to the delivery of possession of the lands sold to plaintiff thus relieving defendant of the obligation to place plaintiff in actual possession thereof. The Court held that in a contract of sale, the vendor is bound to deliver to the vendee the thing sold by placing the vendee in the control and possession of the subject matter of the contract. However, the Court continued, if the sale is executed by means of a public instrument, the *mere* execution of the instrument is *equivalent* to delivery unless the contrary appears or is clearly to be inferred from such instrument. The Court went on further by saying that there is nothing in the instrument from which it can be inferred that vendor (defendant) did not intend to deliver outright the possession of the lands to the vendee. Had the Supreme Court stopped at this point and held that the defendant vendor had already complied with his obligation to deliver (for the

[11] 58 O.G. No. 26, p. 4741.
[12] 38 Phil. 404.
[13] 39 Phil. 134.

execution of the public instrument is equivalent to delivery), its ruling would have been in complete harmony and accord with the earlier cases of *Florendo and Viegelman, supra,* and with the clear and express provision of Article 1498 of the Civil Code.

Unfortunately, the Supreme Court after saying that the execution of the public instrument is *equivalent* to delivery hastened to add that this holds true only when there is no impediment that may prevent the passing of the property from the hands of the vendor into those of the vendee. In fine the Supreme Court held that the execution of the public instrument is equivalent to delivery only if the vendor himself is in actual possession of the thing sold at the time of the sale and capable of giving the vendee actual possession and control over it. In the case of *Addison v. Felix, supra,* the same situation as in the *Sarmiento* case obtained. In that case, the Supreme Court ruled that while it is true that the execution of the public instrument is equivalent to the delivery of the thing sold which is the object of the contract, in order that this symbolic delivery may produce the effect of tradition it is necessary that the vendor shall have such control over the thing sold, that, at the moment of the sale, its *material delivery could have been made* x x x. It is not enough, the Court said, to confer upon the purchaser the ownership and the right of possession. The thing itself must be placed in his control.

The Supreme Court, wittingly or unwittingly fell into a contradiction of terms. While it accepts that the execution of the public instrument is equivalent to delivery, it adds that it is not after all equivalent to delivery unless the vendor is in actual possession of the thing sold. To explain it in the simplest language, it is like stating that one plus one is equivalent to two and then adding that one plus one is not equivalent to two unless other requisites are present, which of course is absurd.

We cannot understand why the Supreme Court has to interpret Article 1498, first paragraph, as requiring that the vendor must be in actual possession of the thing sold. The first and fundamental duty of courts is to apply the law and that construction and interpretation came only after it has been demonstrated that application is impossible without them.[14] The province of construction lies wholly within the domain of ambiguity and that the rules of construction may be resorted to to solve but not to create ambiguity.[15] If the language of the statute is plain and free from ambiguity and ex-

[14] Lizarraga v. Yap Tico, 24 Phil. 504.

[15] Mr. Justice Brown in Hamilton v. Ruthbone, 175 US 414; S. Ct. 155; 44 L. Ed., 219.

presses a single, definite, and sensible meaning, it must be interpreted literally, as that meaning is conclusively presumed to be the meaning which the legislature intended to convey pursuant to the maxim of *index animi sermo est.*[16] Article 1498, first paragraph, is very clear, plain and not susceptible of any ambiguity. Nothing therein indicates that something had been omitted nor does it suggest that the provision is not complete in itself. The provision does not require that the vendor should be in actual possession of the thing sold, why then should the Supreme Court make it a requirement?

The general rule under Article 1498 is that the execution of a public instrument is equivalent to the delivery of the thing sold. To this general rule there are two exceptions under said Article, to wit: (a) when in the deed itself a contrary stipulation appears and (b) when in the deed itself it can be clearly inferred that delivery shall not take place. The first exception is illustrated in the case of *Aviles v. Arcega*[17] where it was held that the plaintiffs cannot invoke symbolic delivery by the execution of the public instrument of sale, inasmuch as there was not, nor could there have been such delivery, the same being prevented by *express* stipulation contained in the deed of sale, to the effect that the vendors *did not part* with their possession of the house but would continue therein for four months. Other examples of the first exception is where the sale is on installment and it is stipulated that the ownership shall not be transferred until payment of the last installment[18] or where the vendor reserves the use and enjoyment of the tenement until the harvest of the pending crops.[19] With the promulgation of the *Sarmiento* and *Addison* rulings *a third exception was added by the Supreme Court* under the guise of judicial interpretation. As it stands now, the three exceptions are the following: (a) when in the deed itself the contrary appears, (b) when in the deed itself it can be clearly inferred that delivery shall not take place and (c) when the vendor at the time of the sale was not in actual possession of the thing sold rendering him incapable of placing the vendee in actual possession over it.

The Supreme Court apparently disregarded the doctrine that where a general rule is established by statute with exceptions, the courts will not curtail the general rule or add to the exceptions by implication and, ordinarily, an express exception *excludes* all others.[20] It is well settled that an exception in a statute amounts to an affirma-

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[16] Black, Interpretation of Laws, pp. 48-50.
[17] 44 Phil. 924.
[18] See Article 1478, Civil Code.
[19] See 10 Manresa, p. 129.
[20] C.J.S. 382, p. 891.

tion of the application of its provisions to all other cases not excepted and excludes all other exceptions.[21]

In the Sarmiento case, the Court ruled that there was no constructive delivery because of the impediment which prevented the vendee from taking actual possession of the land sold. The Court gave too much emphasis on the fact that actual possession was not obtained by the vendee because of the adverse possession of a third person named Deloso. The Court overlooked the fact that in that case the impediment which prevented the vendee from taking actual possession of the land *was not the mere adverse possession* of Deloso but the *alleged ownership* of the latter. It must be noticed that the vendee Sarmiento once filed an action to oust Deloso from the land but said action was later abandoned by her for unknown reasons. Could it be that Sarmiento was convinced that Deloso was the real owner of the land and not his vendor? If that was the case, then the passing of title from vendor Lesaca to his vendee Sarmiento was prevented not because of the absence of delivery *but by the vendor's lack of title over the land sold.* On the other hand, if the vendor Lesaca were the real owner of the land, Sarmiento should have pursued the action against Deloso and recover the damages and expenses incident to the action from his vendor Lesaca for the latter's failure to comply with his warranty under the second sentence of paragraph 1 of Article 1547 of the Civil Code. In either case *there was delivery* but in the first case no amount of delivery can confer ownership in the vendee for the simple reason that vendor has no title to transfer not being the owner of the land sold while in the second case although there was delivery still the vendor is liable for his warranty.

The *Sarmiento* and *Addison* rulings become more untenable in the case of sale of leased property. A lessor notwithstanding the fact that his property is leased to another is still the true, real, legal owner of that property. As owner he has the right to dispose of that property with no other limitations than those established by law.[22] Let us take a hypothetical case: A leased his house and lot to B for five years and the lease was later registered in the Registry of Property. After the lapse of one year, A found himself in a very tight financial condition that he decided to sell the house and lot so he can obtain cash. A offered the house and lot to the lessee B but the latter did not want to buy the property. Later, A found a buyer C and after some negotiations the contract was perfected and executed in a public document. The question now is: Has A com-

[21] Black, Interpretation of Laws, p. 427.
[22] Article 428, Civil Code.

plied with his duty to deliver the thing sold to his buyer C by the execution of the public instrument? Has A transferred his title to his buyer C? Under the *Sarmiento* and *Addison* doctrine, A has not complied with his duty to deliver the thing sold despite the execution of the public instrument. Under the *Sarmiento* rule the execution of the public instrument will not operate as a constructive delivery because A was not in actual possession of the house and lot at the time of the sale, the same being held by lessee B. What then will be the recourse of A so he can comply with his obligation to deliver and thus vest title on his vendee? Under the Sarmiento rule his (A's) only recourse is to oust lessee B so he can take actual possession of the house and lot and thus place his vendee C in actual possession thereof and this is despite a subsisting and valid contract of lease. His (A's) recourse therefor will be to do and perpetrate an illegal act. On the other hand if A chooses to respect the lease thus avoiding the doing of an illegal act, he can never comply with his obligation to deliver and consequently he will never be able to transfer his ownership to his vendee. It is also worthwhile to note that A cannot resort to the other kind of delivery, that is real delivery, for it is impossible for him to give the actual control and possession of the house and lot to his vendee C, the latter being bound by law to respect the possession of lessee B [23] the lease in B's favor being a registered lease. A, therefore, is placed in a dilemma of either doing an unlawful act or of surrendering his fundamental right to dispose of his own property. Either, of course, is revolting and contrary to all precepts of law and justice. Under the cited hypothetical case, the *Sarmiento* and *Addison* rule does not only become untenable but its absurdity is made evident.

We are not unmindful of the fact that in the *Addison* case, the Supreme Court made, in passing, a reservation that if the sale had been made under the *express* agreement of imposing upon the purchaser the obligation to take the necessary steps to obtain the material possession of the thing sold, and it was proven that he knew that the thing was in the possession of a third person claiming to have a right therein, such agreement would be perfectly valid. This reservation, however, only further bolsters our claim that actual possession over the thing sold by the vendor is not a necessity nor an indispensable element to make symbolic or constructive delivery effective. Through that reservation, the Supreme Court only admitted, if hesitantly, that constructive delivery can after all be done and be effective to transfer title even though a third person and not

[23] See Article 1676, first paragraph, Civil Cole; See also Article 1648, Civil Code.

the vendor has the actual possession of the thing sold at the time of the sale.

Real delivery is distinct from constructive delivery. The Legislature had shown its desire to preserve that distinction by providing real delivery in Article 1497 and constructive delivery in Articles 1498 to 1501 but at the same time making one kind of delivery the equivalent of the other.[24] In real delivery, the vendor must of necessity be in actual possession of the thing sold at the time of the sale so he can place the vendee in actual possession and control thereof. If in constructive delivery, the same requisite will be required, that is, the vendor must be the actual possessor of the thing and be under obligation to place the vendee in actual possession thereof as was decreed by the Supreme Court in the *Sarmiento* and *Addison* cases, the distinction between the two kinds of delivery will completely be destroyed. In such a case will not the Supreme Court be undoing what Congress had done?

What is the purpose of Congress in providing that the execution of a public instrument will be equivalent to the delivery of the thing sold? It is unfortunate that the Report of the Code Commission does not furnish enough information to throw light on the matter. This will not however prevent a discovery of the Legislative intent. The Legislative intent must be determined from the language of the statute itself. To depart from the meaning expressed by the words is to alter the statute, is to legislate, not to interpret.[25] From the wordings of Article 1498, it is evident that the purposes of the Legislature are: *first*, to provide for a mode of delivery in cases where the subject matter of the contract is by its nature incapable of being materially delivered, as in the case of incorporeal property[26] or where the object of the contract is such that giving material or real delivery thereof is exceedingly difficult as in the case of sale of vast tracts of land; *second*, to facilitate a prompt and speedy transfer of title from the vendor to the vendee so as to enable the latter to exercise at the earliest time possible the rights of ownership over the thing; and *third*, to provide for cases where real delivery is impossible or highly improbable because of the circumstances surrounding the parties to the contract as where the vendor though an owner is not in actual possession and control of the thing because a third person either as lessee, usurper, trespasser or otherwise, is in actual possession and control thereof.

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[24] V Tolentino, Civil Code, pp. 41-46 (1959 ed.); V Paras, Civil Code, pp. 66-70, 3rd Edition.

[25] Tañada v. Yulo, 61 Phil. 515.

[26] See Article 1501, Civil Code.

The Supreme Court, however, refused to recognize the third purpose of the law by ruling that a vendor, although he owns the thing sold, cannot deliver it constructively to his vendee if the former was not in actual possession of the thing sold at the time of the sale. An owner therefore who had leased his property or which had been usurped by another or being held and controlled by a trespasser is thereby placed in a very disadvantageous position. To illustrate, X, for example, had a piece of land presently controlled and possessed by usurper Y. He wishes to dispose of this property so he entered into a contract of sale with Z informing him *beforehand* that the property is possessed and controlled by usurper Y. Z consented to the sale despite his knowledge that the land was possessed by a usurper because X agreed to a very low price. The deed of sale was executed in a public instrument. Thereafter, Z tried to take possession of the land but Y flatly refused to yield possession. Thereafter Z demanded from his vendor X that he be placed in actual possession of the land or return the purchase price. Due to X's refusal to accede to the demand, Z brings an action against X for the rescission of the sale. The issue then will be: Had X, the vendor, complied with his obligation to make delivery? If yes, then the contract cannot be rescinded, if not, then rescission will be proper and the purchase price will be returned to the buyer, Z. Under this hypothetical case, the vendor was in good faith; he informed the buyer beforehand that the land sold was possessed by a usurper and he agreed to a very low price precisely because of that fact. Yet, the contract of sale will still be rescinded because under the Sarmiento ruling the vendor has not complied with his duty to deliver for at the time of the sale he (vendor) was not in actual possession of the land sold and this is despite the fact that the sale was executed in a public instrument. The Sarmiento rule therefore poses that danger that it may be used as a convenient excuse for a party to back out from the solemn agreement to which he had entered notwithstanding that the other party is in good faith and entirely free from any fault or negligence.

The law is very clear that if the sale is made through the execution of a public instrument, it is *equivalent* to the delivery of the thing sold. Even a layman will not miss that that is the message which Congress intended to convey. Unfortunately, our Supreme Court had decreed that the execution of the public instrument is *not* equivalent to the delivery of the thing sold *unless* the vendor is, at the time of the sale in actual possession thereof. The Court has added something and in effect changed the law in the nature of judicial interpretation.

Interpretation would have been proper if the law is vague or susceptable of many constructions but that condition is totally absent from the provision under consideration. With due regard to the lofty position which our Supreme Court as a body is occupying, we beg to say that it had wittingly or unwittingly engaged (in the *Sarmiento* and *Addison* cases) in spurious interpretation. Let me quote Justice Pound:

> "Spurious interpretation has for its object to make, unmake, or remake laws and not merely to discover." [27]

If legislative usurpation of judicial functions is condemned, in much the same manner, is judicial intrusion into legislative domain abhorred.

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[27] Pound, Genuine and Spurious Interpretation, 7 Am. Pol. Sci. 361.