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Delivery and Acceptance of Deeds

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DELIVERY AND ACCEPTANCE OF DEEDS

IT is proposed, in the first part of this paper, to consider the nature of the delivery of a deed, more particularly a deed of conveyance, and the facts and circumstances which the courts have regarded as justifying an inference of delivery. The second part of the paper will be devoted to a consideration of the necessity of the acceptance of a deed, in addition to delivery, in order that it may have a legal operation.

DELIVERY

A written instrument, regarded as a constitutive or dispositive act, becomes legally operative by reason either (1) of the mutual action of two or more persons, parties in interest thereto, or (2) of the action of one person, from whom the writing may be regarded as issuing. The mutual action of two or more persons is required in the case of what are known as simple contracts, while all other instruments, by the theory of the English common law,[1] become legally operative by the action of one party only. Of such other instruments, some are said to take effect by delivery, this term serving to designate the final act by which one who has previously signed the instrument, or both signed and sealed it, signifies his intention that the instrument shall have a legal operation, and so realizes his intention in fact. Conveyances of land, including leases, contracts under seal, mortgages of land and of chattels, deeds of gift, insurance policies, and promissory notes, take effect by delivery. Of the instruments which, while becoming operative by the action of one person alone, are not said to take effect by delivery, the most important class, perhaps the only class, consists of testamentary instruments, wills. But though, in the case of a will, there is no requirement of delivery under that name, nevertheless an instrument ordinarily becomes operative as a will only by virtue of a final express-

[1] See post at note 83.

ion of intention by the maker to that effect, such expression usually taking the form, by force of statute, of a declaration in the presence of witnesses of an intention that the instrument shall be legally operative, or of a request addressed to witnesses to attest the signature thereto, provided they accede to the request. Such final expression of intention in the case of a will is the equivalent of the final expression of intention by means of delivery in the case of an instrument *inter vivos*.

The expression "delivery," as applied to a written instrument, had its inception, it appears,[2] in connection with written conveyances of lands, the manual transfer or "delivery" of which was, in early times, upon parts of the continent of Europe, regarded as in effect a symbolical transfer of the land itself, analagous to livery of seisin. And not only was the notion of physical delivery of the instrument applied in connection with the transfer of land, but it was applied also in connection with written evidences of contract, the physical transfer of the document being necessary to make it legally operative, and being effective to that end.[3] The view that a transfer of land could be effected by means of the manual transfer of a writing was originally adopted in England to but a limited extent, but in so far as the courts recognized the effectiveness of a written instrument for the purpose of transfer or of contract, they adopted the continental conception of a physical change of possession thereof as a prerequisite to its legal operation, and accordingly the necessity of delivery became established in connection with various classes of written instruments as they came to be recognized by the courts, particularly deeds of grant, contracts under seal, the only class of contract recognized in the earlier history of our law, and promissory notes.[4]

While, as before stated, the necessity of delivery in connection with the instruments last named, and others of an analagous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression "delivery" as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that is shall be legally operative,[5] however this intention may be indicated.[6] Ac-

[2] Brissaud, French Private Law, (Continental Legal History Series) §§ 298, 302, 313. 2 Pollock & Maitland, Hist. Eng. Law, 85, 86.

[3] Brissaud, op. cit. § 370. 2 Pollock & Maitland, 190.

[4] As to promissory notes, see article by Professor W. S. Holdsworth, "The Early History of Negotiable Instruments", 31 Law Quart. Rev. at p. 17.

[5] *Fitzpatrick* v. *Brigman*, 130 Ala. 450; *Russell* v. *May*, 77 Ark. 89; *Follmer* v. *Rohrer*, 158 Cal. 755; *Bowers* v. *Cottrell* (Idaho), 96 Pac. 936; *Riegel* v. *Riegel*, 243 Ill 626;

cordingly, it is generally agreed that delivery does not necessarily involve any manual transfer of the instrument;[7] and provided an intention is indicated that the deed shall take effect, the fact that the grantor retains possession of the instrument is immaterial.[8] So, while it is frequently said, both by the older and later authorities, that delivery may be made to a third person for the benefit of the grantee,[9] meaning thereby that the conveyance may take effect by

Burkholder v. *Casad*, 47 Ind. 418; *Sheldon* v. *Crane* (Iowa), 125 N. W. 238; *Doty* v. *Barker* (Kan.), 97 Pac. 964; *Burk* v. *Sproat*, 96 Mich. 434; *Ingersoll* v. *Odendahl*, 136 Minn. 428; 162 N. W. 525; *Coulson* v. *Coulson*, 180 Mo. 709; *Martin* v. *Flaherty*, 13 Mont. 96; 32 Pac. 187; 19 L. R. A. 242; 40 Am. St. Rep. 415; *Flannery* v. *Flannery*, 99 Neb. 557; 156 N. W. 1065; *Vreeland* v. *Vreeland*, 48 N. J. Eq. 56; *Fisher* v. *Hall*, 41 N. Y. 416; *Lee* v. *Parker*, 171 N. C. 144; 88 S. E. 217; *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377; *Johnson* v. *Craig* (Okla.), 130 Pac. 581; *Sappingfield* v. *King* (Oreg.), 8 L. R. A., N. S. 106; *Hannah* v. *Swarnet*, 8 Watts (Pa.), 11: *McCartney* v. *McCartney*, 93 Tex. 359; *Matson* v. *Johnson* (Wash.), 93 Pac. 324; *Glade Coal Min. Co.* v. *Harris* (W. Va.), 63 S. E. 873. In *Cox* v. *Schnerr* (Cal.), 156 Pac. 509, it is in effect said that though the grantor intends, in handing the instrument to the grantor, to make it operative as a conveyance, there is no delivery if it is procured by fraud. This is, it is submitted, erroneous. The intention exists, and hence there is a delivery, though the intention is based on a misconception wrongfully induced. There are almost numberless decisions recognizing that the legal title passes in such case.

[6] Delivery, being a question of intention, is one of fact, for the jury. *Murray* v. *Stair*, 2 Barn & C. 82; *Fitzpatrick* v. *Brigman*, 133 Ala. 242; *Donahue* v. *Sweney* (Cal.), 153 Pac. 708; *Emmons* v. *Harding*, 162 Ind. 154; *Braun* v. *Monroe*, 11 Ky. Law Rep. 324; *Bishop* v. *Burke*, 207 Mass. 133; *O'Rourke* v. *O'Rourke*, 130 Minn. 292; 153 N. W. 607; *Hurlburt* v. *Wheeler*, 40 N. H. 73; *Jones* v. *Swayze*, 42 N. J. L. 279; *Crain* v. *Wright*, 36 Hun 74; 114 N. Y. 307; *Archambeau* v. *Edmunson* (Ore.), 171 Pac. 186; *Fisher* v. *Kean*, 1 Watts (Pa.) 278; *McCartney* v. *McCartney*, 93 Tex. 359; *Dwinell* v. *Bliss*, 58 Vt. 353; *Holly St. Land Co.* v. *Beyer* (Wash.), 93 Pac. 265; *Garrett* v. *Goff* (W. Va.), 56 S. E. 351; *Kittoe* v. *Willey*, 121 Wis. 548.

[7] *Gulf Red Cedar Co.* v. *Cranshaw* (Ala.), 53 So. 812; *Faulkner* v. *Feazel* (Ark.), 168 S. W. 568; *Smith* v. *May*, 3 Penn. (Del.) 233; 50 At. 59; *Benneson* v. *Aiken*, 102 Ill. 284; 40 Am. Rep. 592; *Prince* v. *Prince*, 258 Ill. 304; 101 N. E. 608; *Fitzgerald* v. *Goff*, 99 Ind. 28; *Newton* v. *Bealer*, 41 Iowa 334; *Pentico* v. *Hays* (Kan.), 88 Pac. 738; *Kirby* v. *Hulette*, 174 Ky. 257; 192 S. W. 63; 9 L. R. A.; *Byers* v. *McClenahan*, 6 Gill & J. 250; *Creeden* v. *Mahoney*, 193 Mass. 402; *Thatcher* v. *St. Andrews Church*, 37 Mich. 264; *Chastek* v. *Sonba*, 93 Minn. 418; *Young* v. *Elgin* (Miss.), 27 So. 595; *Lee* v. *Parker*, 171 N. C. 144; 8 S. E. 217; *Dukes* v. *Spangler*, 35 Ohio St. 119; *Farrar* v. *Bridges*, 5 Humph. (Tenn.), 411; *Matson* v. *Johnson* (Wash.), 93 Pac. 324.

[8] *Doe d. Garnons* v. *Knight*, 5 Barn & C. 671; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Austin* v. *Fendall*, 2 MacArthur (D. C.) 362; *Otis* v. *Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Colee* v. *Colee*, 122 Ind. 109; 17 Am. St. Rep. 345; *Bunnell* v. *Bunnell*, 111 Ky. 566; *Moore* v. *Hazelton*, 9 Allen (Mass.) 102; *Stevens* v. *Hatch*, 6 Minn. 64; *Wall* v. *Wall*, 30 Miss. 91; 64 Am. Dec. 147; *Ruckman* v. *Ruckman*, 32 N. J. Eq. 259; *Scrugham* v. *Wood*, 15 Wend (N. Y.) 545; 30 Am. Dec. 75; *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377; *Ledgerwood* v. *Gault*, 2 Lea (Tenn.) 643; *Thatcher* v. *Capeca*, 75 Wash. 249; 134 Pac. 923.

So the fact that the grantor still has access to the instrument does not conclusively negative delivery. *Strickland* v. *Griswold* (Ala.), 43 So. 105; *Cribbs* v. *Walker*, 74 Ark. 104; *Kenniff* v. *Caulfield*, 140 Cal. 34; *Munro* v. *Bowles*, 187 Ill. 346; 54 L. R. A. 864; *Terry* v. *Glover*, 235 Mo. 544; *Payne* v. *Hallgarth*, 33 Ore. 430; *Wilson* v. *Wilson* (Utah), 89 Pac. 643.

[9] Sheppard's Touchstone. 57; 4 Kent's Comm. 455; *Doe d. Garnons* v. *Knight*, 5 Barn & C. 671; *Xenos* v. *Wickham*, L. R. 2 H. L. 312; *Gulf Red Cedar Co.* v. *Cran-*

reason of physical transfer of the instrument to a third person, this would seem to result, not from any particular virtue in the transfer, but from the fact that the transfer may show an intention to make the instrument legally operative. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if satisfactorily proven,[10] and would indeed, as affording indubitable evidence of the grantor's intention, have a conclusiveness that may be lacking in the case of a mere manual transfer. Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery;[11] nor does such a transfer to the grantee himself, if the transfer is not with such intention, but is for

shaw (Ala.), 53 So. 812; *Watson* v. *Hill* (Ark.), 186 S. W. 68; *Crozer* v. *White* (Cal.), 100 Pac. 730; *Clark* v. *Clark*, 183 Ill. 448, 75 Am. St. Rep. 115; *Gornel* v. *McDaniels*, 269 Ill. 362, 109 N. E. 996; *Matheson* v. *Matheson*, 139 Iowa 511, 18 L. R. A., N. S. 1167; *Harmon* v. *Bower* (Kan.), 96 Pac. 51; *Beatty* v. *Beatty*, 151 Ky. 547; 152 S. W. 540; *Clark* v. *Creswell*, 112 Md. 339; *Foster* v. *Mansfield*, 3 Metc. (Mass.) 412; *Cooper* v. *Cooper* (Mich.), 127 N. W. 266; *Barnard* v. *Thurston*, 86 Minn. 343; *Sneathen* v. *Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Jones* v. *Swayze*, 42 N. J. Law 279; *Church* v. *Gilman*, 15 Wend. 656; *Robbins* v. *Roscoe*, 120 N. C. 79; 38 L. R. A. 238; 58 Am. St. Rep.; *Meeks* v. *Stillwell*, 54 Ohio St. 541; *Belcher* v. *La Grande Nat. Bk.* (Ore.), 171 Pac. 410; *Eckman* v. *Eckman*, 55 Pa. 269; *Kanner* v. *Startz* (Tex. Civ.), 203 S. W. 603.

Statements, occasionally found, to the effect that the instrument must be handed to the third person with the intention that he pass it on, so to speak, to the grantee named, (See e. g. *Osborne* v. *Eslinger*, 155 Ind. 351) or that he must pass it on (*Furenes* v. *Eide*, 109 Iowa 511; *Jaskson* v. *Phipps*, 12 Johns (N. Y.) 418), are, it is conceived, absolutely incorrect. The intention of the grantor as to whether the instrument shall take effect as a conveyance is the subject for ascertainment, not his intention, if he happens to have any, as to the ultimate custody of the writing.

In one state it appears to have been decided that a manuel transfer to a third person can not involve delivery unless such person is a duly authorized agent of the grantor. *Jameson* v. *Goodwin*, (Okla.), 170 Pac. 241. Such a view appears to be entirely out of harmony with the authorities in other jurisdictions.

[10] 3 Preston, Abstracts, 63; *Doc d. Garnons* v. *Knight*, 5 Barn & C. 671; *Xenos* v. *Wickham*, L. R. 2 H. L. 312; *Linton* v. *Brown's Admrs.* (C. C.) 20 Fed. 455; *Rushin* v. *Shields*, 11 Ga. 636; 56 Am. Dec. 436; *Moore* v. *Hazelton*, 9 Allen (Mass.), 102; *Regan* v. *Howe*, 121 Mass. 424; *Kane* v. *Mackin*, 9 Smedes & M. (Mass.) 387; *Vought's Ex'rs* v. *Vought*, 50 N. J. Eq. 177; *Scrugham* v. *Wood*, 15 Wend (N. Y.) 545; *Diehl* v. *Emig*, 65 Pa. St. 320; Contra: *Moore* v. *Collins*, 15 N. C. 384.

[11] Co. Litt. 36a; Sheppard's Touchstone, 57; *Culver* v. *Carroll* (Ala.), 57 So. 767; *Baker* v. *Baker* (Cal.), 100 Pac. 892; *Merrills* v. *Swift*, 18 Conn. 257; *Porter* v. *Woodhouse*, 59 Conn. 568; 22 At. 299; 13 L. R. A. 64; 21 Am. St. Rep. 131; *Lange* v. *Cullinan*, 205 Ill. 365; *Connor* v. *Buhl*, 115 Mich. 531; *Cannon* v. *Cannon*, 26 N. J. Eq. 316; *Jackson* v. *Phipps*, 12 Johns (N. Y.) 418; *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377; *Sears* v. *Scranton Trust Co.*, 228 Pa. 226; *Leftwich* v. *Early* (Va.), 79 S. E. 384; *Showalter* v. *Spangler* (Wash.), 160 Pac. 1042.

A statement by the grantor of an intention that the conveyance shall be immediately operative has been regarded as effective as a delivery, although the instrument had been previously placed by him in another's custody to hold in his, the grantor's, behalf. *Moore* v. *Trott* (Cal.), 122 Pac. 642; *Elliott* v. *Hoffhine*, 97 Kan. 26, 154 Pac. 225.

another purpose as, for instance, to enable him to examine the instrument.[12]

In spite however of these numerous decisions recognizing the minor importance of the matter of actual transfer of the instrument in connection with the question of delivery, the courts not infrequently speak as if such transfer were an essential in delivery. The occasional references, moreover, to delivery "to" the grantee, suggest the idea of a physical transfer to him. The delivery of a conveyance or other instrument involves in its essence no delivery "to" any one, since it means merely the expression, by word or act, of an intention that the instrument shall be legally operative, and the fact that in many cases such intention is indicated by the making of a physical transfer does not show that such transfer is necessary. The partial survival of the primitive formalism, as it has been well termed,[13] which attached some peculiar efficacy to the physical transfer of the instrument, as involving a symbolical transfer of the property described therein, is presumably to be attributed to the fact that in other connections the words "deliver" and "delivery," as applied to inanimate things, ordinarily have reference to a physical transfer.

It being conceded that even a voluntary transfer of the instrument by the grantor to the grantee does not involve a delivery if not with the intention that the instrument shall be legally operative, it necessarily follows that the instrument cannot be regarded as having been delivered merely because the grantee has acquired possession thereof without the grantor's consent.[14] And it has been decided that the fact of non delivery in such case may be asserted even as against a subsequent *bona fide* purchaser, who purchased in reliance on the grantee's possession of the instrument.[15] There are however *dicta* to the effect that the grantor may, by reason of his lack of care in the

[12] *Bray* v. *Bray* (Ark.), 201 S. W. 281; *Kenney* v. *Parks*, 137 Cal. 527; *Oswald* v. *Caldwell*, 225 Ill. 224; *Kavanaugh* v. *Kavanaugh*, 260 Ill. 179, 103 N. E. 65; *Witt* v. *Witt* (Iowa), 156 N. W. 321; *Ball* v. *Sandlin*, 176 Ky. 537, 195 S. W. 1089; *Tewksbury* v. *Tewksbury*, 222 Mass. 595, 111 N. E. 394; *Comer* v. *Baldwin*, 16 Minn. 172; *Braman* v. *Bingham*, 26 N. Y. 483; *Gaylord* v *Gaylord*, 150 N. C. 222; *Clark* v. *Clark*, 56 Ore. 218, 107 Pac. 23; *In re Nicholls*, 190 Pa. 308; *Gordon* v. *White*, (S. D.), 145 N. W. 439; *Dwinell* v. *Bliss*, 58 Vt. 353; *Zoerb* v. *Paetz*, 137 Wis. 59.

[13] 4 Wigmore, Evidence, § 2405.

[14] *Bender* v. *Barton* (Ala.), 52 So. 26; *Bowers* v. *Cottrell* (Idaho), 96 Pac. 936; *Lundy* v. *Mason*, 174 Ill. 505; *Schaefer* v. *Purviance*, 160 Ind. 63; *Hintz* v. *Hintz* (Iowa), 156 N. W. 878; *White* v. *Holder* (Ky.), 118 S. W. 995; *Westlake* v. *Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557; *Gardiner* v. *Gardiner* (Mich.), 95 N. W. 973; *Allen* v. *Ayer*, 26 Ore. 589; *King* v. *Diffey* (Tex. Civ.), 192 S. W. 262.

[15] *Gould* v. *Wise*, 97 Cal. 532; *Henry* v. *Carson*, 95 Ind. 412; *Ogden* v. *Ogden*, 4 Ohio St. 458; *Burns* v. *Kennedy* (Ore.), 90 Pac. 1102; *Van Amringe* v. *Morton*, 4 Whart (Pa.) 382.

custody of the instrument, be estopped, in favor of a *bona fide* purchaser, to deny its delivery.[16]

Apart from any question of *bona fide* purchase, there are a number of decisions to the effect that an instrument of conveyance, the possession of which has been improperly acquired by the grantee named therein, may be subsequently made operative by the grantor's recognition of the title as being in such grantee.[17] In connection with these decisions the courts ordinarily speak of such recognition as involving a "ratification" of the deed or of the delivery, but what actually occurs is, it is conceived, a delivery by the grantor, that is, an expression of an intention by him, not previously expressed, that the instrument, which has already passed into the grantee's hands, shall take effect as a transfer of title. An instrument which is inoperative as a conveyance for lack of legal delivery cannot be made operative by ratification, there being indeed, in such case, nothing to ratify. And likewise a physical transfer of the instrument, which lacks all legal significance because not made by one authorized to make delivery, cannot thereafter, by ratification, be transformed into a legal delivery, that is, an expression of intention that the instrument shall be legally operative.

The delivery of an instrument is a part of the execution thereof,[18] and in so far as a written or sealed authority may be necessary to enable one to sign or seal an instrument as an agent acting in behalf of the grantor, such an authority is, it is conceived, necessary to enable one to deliver the instrument as such agent.[19] It would be strange if the final expression of intention, which makes the instrument legally operative, could be given by one acting under an oral authority, while the merely preliminary acts of signing and sealing can be performed by an agent only when acting under authority in

[16] *Gould* v. *Wise*, 97 Cal. 532; *Allen* v. *Ayer*, 26 Ore. 589; *Merck* v. *Merck*, 83 S. C. 329; *Garner* v. *Risinger* (Tex. Civ.), 81 S. W. 343; *Tisher* v. *Beckwith*, 30 Wis. 55, 11 Am. Rep. 546; *Laughlin* v. *Calumet & Chicago Canal & Dock Co.*, 65 Fed. 441, 13 C. C. A. 1.

[17] *Whitney* v. *Dewey*, 10 Idaho 633; *Phelps* v. *Pratt*, 225 Ill. 85; *Harkness* v. *Cleaves*, 113 Iowa 140; *McNulty* v. *McNulty*, 47 Kan. 208; *Pannell* v. *Askew* (Tex. Civ. App.), 143 S. W. 364.

[18] See *Goodlett* v. *Goodman Coal & Coke Co.*, 192 Fed. 775, 113 C. C. A. 61; *Clark* v. *Child*, 66 Cal. 87, 4 Pac. 1058; *Bowers* v. *Cottrell*, 15 Idaho 221, 96 Pac. 936; *Colee* v. *Colee*, 122 Ind. 109, 17 Am. St. Rep. 345; *McAndrew* v. *Sewell*, 100 Kan. 47, 163 Pac. 653; *Tucker* v. *Helgien*, 102 Minn. 382, 113 N. W. 912; and other cases cited in "Words & Phrases" under "Execute."

[19] That an agent cannot deliver a deed without authority under seal is explicitly decided in *Hibblewhite* v. *M'Morine*, 6 Mees & W. 200; *Powell* v. *London & Provincial Bank* (1893), 2 Ch. 555.

So it is said in Sheppard's Touchstone at p. 57, that "where one person delivers an instrument as the act of another person, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorized by deed, execute an instrument."

writing. There are however to be found occasional judicial statements that a deed may be delivered by one acting under oral authority,[20] and that this may be done is not infrequently assumed by the courts.[21] That an oral authority is sufficient for this purpose appears to be involved in the decisions, rendered in a number of states,[22] that a conveyance which, at the time it leaves the hands of the grantor, lacks the name of a grantee, becomes valid if the name is subsequently inserted by an agent acting under oral authority from the grantor, these decisions apparently involving the assumption that the delivery of the deed is made by such agent, since delivery could not be made so long as the instrument, lacking the name of the grantee, was a legal nullity, and there is no act by the grantor, after the insertion of such name, which can be referred to as indicative of an intention to deliver.

The view indicated in the decisions referred to, that an agent acting under oral authority may make delivery, is presumably based on the misconception, previously referred to, that delivery of a deed means merely the manual transfer of the instrument. That an agent in possession of the instrument in behalf of the grantor is in a position to hand it to the grantee, whether his agency is based on a written or an oral authority, is sufficiently obvious, and because he is in a position to do this it is assumed that he has the power and authority to make delivery of the instrument on behalf of the grantor. But delivery of the instrument involves more than a manual transfer thereof, and the fact that the agent is in a position to make such a transfer is no reason for assuming that he has legal authority to express, by word or act, an intention on the part of the grantor that the instrument shall become legally operative. It no doubt frequently occurs that the grantor hands the completed instrument to an agent, with oral instructions to hand it to the grantee upon some subsequent event, ordinarily the payment of the purchase mon-

[20] *White* v. *Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Macurda* v. *Fuller*, 225 Mass. 341, 114 N. E. 366; *Lafferty* v. *Lafferty*, 42 W. Va. 783; See Huffcut, Agency (2nd ed.), p. 38.

[21] *Sturtevant* v. *Sturtevant*, 116 Ill. 340; *Furenes* v. *Eide*, 109 Iowa 511; *Conway* v. *Rock*, 139 Iowa 162; *Santaquin Min. Co.* v. *High Roller Min. Co.*, 25 Utah 282; *Spring Garden Bank* v. *Hulings Lumber Co.*, 32 W. Va., 357, 3 L. R. A. 583.

[22] *Hall* v. *Kary*, 133 Iowa 465, 110 N. W. 930, 119 Am. St. Rep. 639; *Guthrie* v. *Field*, 85 Kan. 58, 116 Pac. 217, 37 L. R. A., N. S. 326; *Inhabitants of South Berwick* v. *Huntress*, 53 Me. 90; *Board of Education of Minneapolis* v. *Hughes*, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A., N. S. 637; *Thummel* v. *Holden*, 169 Mo. 677; *Montgomery* v. *Dresher*, 90 Neb. 632, 134 N. W. 251, 38 L. R. A., N. S. 423; *Hemmenway* v. *Mulock*, 56 How. Pr. (N. Y.), 38; *Cribben* v. *Deal*, 21 Ore. 211, 28 Am. St. Rep. 746; *Lamar* v. *Simpson*, 1 Rich Eq. (S. C.) 71, 42 Am. Dec. 345; *Threadgill* v. *Butler*, 60 Tex. 599; *Clemmons* v. *McGeer* (Wash.), 115 Pac. 1081; *Lafferty* v. *Lafferty*, 42 W. Va. 783; *Friend* v. *Yahr*, 126 Wis. 291, 1 L. R. A., N. S. 891, 110 Am. St. Rep. 924.

ey. In such case, however, the delivery, it is conceived, is properly to be regarded as a conditional delivery made by the grantor himself, a delivery made by him, that is, at the time of handing the instrument to his agent, conditioned however upon the subsequent payment of the purchase money or occurrence of the other event named, on which the agent was to hand the instrument to the grantee. Upon the satisfaction of the condition the delivery by the grantor becomes effective, as in the case of any other conditional delivery,[23] and the mere act of the agent in handing the instrument to the grantee is not, technically speaking, a delivery thereof, it having already been delivered.

Since the delivery must be made by the grantor, or by the grantor's agent, in order to be effective, there can be no delivery after the grantor's death. A deceased grantor can obviously not make delivery, and the agent's authority necessarily comes to an end upon the death of the principal.[24]

It is not infrequently said that there is no delivery if the grantor still retains control or dominion over the deed.[25] Such a statement is somewhat ambiguous. The mere fact that the grantor retains possession of the instrument is, as above indicated,[26] not incompatible with delivery, and yet it can hardly be said that, having possession of the deed, he has no dominion or control thereover. The statement may mean that the fact that the grantor has a right to demand the physical possession of the instrument, or to refuse to relinquish such possession, conclusively shows that the instrument has not been delivered since, after delivery, the grantee, and not the grantor, is entitled to control the possession of the instrument, it being his muniment of title. Or it may mean that the fact that the grantor has a right to determine whether the instrument shall have

[23] See an article by the present writer on "Conditional Delivery of Deeds", 14 Columbia Law Rev. 389.

[24] *Mortgage Trust Co.* v. *Moore*, 150 Ind. 465; *Schaefer* v. *Anchor Mutual Fire Insur. Co.*, 113 Iowa 652; *Colyer* v. *Hayden*, 94 Ky. 180; *Taft* v. *Taft*, 59 Mich. 185, 60 Am. Rep. 291; *Givens* v. *Ott*, 222 Mo. 395; *Meikle* v. *Cloquet* (Wash.), 87 Pac. 841.

[25] See *e. g. Tarwater* v. *Going*, 140 Ala. 273; *Porter* v. *Woodhouse*, 59 Conn. 568, 21 Am. St. Rep. 131, 13 L. R. A. 64; *Rutledge* v. *Montgomery*, 30 Ga. 899; *Callerand* v. *Piot*, 241 Ill. 120; *Pethel* v. *Pethel* (Ind. App.), 90 N. E. 102; *Kirby* v. *Hulette*, 174 Ky. 257, 192 S. W. 63; *Renehan* v. *McAvoy* (Md.), 81 At. 586; *Joslin* v. *Goddard*, 187 Mass. 165; *Taft* v. *Taft*, 59 Mich. 185; *Ingersoll* v. *Odendahl*, 136 Minn. 428, 162 N. W. 525; *Hall* v. *Waddill*, 78 Miss. 16; *Peters* v. *Berkmeier*, 184 Mo. 393; *Baker* v. *Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Fisher* v. *Hall*, 41 N. Y. 416; *Gaylord* v. *Gaylord*, 150 N. C. 222; *Arnegaard* v. *Arnegaard*, 7 N. D. 475, 41 L. R. A. 258; *Ball* v. *Foreman*, 37 Ohio St. 139; *Eckman* v. *Eckman*, 55 Pa. St. 269; *Johnson* v. *Johnson*, 24 R. I. 571; *Merck* v. *Merck*, 83 S. C. 329; *Cassidy* v. *Holland* (S. D.), 130 N. W. 771; *Gaines* v. *Keener*, 48 W. Va. 56; *Butts* v. *Richards*, 152 Wis. 318, 140 N. W. 1.

[26] Ante note 8.

a legal operation shows that it has not been delivered, since after delivery he has no such right. But since the question whether the grantor has the right of control as regards either possession of the instrument or its legal operation depends on whether there has been a delivery, the statement referred to amounts to little more than a statement that, so long as the instrument is subject to the grantor's control by reason of lack of delivery, the instrument has not been delivered. The statement is unquestionably correct, but appears to be of questionable utility, and its frequent repetition is calculated to obscure, rather than to clarify, the nature of delivery.

In connection with the question of the delivery of a deed, various rules of presumption have been judicially asserted, that is, particular states of fact have been regarded as showing *prima facie*, that the instrument has or has not been delivered.

It has been said that the fact that the instrument remains in the possession of the grantor raises a presumption that it has not been delivered.[27] This appears to be merely another way of saying that delivery is an affirmative fact, the burden of proving which is upon the person alleging it. If he cannot support this burden by evidence of a change of possession of the instrument, he must support it by other evidence.[28]

While a presumption of non delivery is said ordinarily to arise from the grantor's possession of the instrument, no such presumption arises, it is said, if the grantor, by the terms of the instrument, reserves a life estate in the property, for the reason that there is no object in such a reservation unless the instrument is to operate before the grantor's death.[29] That such a reservation shows that the instrument was prepared with the intention that its operation should not be postponed till the grantor's death may be conceded, but it is difficult to see what bearing this has on the question of delivery, since the form of the instrument, even without the reservation, shows that it was prepared with this intention. It might as well be said that any instrument in the form of a conveyance *inter vivos* as distinguished from a will, though still in the possession of the grant-

[27] *Donahue* v. *Sweeny* (Cal.), 153 Pac. 708; *Kavanaugh* v. *Kavanaugh*, 260 Ill. 179, 103 N. E. 65; *Shetler* v. *Stewart*, 133 Iowa 320; *Dunbar* v. *Meadows*, 165 Ky. 275, 176 S. W. 1167; *Dudley* v. *Nickerson* (Me.), 78 At. 100; *Cassidy* v. *Holland* (S. D.), 130 N. W. 771; *Butts* v. *Richards*, 152 Wis. 318, 140 N. W. 1.

[28] See *Jenkins* v. *Southern Railway Co.*, 109 Ga. 35; *Burton* v. *Boyd*, 7 Kan. 1; *Powers* v. *Russell*, 13 Pick (Mass.) 69; *Bisard* v. *Sparks*, 133 Mich. 587; *Ligon* v. *Barton*, 88 Miss. 135; *Tyler* v. *Hall*, 106 Mo. 313, 27 Am. St. Rep. 338; *Atwood* v. *Atwood*, 15 Wash. 285; *Gaines* v. *Keener*, 48 W. Va. 56; *Butts* v. *Richards* (Wis.), 140 N. W. 1.

[29] *Hill* v. *Kreiger*, 250 Ill. 408; *Brick* v. *Garber*, 261 Ill. 378, 103 N. E. 1059; *Collins* v. *Smith* (Iowa), 122 N. W. 839; *Sneathen* v. *Sneathen*, 104 Mo. 201; *Williams* v. *Latham*, 113 Mo. 165; *Ball* v. *Foreman*, 37 Ohio St. 132.

or, is to be presumed to have been delivered, since it would not have been prepared in that form had it not been intended to operate before the grantor's death. Delivery is, as above indicated, the final expression, subsequent to the signing and sealing, of an intention that the instrument shall be legally operative, and whatever the form of the instrument, it cannot well constitute the basis for an inference that, subsequent to the signing and sealing, such intention was expressed.[30]

It has furthermore been said that the grantor's retention of the instrument does not give rise to a presumption of non-delivery if he retains an interest in the property and it is consequently to his advantage that the instrument be preserved.[31] It is however difficult to see that, in the ordinary case, it is to his advantage that the instrument be preserved, if its effect is to divest him of either the whole interest or a partial interest in the property. He would in either case be better off if the instrument were no longer available for the purpose of asserting his grantee's rights thereunder.

That the instrument is in the possession of the grantee named therein is usually referred to as raising a presumption that it has been delivered,[32] based, it would seem, on the probability that the grantor gave him possession of the instrument, and the improbability that the grantor would vest him with such a muniment of title unless he intended that the title should pass.

In England and Massachusetts there are decisions to the effect that the signing and sealing of the instrument in the presence of an attesting witness raises a presumption of delivery,[33] the effect of which presumption would be to justify a finding of delivery, although the instrument is still in the grantor's possession, upon evidence that it was signed and sealed by him. Such a presumption does not appear to have been recognized elsewhere, and it may perhaps be regarded as based on a recognized practice, in the jurisdictions named,

[30] See *Whitney* v. *Dewey*, 10 Idaho 633, 655, 80 Pac. 1117, 69 L. R. A. 572; *Colyer* v. *Hyden*, 94 Ky. 180.

[31] *Blakemore* v. *Byrnside*, 7 Ark. 504; *Cribbs* v. *Walker*, 74 Ark. 104; *Scrugham* v. *Wood*, 15 Wend. 545.

[32] *Gaines* v. *Stiles*, 14 Pet. 322; *Simmons* v. *Simmons*, 78 Ala. 365; *Thompson* v. *McKenna* (Cal. App.), 133 Pac. 512; *Hill* v. *Merritt* (Ga.), 91 S. E. 204; *Inman* v. *Swearingen*, 198 Ill. 437; *Hathaway* v. *Cook*, 258 Ill. 92, 101 N. E. 227; *Hild* v. *Hild*, 129 Iowa 649, 113 Am. St. Rep. 500; *Fish* v. *Poorman*, 85 Kan. 237; *Ball* v. *Sandlin*, 176 Ky. 537, 195 S. W. 1089; *Valentine* v. *Wheeler*, 116 Mass. 478; *Barras* v. *Barras* (Mich.), 159 N. W. 147; *Wilson* v. *Wilson*, 85 Neb. 167; *Pierson* v. *Fisher*, 48 Ore. 223; *Painter* v. *Campbell*, 207 Pa. 189; *Jackson* v. *Lamar* (Wash.), 108 Pac. 946.

[33] *Hall* v. *Bainbridge*, 12 Q. B. 699; *Hope* v. *Harman*, 16 Q. B. 751, note; *Burling* v. *Paterson*, 9 C. & P. 570; *Moore* v. *Hazelton*, 9 Allen (Mass.) 102; *Howe* v. *Howe*, 99 Mass. 88.

of making delivery of the instrument by a declaration to that effect in the presence of witnesses at the time of signing and sealing.[34] The propriety of such an inference of delivery from the mere fact of signing and sealing might indeed depend on the particular circumstances of the case, for instance on the presence or absence of the grantee. That the grantor signs and seals the instrument in the presence of the grantee may justify an inference of delivery, while his doing so in the grantee's absence may not.[35]

That the attestation clause, under which the witnesses write their names, recites the delivery of the instrument, has occasionally been regarded as creating a presumption of delivery,[36] while a contrary view has also been expressed.[37] Such a fact might properly, it would seem, be regarded as evidence sufficient to support a finding of delivery, but whether it should be regarded as creating a presumption of delivery, in the sense of requiring a finding of delivery in the absence of countervailing evidence, appears questionable.[38]

Upon the question whether the fact that an instrument is acknowledged raises a presumption of delivery the cases are few and unsatisfactory. That it does not has occasionally been decided,[39] but there are a greater number of decisions to an opposite effect.[40] The fact that the instrument is acknowledged in the presence of the grantee might operate to create an inference in this regard which

[34] See Halsbury's Laws of England, Vol. 10, p. 385; Williams, Real Prop. (18th ed.) 149; *Xenos* v. *Wickham*, L. R. 2 H. L. 296, 320.

[35] See *Shelton's Case*, Cro. Ely 7; *Levister* v. *Hilliard*, 57 N. C. 12. "If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor." 4 Kent's Comm. 455, quoted and applied in *Scrugham* v. *Wood*, 15 Wend (N. Y) 545; *Wallace* v. *Berdell*, 97 N. Y. 13.

[36] *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Evans* v. *Grey*, 9 L. R. Id. 539; *Clark* v. *Akers*, 16 Kan. 166, (semble); *Hall* v. *Sears*, 210 Mass. 185; *Diehl* v. *Emig*, 65 Pa. 320; *Currie* v. *Donald*, 2 Wash. (Va.) 58.

[37] *Rushin* v. *Shield*, 11 Ga. 636; *Hill* v. *McNichol*, 80 Me. 209; *Fisher* v. *Hall*, 41 N. Y. 416.

[38] That it may furnish evidence of delivery see *Dennis* v. *Dennis*, 119 Mich. 380, 78 N. W. 333; *Hill* v. *Merritt* (Ga.), 91 S. E. 204 (semble).

[39] *Braun* v. *Monroe*, 11 Ky. Law Rep. 324; *Den* v. *Farlee*, 21 N. J. L. 279; *Kille* v. *Ege*, 79 Pa. 15.

[40] *Boyd* v. *Slayback*, 63 Cal. 493; *New Haven Trust Co.* v. *Camp*, 81 Conn. 539, 71 At. 788; *Baker* v. *Updike*, 155 Ill. 54; *Burton* v. *Boyd*, 7 Kan. 17; *Govin* v. *De Miranda*, 76 Hun (N. Y.) 414, 27 N. Y. Supp. 1019; *Tarlton* v. *Griggs*, 131 N. C. 216, 233; *Humphrey* v. *Hartford Fire Ins. Co.*, 15 Blatchf. (U. S.) 35.

In *Alexander* v. *De Kermel*, 81 Ky. 345, it was decided that acknowledgement did not create a presumption of delivery for the reason that the concurrence of the grantee is necessary. This however involves another question, that of the necessity of acceptance.

an acknowledgment out of his presence would not create.[41] Some weight might also be imputed to the language of the certificate of acknowledgment, an acknowledgment in express terms that the grantor delivered the instrument being perhaps entitled to more weight than an acknowledgment merely that he executed it.[43-44] The usage of the community as to the time and manner of making acknowledgments might also have a bearing in this regard.[45] It would seem on the whole desirable that the courts refrain from the assertion of a presumption of delivery from acknowledgment. but rather leave it to the jury to determine whether the circumstances of the particular case show an intention on the part of the grantor that the instrument shall be legally operative.[46] In several cases it is in effect decided that a finding of delivery cannot be based on the fact of acknowledgment alone.[47]

The question may arise in this connection of the effect of a statute, such as exists in a number of states, making an instrument, if duly acknowledged, admissible without further proof of execution. In one state such a statute has been regarded as placing on the opposite party the burden of showing non-delivery[48] but this does not appear to accord with decisions in other jurisdictions that the authentication of a document sufficient to render it admissible in evidence does not necessarily create a presumption of its execution.[49]

That the grantor has the instrument recorded, or leaves it with the proper official for record, has been frequently referred to as raising a presumption of delivery.[50] This amounts in effect to a

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[41] See *Scrugham* v. *Wood*, 15 Wend (N. Y.) 545; *Delaplain* v. *Grubb*, 44 W. Va. 612; *Adams* v. *Baker*, 50 W. Va. 249, 40 S. E. 356.

[43-44] See *Hawes* v. *Hawes*, 177 Ill. 409; *Den* v. *Farlee*, 21 N. J. L. 279; *Blight* v. *Schenck*, 10 Pa. 285.

[45] In *Braun* v. *Monroe*, 11 Ky. Law Rep. 324, it is said that the acknowledgment raises a presumption of delivery because the instrument ought to be delivered before acknowledgment. This cannot well be said in all communities.

[46] That the acknowledgment is merely evidence bearing on the question appears to be recognized in *Ferguson* v. *Bond*, 39 W. Va. 566; *Hutchinson* v. *Rust*, 2 Gratt (Va.) 394.

[47] *Humphrey* v. *Hartford Fire Ins. Co.*, 15 Blatchf. (U. S.) 35; *Wiggins* v. *Lusk*, 12 Ill. 132; *Baker* v. *Updike*, 155 Ill. 54; *Burton* v. *Boyd*, 7 Kan. 17; *Govin* v. *De Miranda*, 76 Hun 414, 27 N. Y. Supp. 1019.

[48] *Tucker* v. *Helgren*, 102 Minn. 382.

[49] *Anderson* v. *Cuthbert*, 103 Ga. 767; *Scott* v. *Delany*, 87 Ill. 146; *Ross* v. *Gould*, 5 Me. 204; *Siegfried* v. *Levan*, 6 Sergt. R. 308; *Bogle* v. *Sullivant*, 1 Call (Va.) 561. See 3 Wigmore, Evidence, § 2135.

[50] *Lewis* v. *Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Lee Hardware Co.* v. *Johnson* (Ark.), 201 S. W. 289; *Ellis* v. *Clark*, 39 Fla. 714; *Creighton* v. *Roe*, 218 Ill. 619, 109 Am. St. Rep. 310; *Blackenship* v. *Hall*, 233 Ill. 116; *Colee* v. *Colee*, 122 Ind. 109; *Hutton* v. *Smith*, 88 Iowa 238; *Lay* v. *Lay* (Ky.), 66 S. W. 371; *Holmes* v. *McDonald*, 119 Mich. 563, 75, Am. St. Rep. 430; *Griffin* v. *Hovey* (Mich.), 146 N. W. 210; *Ingersoll* v. *Odendahl*, 136 Minn. 428, 162 N. W. 525; *Chambers* v. *Chambers*, 227 Mo. 262;

statement that such action on the part of the grantor shows, *prima facie*, an intention on his part that the instrument shall be legally operative. It is, in the ordinary case, difficult to see any object in leaving the instrument for record, unless it is intended that it shall operate as a conveyance, and the rule of presumption referred to appears to be founded in reason. In a few states only does this view appear to have been actually repudiated, and it is not always clear, in these states, why such an effect is denied to the grantor's conduct in this regard.[51] In a very considerable number of cases it is said that the action of the grantor in having the instrument recorded does not show delivery if this was without the knowledge or consent of the grantee,[52] but this introduces another question, that of the necessity of acceptance of a conveyance, which properly calls for separate discussion,[53] and these cases cannot generally be regarded as involving a repudiation of the view that the action of the grantor in having the instrument recorded shows, *prima facie*, an intention that it shall take effect as a conveyance. The presumption of delivery, based on the action of the grantor in having the instrument recorded, is recognized as being subject to rebuttal by evidence that he did not intend the instrument to operate as a conveyance.[54]

In several cases the fact that the purpose of the conveyance was

Mitchell's Lessee v. *Ryan*, 3 Ohio St. 377; *Robbins* v. *Roscoe*, 120 N. C. 791, 38 L. R. A. 238, 58 Am. St. Rep. 774; *Thompson* v. *Jones*, 1 Head (Tenn.) 574; *Davis* v. *Garrett*, 91 Tenn. 147; *Newton* v. *Emerson*, 66 Tex. 142; *Bjmerland* v. *Ely*, 15 Wash. 101.

[51] See *Egan* v. *Horrigan*, 96 Me. 46. In *McManus* v. *Commow*, 10 N. D. 340, the decision to this effect is based on an ill-advised statute undertaking to state what constitutes delivery. In Massachusetts this position appears to be in part the result of the view (post at note 81) that there must be knowledge of or assent to the conveyance on the part of the grantee. (See *Maynard* v. *Maynard*, 10 Mass. 456; *Samson* v. *Thornton*, 3 Metc. 275), and in part of the notion that delivery of a deed means the physical transfer of the instrument. *Hawkes* v. *Pike*, 105 Mass. 560; 7 Am. St. Rep. 554; *Barnes* v. *Barnes*, 161 Mass. 381. The legislature has now intervened by making the record of a conveyance conclusive evidence of delivery in favor of a bona fide purchaser. See Rev. Laws, c. 127, § 5.

[52] *Young* v. *Guilbean*, 3 Wall (U. S.) 636; *Parmelee* v. *Simpson*, 5 Wall 81; *Knox* v. *Clark* (Col.), 62 Pac. 334; *Sullivan* v. *Eddy*, 154 Ill. 199; *Wilcnon* v. *Handlon*, 207 Ill. 104; *Vaughan* v. *Godman*, 94 Ind. 191; *O'Connor* v. *O'Connor*, 100 Iowa 476; *Alexander* v. *De Kermel*, 81 Ky. 345; *Oxnard* v. *Blake*, 45 Me. 602; *Maynard* v. *Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Samson* v. *Thornton*, 3 Metc. (Mass.) 275, 37 Am. Dec. 135; *Bullitt* v. *Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Cravens* v. *Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606; *Derry Bank* v. *Webster*, 44 N. H. 264; *Jackson* v. *Phipps*, 12 Johns (N. Y.) 418; *King* v. *Antrim Lumber Co.* (Okla.), 172 Pac. 958; *Bogard* v. *Barham* (Ore.), 108 Pac. 214.

[53] Post at note 81 et seq.

[54] *Humiston* v. *Humiston*, 66 Conn. 579; *Jones* v. *Bush*, 4 Harr (Del.) 1; *Ellis* v. *Clark*, 39 Fla. 714; *Sullivan* v. *Eddy*, 154 Ill. 199; *Vaughan* v. *Vaughan*, 94 Ind. 19; *Hutton* v. *Smith*, 88 Iowa 238; *Hogadone* v. *Grange Mut. Fire Ins. Co.*, 133 Mich. 339; *Barras* v. *Barras* (Mich.), 159 N. W. 147; *Babbitt* v. *Bennett*, 68 Minn. 260; *Metcalfe* v. *Brandon*, 60 Miss. 685; *Boardman* v. *Dana*, 34 Pa. 252; *Thompson* v. *Jones*, Head (Tenn.) 576; *Walsh* v. *Vermont Mut. Fire Ins. Co.*, 54 Vt. 351.

merely to prevent the assertion or collection of a claim by a third person against the grantor and not to vest a beneficial interest in the grantee, has been regarded as precluding, or at least as tending to preclude, any inference of delivery from the grantor's action in recording the instrument.[55] Such a view appears, however, to be open to question. The instrument cannot operate in any degree for his protection unless it operates as a conveyance, and the fact that he desires protection would seem to be rather an additional reason for regarding the instrument as having become operative by delivery.[56] Even conceding that his purpose to avoid payment of claims would show that there was no delivery, it might be questioned whether he, or one claiming in his right, should be allowed to assert that the ordinary inference from his use of the recording system should not be drawn, because he made such use for purposes of deception.

That the grantor, after having the instrument recorded, himself obtains it from the recording officer, instead of leaving it with the latter to be called for by the grantee, does not appear to have any proper bearing upon the question of the grantor's intention in having it recorded.[57] Even though there were the fullest intention on the part of the grantor that the instrument should become legally effective, he might well desire to have it returned to him to hold temporarily. The fact however that the grantor not only obtains the instrument after its record, but retains it in his possession, has been regarded as showing that it has not been delivered.[58] Conceding that the record of the instrument by the grantor is sufficient in itself to make a *prima facie* showing of delivery, it is not entirely clear why his subsequent retention of the instrument should be regarded as showing a different intention. That the grantor has the instrument recorded might properly, it is submitted, overcome any inference of non-delivery from his subsequent possession of the in-

[55] *Coulson* v. *Scott* (Ala.), 52 So. 436; *Union Mut. Life Ins. Co.* v. *Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *Weber* v. *Christen*, 121 Ill. 98; *Vaughan* v. *Godman*, 94 Ind. 19; *Davis* v. *Davis*, 92 Iowa 147; *Egan* v. *Horrigan*, 96 Me. 46; *Hogadone* v. *Grange Mut. Fire Ins Co.*, 133 Mich. 339; *Hooper* v. *Vanstrum*, 92 Minn. 406; *Koppelmann* v. *Koppelmann*, 94 Tex. 40, 57 S. W. 570; *Elmore* v. *Marks*, 39 Vt. 538.

[56] See *Decker* v. *Stansbury*, 249 Ill. 487; *Chambers* v. *Chambers*, 227 Mo. 262; *Corley* v. *Corley*, 2 Cold (Tenn.) 520.

[57] See *Lewis* v. *Watson*, 98 Ala. 480, 22 L. R. A. 297; *Russell* v. *May*, 77 Ark. 89; *Moore* v. *Giles*, 49 Conn. 570; *Allen* v. *Hughes*, 106 Ga. 775; *Colee* v. *Colee*, 122 Ind. 109; *Collins* v. *Smith* (Iowa), 122 N. W. 839; *Lay* v. *Lay* (Ky.), 66 S. W. 371; *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377; *Thompson* v. *Jones*, 1 Head (Tenn.) 576. But *Weber* v. *Christen*, 121 Ill. 98 is apparently *contra*.

[58] *Weber* v. *Christen*, 121 Ill. 98; *Hutton* v. *Smith*, 88 Iowa 238; *Jourdain* v. *Patterson*, 102 Mich. 602; *Babbitt* v. *Babbitt*, 68 Minn. 260; *Elmore* v. *Marks*, 39 Vt. 538; *Fairhaven Marble Co.* v. *Owens*, 69 Vt. 749. See *King* v. *Antrim Lumber Co.* (Okla.), 172 Pac. 958.

strument, since, as before remarked, it is difficult to conceive of any object in having it recorded other than that it should be legally operative.

It being conceded that a manual transfer of the instrument by the grantor directly to the recording officer shows, *prima facie,* an intention that it shall operate as a conveyance, it would seem that his transfer of the instrument to another, to be by the latter handed to the recording officer, might likewise show such an intention, and there are decisions to that effect.[59]

It has been frequently asserted that the mere fact that the instrument is of record raises a presumption of delivery, without any reference being made to the identity of the person who had it recorded.[60] The cases do not ordinarily indicate the basis of this presumption, but occasionally[61] it has been regarded as based, to some extent at least, upon the statutory provisions, existent in most of the states[62] making an instrument, duly acknowledged or proved, and recorded, or a copy thereof, admissible without further proof. But this latter view does not appear to accord with the authorities, before referred to,[63] that the authentication of an instrument sufficient to justify its admission in evidence does not create a presumption of its due execution. A more satisfactory reason for inferring delivery from the fact that the instrument is of record would seem to be the probability that it was placed on record either by the grantor, this indicating an intention on his part to make it operative,[64] or by the grantee, this indicating that it was in his possession, which itself raises a presumption of delivery.[65] Any presumption arising from the mere fact of record might be overthrown by evidence that the instrument was not placed on record by the authority of either the

[59] *Tennessee Coal, Iron & Railroad Co.* v. *Wheeler,* 125 Ala. 538; *Zeigler* v. *Daniel* (Ark.), 194 S. W. 246; *Valta* v. *Blavka,* 195 Ill. 610; *In re Bell's Estate* (Iowa), 130 N. W. 798; *Robbins* v. *Roscoe,* 120 N. C. 79, 39 L. R. A. 238, 58 Am. St. Rep. 774; *Thompson* v. *Jones,* 1 Head (Tenn.) 576; *Bates* v. *Winters,* 138 Wis. 673, 120 N. W. 498.

[60] *Estes* v. *German Nat. Bank,* 62 Ark. 7; *Parker* v. *Salmons,* 101 Ga. 160, 65 Am. St. Rep. 291; *Spencer* v. *Rayor,* 251 Ill. 278; *Witt* v. *Witt* (Iowa), 156 N. W. 321; *Balin* v. *Osola* (Kan.), 91 Pac. 57; *Maynard* v. *Maynard,* 145 Ky. 197; *Patrick* v. *Howard,* 47 Mich. 40; *Sweetland* v. *Buell,* 164 N. Y. 541, 79 Am. St. Rep. 676; *Stephenson* v. *Van Blokland* (Ore.), 118 Pac. 1026; *McDaniel* v. *Anderson,* 19 S. C. 211; *Morgan* v. *Morgan,* 82 Vt. 243; *Whiting* v. *Hoglund,* 127 Wis. 135; *Laughlin* v. *Calumet & Chicago Canal & Dock Co.,* 13 C. C. A. 1, Fed. 441.

[61] See *Napier* v. *Elliott* (Ala). 58 So. 435; *Jackson* v. *Perkins,* 2 Wend. (N. Y.) 317; *Mitchell's Lessee* v. *Ryan,* 3 Ohio St. 377; *Goodlett* v. *Goodman Coal & Coke Co.,* 192 Fed. 775, 113 C. C. A. 61.

[62] These statutes are summarized in 3 Wigmore, Evidence, §§ 1651, 1676.

[63] Ante note 49.

[64] Ante note 50.

[65] Ante note 32.

grantor or grantee,[66] or by other evidence to the effect that there was no delivery.[67]

That the parties to the instrument acted as if the title to the property had passed to the grantee named has been regarded as showing, or tending to show, delivery.[68] In regard to this it may be said that, while the fact that the grantor named acts as if the title had passed to the grantee named would appear to be strong evidence of his intention that the instrument should operate to pass the title,[69] that the grantee named so acts would appear to have little or no evidential value in this regard.

It was said by Chancellor Kent, in a quite early New York case,[70] that a voluntary settlement is valid, even though the grantor retains possession of the instrument, in the absence of other circumstances to show that it is not intended to be absolute. In view of the fact, well recognized at the present day, if not at that time, that not only a voluntary settlement, but any conveyance, may be effective although the physical possession of the instrument remains in the grantor,[71] the statement referred to with reference to voluntary settlements appears to have no particular significance. It has however been quoted from time to time,[72] and it appears to be responsible for the view, asserted in two or three states, that in the case of a voluntary settlement, especially when made in favor of an infant, the law will make stronger presumptions in favor of delivery than in other cases.[73] In one state it has even been said that in case of such a settlement the burden of proof is on the grantor to show that there was no delivery.[74] Why there should be a relaxation of the require-

[66] *Bouvier Jaeger Coal Co.* v. *Sypher*, 186 Fed. 644.

[67] *Equitable Mortgage Co.* v. *Brown*, 105 Ga. 475; *Hathaway* v. *Cook*, 258 Ill. 92, 101 N. E. 227; *McCune* v. *Goodwillie*, 204 Mo. 306.

[68] *Gould* v. *Day*, 94 U. S. 405; *In re Jackson Brick & Tile Co.*, 189 Fed. 636; *Cribbs* v. *Walker*, 74 Ark. 104; *Bruner* v. *Hart* (Fla.), 51 So. 593; *Rodemeier* v. *Brown*, 169 Ill. 347; *Bunnell* v. *Bunnell*, 111 Ky. 566; *Patrick* v. *Howard*, 47 Mich. 40.

[69] See *Cooley* v. *Cooley*, 2 Coldw. (Tenn.) 520; *Donahue* v. *Sweeny* (Cal.), 153 Pac. 708; *Tweedale* v. *Barnett* (Cal.), 156 Pac. 483; *Tupper* v. *Foulkes*, 9 C. B., N. S. 797.

[70] *Sowerbye* v. *Arden*, 1 Johns, Ch. 240.

[71] Ante note 8.

[72] See *Wallace* v. *Berdell*, 97 N. Y. 13; *Bryan* v. *Wash*, 7 Ill. 557; 1 Perry, Trusts, § 103.

[73] *Miller* v. *Meers*, 155 Ill. 284; *Latimer* v. *Latimer*, 174 Ill. 418; *Abbott* v. *Abbott*, 189 Ill. 488, 82 Am. St. Rep. 472; *Baker* v. *Hall*, 214 Ill. 364, 73 N. E. 351; *Colee* v. *Colee*, 122 Ind. 109; *Crowder* v. *Searcy*, 103 Mo. 97; *Schooler* v. *Schooler*, 258 Mo. 83, 167 S. W. 444.

[74] *Bryan* v. *Wash*, 7 Ill. 557; *Winterbottom* v. *Pattison*, 152 Ill. 334; *Abbott* v. *Abbott*, 189 Ill. 488, 82 Am. St. Rep. 472. But in *Hawes* v. *Hawes*, 177 Ill. 409, the necessity of a showing of delivery even in the case of a voluntary settlement is clearly recognized.

ments of proof of delivery in the case of such a settlement is not entirely clear. It has been said that "the same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee, frequently, to take care of his own interests."[75] As a matter of fact, however, no formality is necessary in any case for the delivery of a conveyance, and conceding the necessity of delivery, the reasons suggested for dispensing with the ordinary proof thereof in this particular case appear somewhat inadequate. Indeed the fact that the settlement is voluntary, a gift merely, might well be regarded as requiring the strictest proof of delivery.[76]

Since an instrument of conveyance operates to transfer the title to the property only upon delivery, the ascertainment of the date of delivery is frequently a matter of importance. There is a rebuttable presumption that the day of delivery was the day on which it is dated,[77] provided at least it is not acknowledged, or is not acknowledged on a different date. When the date of the instrument differs from the date of acknowledgment, the delivery is by some courts presumed to have taken place on the former date,[78] and by some on the latter.[79] This difference of view as to whether the date of acknowledgment controls, in the absence of other evidence, appears to be the result, to a very considerable extent at least, of a difference of view as to the probability of delivery before acknowledgment, and the usage of different communities in this regard might well differ.

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[75] *Bryan* v. *Walsh*, 7 Ill. 557.

[76] See *Jamison* v. *Craven*, 4 Del. Ch. 311; *Hooper* v. *Vanstrum*, 92 Minn. 406.

[77] *Williams* v. *Armstrong*, 130 Ala. 389; *Kimball* v. *Chicago*, 253 Ill. 105; *Sweetser* v. *Lowell*, 33 Me. 446; *Schweigel* v. *Shakman Co.*, 78 Minn. 142; *Blair State Bank* v. *Bunn*, 61 Neb. 464; *Grossen* v. *Oliver*, 37 Ore. 514; *State* v. *Dana* (Wash.), 109 Pac. 191; *Douthat* v. *Roberts* (W. Va.), 80 S. E. 819; *Wheeler* v. *Single*, 62 Wis. 380.

[78] *Smith* v. *Scarbrough*, 61 Ark. 104; *Smiley* v. *Fries*, 104 Ill. 416; *Lake Erie etc. R. Co.* v. *Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, 28 L. R. A. 612; *McConnell* v. *Brown*, 6 Litt (Ky.) 459; *Ford* v. *Gregory*, 10 B. Mon. (Ky.) 175; *Smith* v. *Porter*, 10 Gray (Mass.) 66; *Conley* v. *Finn*, 171 Mass. 70, 68 Am. St. Rep. 399; (But see *Mighill* v. *Town of Rowley*, 224 Mass. 586, 113 N. E. 569); *People* v. *Snyder*, 41 N. Y. 397; *Harriman Land Co.* v. *Hilton*, 121 Tenn. 308; *Kirby* v. *Cartwright* (Tex. Civ. App.), 106 S. W. 742; *Beall* v. *Chatham* (Tex. Civ. App.), 117 S. W. 492; *Harman* v. *Oberdorfer*, 33 Gratt (Va.) 497. In *Calligan* v. *Calligan*, 259 Ill. 52, 102 N. E. 247, it is decided that the deed is to be presumed to have been delivered on the day of its date, though not acknowledged till a later date, if the acknowledgment was not necessary to the passing of the title, and only then.

[79] *Kitchener* v. *Jehlik*, 85 Kan. 684; *Loomis* v. *Pingree*, 43 Me. 299 (semble); *Henderson* v. *Baltimore*, 8 Md. 352 (semble); *Fontaine* v. *Boatmen's Sav. Inst.*, 57 Mo. 552; *Blanchard* v. *Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Miller* v. *Peter*, 158 Mich. 336; *Barber Asphalt Pav. Co.* v. *Field*, 174 Mo. App. 11, 161 S. W. 364; *Bolaskey* v. *Furey*, 12 Phila. (Pa.) 428 (semble); *Kent* v. *Cecil* (Tex. Civ. App.), 25 S. W. 715.

ACCEPTANCE

In many of the states, perhaps a majority, an acceptance of the conveyance by the grantee named therein has been regarded as essential to its validity.[80] And it has accordingly been decided in a number of cases that the conveyance is not effective as against the claim of a third person which accrued, by reason of attachment, recovery of a judgment, or purchase for value, between the time of delivery of the instrument and the grantee's subsequent assent thereto.[81]

A conveyance was effective at common law although the transferee did not assent thereto or even know thereof, he always having however the right to "disclaim," that is, to repudiate the conveyance and thereby revest the title in the grantor.[82] Such is the rule in England at the present day.[83] And in spite of the constant assertion and reassertion by the courts in this country of the necessity of acceptance, it is difficult to avoid the conclusion that in a number of states the rule in this regard is the same as in England, that no acceptance of the conveyance is necessary, though the grantee may, if he choose, dissent and disclaim. That no acceptance is necessary appears to be involved in the statement, made with great frequency,

[80] *Russell* v. *May*, 77 Ark. 89, 90 S. W. 617; *Hibberd* v. *Smith*, 67 Cal. 547; 56 Am. Rep. 726; *Knox* v. *Clark* (Colo. App.), 62 Pac. 334; *Stallings* v. *Newton*, 110 Ga. 875; *Hulick* v. *Scovil*, 9 Ill. 159; *Abernathie* v. *Rich*, 256 Ill. 166, 99 N. E. 883; *Woodbury* v. *Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Kyle* v. *Kyle* (Iowa), 157 N. W. 248; *Alexander* v. *De Kermel*, 81 Ky. 345; *Cates* v. *Cates*, 152 Ky. 47, 153 S. W. 10; *Houlton* v. *Houlton*, 119 Md. 180, 86 At. 514; *Meigs* v. *Dexter*, 172 Mass. 217; *Watson* v. *Hillman*, 57 Mich. 607; *Miller* v. *McCaleb*, 208 Mo. 562; *Rennebaum* v. *Rennebaum*, 78 N. J. Eq. 307, 79 At. 275, 79 N. J. Eq. 654, 83 At. 1118; *Arnegaard* v. *Arnegaard*, 7 N. D. 475, 75 N. W. 795, 41 L. R. A. 258; *Couch* v. *Addy*, 35 Okla. 355, 129 Pac. 709; *Larisey* v. *Larisey*, 93 S. C. 450, 77 S. E. 129 *Reid* v. *Gorman* (S. D.), 158 N. W. 780; *Kempner* v. *Rosenthal*, 81 Tex. 12; *Welch* v. *Sackett*, 12 Wis. 243; And see ante, note. *Kuh* v. *Garvin*, 125 Mo. 563; *Rogers* v. *Heads Iron Foundry*, 51 Neb. 52, 37 L. R. A. 433; *Welch* v. *Sackett*, 12 Wis. 243.

It has been said in this connection that while acceptance will ordinarily relate back to the time of delivery, it will not do so to the prejudice of third persons. *Hibberd* v. *Smith*, 67 Cal. 547, 56 Am. Rep. 726.

[81] *Partridge* v. *Chapman*, 81 Ill. 137; *Woodbury* v. *Fisher*, 20 Ind. 387, 83 Am. Dec. 325; (But see *Emmons* v. *Harding*, 162 Ind. 154); *Day* v. *Griffith*, 15 Iowa 104; *Bell* v. *Farmers' Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205; *Simpson* v. *Yocum*, 172 Ky. 449, 189 S. W. 439; *Field* v. *Fisher*, 65 Mich. 606; *Knox* v. *Clark* (Colo. App.), 62 Pac. 334; *Evans* v. *Coleman*, 101 Ga. 152; *McFadden* v. *Ross*, 14 Ind. App. 312; *Fischer Leaf Co.* v. *Whipple*, 51 Mo. App. 181; *Derry Bank* v. *Webster*, 44 N. H. 264; *Kempner* v. *Rosenthal*, 81 Tex. 12; *Parmelee* v. *Simpson*, 5 Wall (U. S.) 81. See *Stone* v. *New England Box Co.*, 216 Mass. 8, 102 N. E. 949.

[82] Litt. §§ 684, 685; *Butler* v. *Baker's Case*, 3 Co. Rep. 26c; *Thompson* v. *Leach*, 2 Vent. 198; Sheppard's Touchstone, 284. See *Skipwith's Ex'r.* v. *Cunningham*, 8 Leigh (Va.) 272.

[83] *Siggers* v. *Evans*, 2 El. & Bl. 367; *Standing* v. *Bowring*, 31 Ch. D. 286; *Mallott* v. *Wilson* (1903), 2 Ch. 494. See article on the nature of disclaimer by F. E. Farrer, Esq., in 32 Law Quart. Rev. 83.

that, provided the conveyance can be regarded as beneficial in character, and as not involving any burden on the grantee, his acceptance will be presumed in the absence of any showing of dissent,[84] and this though he is in entire ignorance of the conveyance.[85] Such a statement represents a tendency, which appears to be open to criticism,[86] to express rules of substantive law in the form of rules of presumption, a mode of expression which is particularly objectionable when, as in this case, the thing presumed to exist is a thing which concededly does not exist. If there is no acceptance, no rule of law, whether or not designated a presumption, can create an acceptance. And the only conclusion, it is submitted, to be drawn from the decisions upholding a beneficial conveyance even in the absence of acceptance, is that acceptance is not necessary in the case of such a conveyance. The adoption of the double fiction, that acceptance is necessary, and that it exists although confessedly it does not exist, has, it is conceived, no reason whatsoever of policy or convenience in its favor.

The assertion of a presumption of acceptance, as it appears in the cases referred to, is objectionable, it is submitted, not only as involving the introduction of confusing and unnecessary fictions, but also because it in effect differentiates, as regards the necessity of acceptance, between conveyances which are and are not beneficial. Since the grantee, so long as he has not actually accepted the trans-

[84] *Arrington* v. *Arrington*, 122 Ala. 510; *Graham* v. *Suddeth* (Ark.), 133 S. W. 1033; *De Levillian* v. *Edwards*, 39 Cal. 120; *Merrills* v. *Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Moore* v. *Giles*, 49 Conn. 570; *Baker* v. *Hall*, 214 Ill. 364, 73 N. E. 351; *Bremmerman* v. *Jennings*, 101 Ind. 253; *Emmons* v. *Harding*, 162 Ind. 154, 70 N. E. 142; *Podhajsky's Estate*, 137 Iowa 745, 115 N. W. 596; *Gideon* v. *Gideon*, 99 Kan. 334; *Jefferson County Building Ass'n* v. *Heil*, 81 Ky. 513; *Houlton* v. *Houlton*, 119 Md. 180. 86 At. 514; *Ingersoll* v. *Odendahl*, 136 Minn. 428, 162 N. W. 525; *Metcalfe* v. *Brandon*, 60 Miss. 685; *Ensworth* v. *King*, 50 Mo. 477; *Jones* v. *Swayze*, 42 N. J. L. 279; *Rennebaum* v. *Rennebaum*, 78 N. J. Eq. 427, 79 At. 309; *Spencer* v. *Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Ten Eyck* v. *Whitbeck*, 156 N. Y. 341; *Lynch* v. *Johnson*, 171 N. C. 611; 89 S. E. 61; *Arnegaard* v. *Arnegaard*, 7 N. D. 475, 75 N. W. 797; 41 L. R. A. 258; *Shaffer* v. *Smith* (Okla.), 156 Pac. 1188, (voluntary deed); *In re Braley's Estate* (Vt.), 82 At. 5; *Guggenheimer* v. *Lockridge*, 39 W. Va. 457. In *Ward* v. *Rittenhouse Coal Co.*, 152 Ky. 228, 153 S. W. 217, it is said that acceptance is not to be implied or presumed if the grantee is competent and is present in person.

[85] *Elsberry* v. *Boykin*, 65 Ala. 336; *Gulf Red Cedar Co.* v. *Cranshaw* (Ala.), 53 So. 812; *Russell* v. *May* (Ark.), 90 S. W. 617; *Tibballs* v. *Jacobs*, 31 Conn. 428; *In re Bell's Estate* (Iowa), 133 S. W. 1033; *Burch* v *Nicholson* (Iowa), 137 N. W. 1066; *Wuester* v. *Folin*, 60 Kan. 334, 56 Pac. 490; *Clark* v. *Creswell*, 112 Md. 339; *Roepke* v. *Nutzman* (Neb.), 146 Mo. 939 (conditional delivery); *Vreeland* v. *Vreeland*, 48 N. J. Eq. 56; *Everett* v. *Everett*, 48 N. Y. 218; *Munoz* v. *Wilson*, 111 N. Y. 295; *Saltzsieder* v. *Saltzsieder*, 219 N. Y. 523, 114 N. E. 856 (conditional delivery); *Robbins* v. *Roscoe*, 120 N. C. 79, 38 L. R. A. 238, 58 Am. St. Rep. 774; *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377.

[86] See Thayer, Preliminary Treatise on Evidence, pp. 326, 335, 351; 2 Chamberlayne, Evidence, §§ 1087, 1145, 1146, 1160 et seq.

fer, can disclaim, and so exclude any possibility of prejudice to him by reason of the conveyance, it is not readily perceived why the courts should undertake to discriminate in this regard. Whether the conveyance shall be eventually availed of by the grantee is a matter for him to decide, and it does not appear to be the province of the court to indulge in suppositions as to his probable action in this respect. If acceptance is otherwise not necessary, why should the non beneficial character of the conveyance render it necessary? If it is otherwise necessary, why should the beneficial character of the conveyance render it unnecessary? Such a distinction, based on the beneficial or onerous character of the conveyance, has been repudiated in England,[87] but has been applied in several cases in this country,[88] with the effect of invalidating a conveyance not actually accepted, because not regarded by the court as beneficial in character, although, in these same jurisdictions, a "beneficial" conveyance would have been upheld without any acceptance. If an actual assent or acceptance, it may be remarked, is to be regarded as necessary whenever any burden or obligation is imposed on the grantee, it is somewhat difficult to understand the decisions, hereafter referred to[89] which uphold the validity of a conveyance in trust, although the trustee has not assented thereto.

The view that assent or acceptance on the part of the grantee is necessary appears to have had its origin, for the most part, in the notion that a conveyance is a contract, and that consequently there must be a meeting of minds.[90] But a conveyance is not a contract,[91] and there is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it. In the case of a devise, as well as in that of a

[87] "Almost every conveyance, in truth, entails some charge or obligation which may be onerous in the way of covenant or liability; and we think it much safer that one general rule should prevail, than that the courts should be asked in each particular instance if the deed may not be considered onerous." Campbell, C. J. in *Siggers* v. *Evans*, 5 El. & Bl. 367.

[88] Occasionally a conveyance has been regarded as not beneficial because it was made in the performance of a contract of sale, which imposed an obligation for the purchase money upon the purchaser. *Derry Bank* v. *Webster*, 44 N. H. 268; *Boardman* v. *Dean*, 34 Pa. 252; *Wood* v. *Montpelier*, (Vt.), 82 At. 671. And a mortgage or conveyance to secure several creditors has been regarded as not beneficial for the reason that its acceptance by any one of the creditors might result in precluding his recovery of the whole of his claim. *Johnson* v. *Farley*, 45 N. H. 505. A conveyance made to one merely as a conduit of title has been regarded as not beneficial for this purpose. *Little* v. *Eaton*, 267 Ill. 263, 108 N. E. 727. Compare *Ferrell* v. *Childress*, 172 Ky. 160, 189 S. W. 1149, where a conveyance so made was regarded as properly accepted by the person beneficially interested in its execution.

[89] Post note 95.

[90] See *Welch* v. *Sackett*, 12 Wis. 243; Rogers Heads Iron Foundry, 51 Neb. 521; 37 L. R. A. 433.

transfer by operation of law, the ownership passes without reference to whether the transferee has consented to take the property, and the same might well occur in the case of a voluntary transfer *inter vivos*, provided only the transferee has the privilege of subsequently refusing the transfer.[92] In support of this view reference may be made to the case of conveyances to infants and persons *non compos mentis*, and to that of conveyances in trust, discussed in the two following paragraphs.

In the case of a conveyance to an infant, or to a person *non compos mentis* the courts, even those which assert most positively the necessity, in the ordinary case, of an actual acceptance, undertake to avoid the difficulty of requiring acceptance on the part of one incapable of giving it, by asserting that in such case the assent of the grantee will be conclusively presumed, provided at least the conveyance is beneficial in character.[93] But, as before remarked, the conceded lack of acceptance cannot well be supplied by a presumption that the grantee would, if he had an opportunity, accept the conveyance, and moreover, even supposing this could be done, the presumed acceptance, in the case of a conveyance to an infant, or to a person *non compos mentis* would be an acceptance by a person lacking in legal capacity, and therefore a nullity.

In the case of a conveyance in trust, the legal title is usually regarded as vesting in the trustee without any acceptance by him, or even any knowledge on his part of the conveyance,[94] this result

[91] Anson, Contracts (13th ed.) 3, 4; Pollock, Contracts, Appendix A; Hammon, Contracts, §§ 6, 7, note 11; Clark, Contracts, 11.

Nor does a contract necessarily involve a meeting of the minds of the parties. "The contractual obligations which the common law recognized were enforced, and are still enforced, not because those obligations are the result of agreement, but because certain forms of procedure afforded remedies for certain wrongs." Harriman, Contracts, (2nd ed.) § 611.

[92] If a father should die testate, devising an estate to his daughter, and the latter should afterwards die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate. Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will. Thurman, C. J. in *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 377.

[93] *Staggers* v. *White* (Ark.), 11 S. W. 139; *Turner* v. *Turner* (Cal.), 161 Pac. 980; *Miller* v. *Meers*, 155 Ill. 284; *Vaughan* v. *Godman*, 94 Ind. 191; *Tausel* v. *Smith* (Ind. App.), 93 N. E. 548; *Fitzgerald* v. *Toedt* (Iowa), 120 N. W. 465; *Combs* v. *Ison*, 168 Ky. 728, 182 N. W. 953; *Campbell* v. *Kuhn*, 45 Mich. 513, 40 Am. Rep. 479; *Fenton* v. *Fenton* (Mo.), 168 S. W. 1152; *Chambers* v. *Chambers*, 227 Mo. 262; *Bjmerland* v. *Eley*, 15 Wash. 101.

[94] *Adams* v. *Adams*, 21 Wall. 185; *Devol* v. *Dye*, 123 Ind. 321; 7 L. R. A. 439; *Minot* v. *Tilton*, 64 N. H. 371; *Gulick* v. *Gulick*, 39 N. J. Eq. 401; *Myrover* v. *Frenchi*,

being not infrequently attained on the theory of a presumption of assent.[95] Even though he subsequently dissents, and refuses to accept, the conveyance does not become nugatory, but equity will appoint another trustee.[96] The equitable interest under a deed of trust likewise vests in the beneficiary named without any acceptance thereof by him, or even any knowledge by him of the trust.[97] It is sometimes said, in this connection, that one is presumed to accept the benefit of a trust.[98]

The courts, in referring to the necessity of acceptance, do not always clearly indicate whether it is to be regarded as an element of delivery, or as something additional to, and separate from delivery. Perhaps they more frequently suggest the former view[99]

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73 N. C. 609; *Read* v. *Robinson*, 6 Watts & S. 329; *First Bank* v. *Holmes*, 85 Pa. 231; *Talbot* v. *Talbot* (R. I.), 78 At. 535; *Cloud* v. *Calhoun*, 10 Rich Eq. (S. C.), 358; *Furman* v. *Fisher*, 4 Cold (Tenn.) 626, 94 Am. Dec. 210; *Fletcher* v. *Fletcher*, 4 Hare 67; Ames, Cases on Trusts (2nd ed.) 229. But statements are occasionally found to the effect that no title vests in the trustee until he expressly or by implication accepts the trust. 1 Perry, Trusts, § 259. *Armstrong* v. *Morrill*, 14 Wall (U. S.) 138; *Oscley Stave Co.* v. *Butler County*, 121 Mo. 614; *McFall* v. *Kirkpatrick*, 236 Ill. 281, 86 N. E. 139.

[95] *Kennedy* v. *Wire*, 80 Ala. 165; *Devoe* v. *Dye*, 123 Ind. 321, 7 L. R. A. 439; *Howry* v. *Gardner*, 41 Ohio St. 642; *McKinney* v. *Rhoads*, 5 Watts (Pa.) 343; *Eyrick* v. *Hetrick*, 13 Pa. 488; *Goss* v. *Singleton*, 2 Head (Tenn.) 67; *Bowden* v. *Parrish*, 86 Va. 67, 19 Am. St. Rep. 873.

[96] *Irvine* v. *Dunham*, 111 U. S. 327; *Smith* v. *Davis*, 90 Cal. 25; *Dailey* v. *New Haven*, 60 Conn. 314; *Braswell* v. *Downs*, 11 Fla. 62; *French* v. *Northern Trust Co.*, 197 Ill. 30; *Brandon* v. *Carter*, 119 Mo. 572, 41 Am. St. Rep. 673; *King* v. *Donelly*, 5 Paige (N. Y.) 46; *Roseman* v. *Roseman*, 127 N. C. 494; *Talbot* v. *Talbot* (R. I.), 78 At. 535; *Cloud* v. *Calhoun*, 10 Rich Eq. (S. C.) 358.

[97] *Brooks* v. *Marbury*, 11 Wheat (U. S.) 78; *Security Trust & Safe Deposit Co.* v. *Farrady* (Del. Ch.), 82 At. 24; *Koch* v. *Streuter*, 232 Ill. 594; 83 N. E. 1072; *Milholland* v. *Whalen*, 89 Md. 216; *Boston* v. *Turner*, 201 Mass. 190; *Marquette* v. *Wilkinson*, 119 *Mich.* 414, 78 N. W. 474, 43 L. R. A. 840; *Gulick* v. *Gulick*, 39 N. J. Eq. 401; *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Moloney* v. *Tilton*, 22 N. Y. Misc. 682, 51 N. Y. Supp. 682; *Breedlove* v. *Stump*, 3 Yerg. (Tenn.) 257; *Skipwith's Ex'r* v. *Cunningham*, 8 Leigh (Va.) 272; *Flegnor* v. *Hensley* (Va.), 93 S. E. 582; *Connecticut River Sav. Bank* v. *Albee*, 64 Vt. 571. See *McEwen* v. *Bamberger*, 3 Lea (Tenn.) 576.

[98] *Bronson* v. *Henry*, 140 Ind. 455; *Emporia First Nat. Bank* v. *Ridenour*, 46 Kan. 718, 26 Am. St. Rep. 167; *H. B. Cartwright & Bro.* v. *United States Bank & Trust Co.* (N. M.), 167 Pac. 436; *Stone* v. *King*, 7 R. I. 358, 84 Am. Dec. 557; *Cloud* v. *Calhoun*, 10 Rich Eq. (S. C) 358; *Furman* v. *Fisher*, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 557.

[99] *Stallings* v. *Newton*, 110 Ga. 875; *Bremmerman* v. *Jennings*, 101 Ind. 253; *O'Connor* v. *O'Connor*, 100 Iowa 476; *Byers* v. *Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Meigs* v. *Dexter*, 172 Mass. 217; *Miller* v. *McCalcb*, 208 Mo. 562; *Jackson* v. *Phipps*, 12 Johns 418; *Spencer* v. *Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Sullivan* v. *Sullivan* (Ky.), 201 S. W. 24.

Occasionally it has been said that delivery and acceptance must be simultaneous. *Hulick* v. *Scovil*, 9 Ill. 159; *Church* v. *Gilman*, 15 Wend (N. Y.) 656, 30 Am. Dec. 82. Contra: *Regan* v. *Howe*, 121 Mass. 424; *Welch* v. *Sackett*, 12 Wis. 243; *Sullivan* v. *Sullivan* (Ky.), 201 S. W. 24. And see *Stone* v. *New England Box Co.*, 216 Mass. 8, 102 N. E. 949.

and this they apparently do in effect when they state that the grantor's record of the instrument does not create any presumption of delivery without the knowledge or assent of the grantee.[100] There would seem, however, to be some difficulties in the way of regarding the grantor's indication of intention as constituting delivery only when accompanied or immediately followed by acceptance. Adopting such a view, the grantor would, after having indicated his intention that the conveyance should operate, have the right until acceptance to change his intention, and to dispose otherwise of the property, and yet the cases appear to regard his indication of intention, in the case both of conditional[101] and unconditional delivery,[102] as putting the property entirely out of his control. It is more satisfactory, it is submitted, conceding that acceptance is necessary, to regard it as something outside of delivery, as, in effect, an indication of the grantor's attention.[103] The contrary view, above referred to, is apparently to some extent the outcome of the mistaken tendency to regard delivery as involving a manual transfer of the instrument, such a transfer being ordinarily impossible without the assent of the person to whom the transfer is made.

The acceptance may, it has been said, be given by another person acting on behalf of the grantee, such acceptance being sufficient if afterwards ratified by the grantee.[104] Such a statement is somewhat ambiguous. If it means that, provided an unauthorized person accepts on behalf of the grantee, title immediately vests in the latter, subject to an option on his part as to whether he will ratify the acceptance, this appears to be the equivalent of a statement that, although there is no valid acceptance, title immediately passes to the grantee subject to an option in him subsequently to repudiate the transfer, this being the common law and present English rule. It may however mean that an unauthorized acceptance being invalid, title does not pass until the grantee, by indicating his adoption of the acceptance, in effect himself accepts the conveyance, this in ef-

[100] Ante, note 52.

[101] See 14 Columbia Law Rev. at p. 394.

[102] Ante, note 25.

[103] Such a view is involved in the occasional statements that the acceptance may be given by the grantee even after the grantor's death. *Cates* v. *Cates*, 152 Ky. 47, 153 S. W. 10; *Taylor* v. *Sanford* (Tex.), 193 S. W. 661; *Burkey* v. *Burkey* (Mo.), 175 S. W. 623; *Gulf Red Cedar Co.* v. *Cranshaw* (Ala.), 53 So. 812.

[104] *Meigs* v. *Dexter*, 172 Mass. 217, 52 N. E. 75; *Couch* v. *Addy*, 35 Okla. 355, 129 Pac. 709.

In *Blackwell* v. *Blackwell*, 196 Mass. 186, 12 A. & E. Ann. Cas. 1070, it was decided that there may be a valid acceptance by the grantor in behalf of the grantee, whose general agent he was. The cases cited in support of the decision merely involved the principle that no manual transfer of the instrument is necessary.

fect recognizing the asserted American rule, that the grantee's acceptance is necessary. Whichever meaning is given to the statement, it does not appear that the unauthorized acceptance has any legal significance, the grantee's ratification of such acceptance, so called, being merely his acceptance of the transfer, of which there had previously been no valid acceptance.

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