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Note

Arthur Duffy

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part character plays in the success of a lawyer, the necessity of shaping this character while a student by good moral training, and the consequent effect of this basic need of lawyers.

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Col. Hoynes, Dean Emeritus of the College of Law, has been in St. Joseph Hospital in South Bend for several weeks.

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The annual Lawyer's Ball will be held after the Easter holidays, preparations for the ball having been begun already. The Law Club is sponsoring the ball and again promises a successful climax to the year's social activities of the club.

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At the Washington Day exercises, thirty-five seniors, members of this year's graduating class in the Law School took part, as the class of 1933 presented a flag to the school.

Thomas E. Coughlan.

NOTE

MORTGAGES—DELIVERY AND ACCEPTANCE—RELATION BACK.—Somewhat perplexing are the problems that arise when a person who executes a mortgage to another, but does not deliver a deed, subsequently has the mortgage recorded without the knowledge of the mortgagee, and still later transfers the mortgaged *res* to a third person who knows nothing further than the record. Is delivery necessary to render the mortgage operative, and if so, does the act of the mortgagor in recording, without the knowledge or assent of the mortgagee, constitute sufficient delivery? Would a subsequent assent by the mortgagee to the act of the mortgagor in recording relate back to the date of the recording to cut off an intermediate transferee's interest?

A mortgage deed, like any other deed, to be valid and operative, must be delivered by the mortgagor; without delivery it cannot take effect as a transfer of title or as a security.¹ No particular form of ceremony can be said to be necessary to constitute a sufficient delivery; it may be by words without acts, or by acts without words, or by both combined.² Actual transfer of the deed from hand to hand

¹ *Mix v. Cowles*, 20 Conn. 420 (1850). "The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect." *Goodsell v. Stinson*, 7 Blackf. 437 (1845).

² *Rountree v. Smith*, 152 Ill. 493 (1894).

between the mortgagor and the mortgagee is not essential. All that can be required is that there should be manifested a clear intention of the parties that the instrument shall become operative as a mortgage, and that the mortgagor shall lose, and the mortgagee acquire, the absolute control over it.³

In many states, perhaps a majority, it is said that to constitute a complete delivery so as to make it legally operative, acceptance on the part of the mortgagee is necessary to its validity.⁴ In these jurisdictions it is held that the conveyance is not effective as against the claims of a third person which accrued, by attachment, judgment, or purchase for value, between the time of the purported delivery of the instrument and the grantee's subsequent assent thereto.⁵ In other states, an express acceptance is not essential to the validity of a conveyance. And it has accordingly been held that when a mortgage is beneficial to the mortgagee, his acceptance will be presumed in the absence of contrary evidence, or it may be made out by implication from circumstances, or from such conduct on his part as necessarily supposes an acceptance of the mortgage by him.⁶ In regard to the necessity of acceptance, it is not clear whether it is to be considered an element of delivery or as something additional to, and separate from delivery. The courts frequently suggest the former view. Tiffany,⁷ in discussing the subject, has this to say: "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 grantee's intention, as delivery is an indication of the grantor's intention."

Does the act of the mortgagor, in recording a mortgage without the knowledge of the mortgagee, constitute a delivery? Such has been frequently referred to as raising a presumption of delivery; a statement that the grantor's action shows, *prima facie*, an intention on his part that the instrument shall be legally operative. Thus, in *Rogers v. Head's Iron Foundry*⁸ it was said: "This Court has held that, where a deed beneficial to the grantee is involuntarily executed and placed on record by the grantor, the acceptance of the grantee will be presumed. *Issett v. Dewey*, 47 Neb. 196. And on principle,

³ *Merrills v. Swift*, 18 Conn. 257 (1847).

⁴ "All agree that it is necessary to the validity of every deed or conveyance, that there be a grantee who is not only willing, but who does in fact accept it." *Welch v. Sackett*, 12 Wis. 243 (1860). Accord: *Abermathie v. Rich*, 99 N. E. 883 (Ill. 1912); *Woodbury v. Fisher*, 120 Ind. 387 (1863).

⁵ *Parmelee v. Simpson*, 18 L. Ed. 542 (1866); and cases cited *infra* note 6.

⁶ *Ely v. Stannard*, 44 Conn. 528 (1877); *Baker v. Hall* 73 N. E. 351 (Ill. 1905). See Tiffany on Real Property, Vol. II, § 463.

⁷ *Op. cit. supra* note 6.

⁸ 61 Neb. 39, 70 N. W. 527, 37 L. R. A. 429 (1897). Accord: *Elsberry v. Boykin*, 65 Ala. 336 (1880); *Haskell v. Sevier*, 25 Ark. 152 (1867).

delivery of mortgage by the mortgagor or by his direction for record is sufficient, in the absence of proof, to the contrary, to justify a finding of its delivery by the mortgagor, and acceptance by the mortgagee. But presumption of delivery and acceptance is not a conclusive one, but is *prima facie* alone. It may be shown, if such be the fact, that the mortgagee never accepted the instrument." In a few jurisdictions this view is repudiated. Thus it was held in *Stiles v. Probst*⁹ that the mere execution of a mortgage and recording of it do not constitute a delivery of the instrument to the mortgagee, where it is not actually placed in his hands, or in the possession of someone authorized to receive it for him, and where the money loaned is not paid over by the mortgagee; and that there can be no legal delivery of the mortgage until the mortgagee is willing to accept it and does accept it and pay over the consideration. In a number of cases it is said that the grantor's action in recording the instrument does not show delivery if this was without the knowledge or consent of the grantee.¹⁰ The presumption of delivery above referred to is recognized as being subject to rebuttal by evidence that the mortgagor did not intend the instrument to operate as a conveyance.¹¹

We have seen that delivery is essential to the validity of a mortgage; that, by the weight of authority, the act of the mortgagor in recording the mortgage without the knowledge of the mortgagee, constitutes *prima facie* evidence of a delivery; that express acceptance by the mortgagee is necessary, but acceptance will be presumed in the absence of evidence to the contrary where the mortgage is beneficial to the mortgagee. Irrespective of the beneficial interest to the mortgagee, would a subsequent acceptance by the mortgagee after the mortgagor has transferred the mortgaged *res* relate back to the date of recording by the mortgagor without the knowledge of the mortgagee so as to cut off the transferee's interest? As between the mortgagor and the mortgagee a mortgage not delivered, may take effect from the date when it was left for record.¹² But a delivery to the mortgagee after the mortgage has been recorded does not relate back to the time

⁹ 69 Ill. 382 (1873); *Egan v. Horrigan*, 96 Me. 46 (1901). Accord: *Walton v. Barton*, 107 Ill. 54 (1883).

If the mortgage is made following an agreement of the parties to place a mortgage on specific property, which mortgagee has agreed to accept, then the act of mortgagor in filing it for record constitutes a sufficient delivery of it (*Bronson v. Henry*, 140 Ind. 455 (1894)); or if, after delivering it to the recorder, the mortgagor notifies mortgagee that it has been filed for record and latter approves or acquiesces in the action taken (*Parkhurst v. Berdell*, 5 N. Y. S. 328 (1894), *Farmers and Mechanics Bank v. Drury*, 38 Vt. 426 (1866)); or, in general, if mortgagee does any act showing his ratification of the manner of delivery (*Kinney v. Wells*, *op. cit. supra* note 6).

¹⁰ *Op. cit. supra* note 5; *Sullivan v. Eddy*, 154 Ill. 199 (1894).

¹¹ *Humiston v. Preston*, 34 Atl. 544 (Conn. 1895).

¹² *Kingsbury v. Burnside*, 58 Ill. 310 (1871).

of recording to the prejudice of intervening equities of third persons.¹³ These equities might accrue by reason of attachment, the recovery of a judgment, or a purchase of the property, between the date of the recording and the grantee's subsequent assent thereto. In *Goodsell v. Stinson*¹⁴ a real estate mortgage was executed to one G, in the absence and without the knowledge of the latter, and was delivered by the mortgagor to the recorder for record. Subsequently, but before the mortgagee was informed of what had been done, and before he assented to the mortgagee, one S obtained a judgment against the mortgagor. It was held that the judgment was entitled to the preference. The court said: "The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery, unless the rights of third persons should be affected by it. In that event the doctrine of relation would not apply, for it is a general rule, that it should not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice."¹⁵

¹³ "The mortgage of \$60,000 was not delivered until the 7th of June, when the money was advanced. Mr. Jacobus says that when it was handed to him, he gave his check for the money. Up to that time it was no lien as against any one. It had no validity. It had been executed and put on record, not only in the absence of any agreement between the mortgagor and mortgagee for the loan, but without the knowledge of the latter. The considerations which would give the mortgage relation back to its date as between the mortgagor and mortgagee, are not applicable to the question between the present parties litigant." *Mutual Benefit Life Insurance Co. v. Rowand*, 26 N. J. Eq. 389, 393 (1875).

Recording a mortgage before it is a completed conveyance gives it no superior rights, so that if it has not been delivered to the mortgagee or accepted or assented to by him, its record gives it no priority over a subsequent mortgage which is executed, delivered, and recorded before the delivery or acceptance of the first. *Parmelee v. Simpson*, 18 L. Ed. 542 (1866); *Evans v. Coleman*, 28 S. E. 645 (Ga. 1897); *Lanphier v. Desmond*, 58 N. E. 343 (Ill. 1900).

¹⁴ 7 Blackf. 437 (1845).

¹⁵ Accord: *Woodbury v. Fisher*, 20 Ind. 387 (1863); *Johnson v. Farley*, 45 N. H. 505; *Hibberd v. Smith*, 67 Cal. 547 (1885); *Day v. Griffith*, 15 Ia. 104 (1863).

In *Bell v. Farmers' Bank of Kentucky*, 11 Bush. 34, 21 Am. Rep. 205 (1874), it was said: "A deed delivered to the registering officer or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as between the grantor and the grantee from the time of the first delivery; and in such the grantor and ordinary creditors who have acquired no lien upon nor interest in the estate conveyed are entitled to no greater consideration than the grantor. Yet, until the grantee is informed of the execution of the deed and does some act equivalent to an acceptance of it, it is manifest that he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his heirs, devisees, and ordinary creditors. But this fiction will not be allowed to