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amendment to the United States Arbitration Act extending it to embrace written agreements to arbitrate labor disputes would lead to settlement of even more industrial disputes by peaceful arbitration.[24]

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Real Property—Deeds—Requisites to a Valid Delivery in North Carolina

In the recent North Carolina case of *Ballard v. Ballard,*[1] a grantor drafted, signed, sealed, and registered an instrument which purported to convey for a consideration a tract of land to the grantee (son of the grantor), subject to a twenty-one year estate reserved by the grantor. After the grantor's death, the widow, who had married the grantor after the conveyance, filed a petition for dower claiming that the deed was not delivered, and the Superior Court granted this petition, but the Supreme Court reversed the lower court and held that registration in addition to a declaration by the grantor that he had conveyed to the grantee was sufficient evidence of an effective delivery even though it was not shown that the deed was ever physically transferred to the grantee and though the grantor apparently retained possession of the deed until his death. Although the holding of the instant case does not, in itself, change the law on the subject of delivery, there were statements in the opinion indicating, perhaps, a relaxation of the former requirements stated by the court in *Gillespie v. Gillespie,* where it said: "Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee but also upon the intent of the parties. *Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title.*"[2]

It is the purpose of this note to examine, in the light of past cases, the three requirements of a valid delivery as enunciated by the court in

[24] Such an amendment has been suggested for presentation to Congress. Sturges, *Proposed Amendment of the United States Arbitration Act,* 6 ARB. J. 227 (1942). It has been suggested that the same result could be reached by a court simply limiting the common law rule of revocability to commercial disputes and, on the basis of public policy, refusing to extend the rule into the field of labor disputes. Latter v. Holsum Bread Co., 108 Utah 364, 160 P. 2d 421 (1945); Comment, *Arbitration of Labor Contract Disputes,* 43 ILL. L. REV. 678 (1948). There is very little possibility of the federal courts reaching this result, however, because of the existing line of cases which have refused to make this distinction.

[1] Ballard v. Ballard, 230 N. C. 629, 55 S. E. 2d 316 (1949). The court, however, held that the admission of incompetent testimony by the widow as to nondelivery of the deed under which the grantee claimed title was prejudicial error and set aside the verdict and judgment since the witness did not show that she had had an opportunity to acquire personal knowledge of the facts of delivery.

[2] Gillespie v. Gillespie, 187 N. C. 40, 41, 120 S. E. 822, 823 (1924). Italics added.

the present case and to determine how these requirements might affect the old law. In the instant case the court said:

> "The requisites to the valid delivery of a deed are threefold. They are: (1) An intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some *word or act* disclosing that the grantor has put the instrument beyond his *legal* control, *though not necessarily beyond his physical control;* and (3) acquiescence by the grantee in such intention."[3]

First, there must be an intent on the part of the grantor to give the instrument legal effect. The intention of the parties at the time is controlling as to whether there has been an effective delivery;[4] but intention by the grantor has not in the past taken the place of a manual transfer,[5] nor is mere physical transfer without intent a valid delivery.[6] A handing over of the instrument to a third party for examination does not constitute an effective delivery, since the requisite intent for a valid delivery is lacking.[7]

Second, in order to constitute a valid delivery, there must be "the evidencing of such intention by some *word or act* disclosing that the grantor has put the instrument beyond his legal control, though not

[3] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). Italics added.

[4] Blades v. Wilmington Trust Co., 207 N. C. 771, 178 S. E. 565 (1935). In Lee v. Parker, 171 N. C. 144, 88 S. E. 217 (1916), the grantor was confined to her bed and there was evidence tending to show that she was averse to executing the deed, but was afraid to refuse to do so. It was held that the jury should consider the question of whether the grantor had exercised her will and executed the instrument with the intent that it should operate as her deed. In Gaylord v. Gaylord, 150 N. C. 222, 233, 63 S. E. 1028, 1033 (1909), a grantor had prepared, signed, and sealed an instrument and had given it to his brother for the purpose of keeping the instrument until he should get his family affairs corrected. It was held that manual delivery alone is not enough but that there must also be an intent to deliver, the court saying: "And the authorities are uniformly to the effect that, in order to be a valid delivery, the deed must pass from the possession and control of the grantor to that of the grantee, or to someone for the grantee's use and benefit, with the intent at the time that title should pass or the instrument become effective as a conveyance."

[5] In Fortune v. Hunt, 149 N. C. 358, 360, 63 S. E. 82, 83 (1908), where the grantor had given a deed to a third persons with instructions to have it delivered in case of the grantor's death, but to retain it subject to the grantor's control until the grantor's death, it was held that there was no delivery, the court saying: "The intention of the grantor will not take the place of actual delivery, which is essential to the validity of a deed."

[6] "There must not only be a physical delivery of a deed as the final act of execution, but it must be accompanied by an intent of the grantor to perfect the instrument." See Huddleston v. Hardy, 164 N. C. 210, 214, 80 S. E. 158, 160 (1913), (concurring opinion).

[7] Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909); in Tarlton v. Griggs, 131 N. C. 216, 221, 42 S. E. 591, 593 (1902), a deed by the grantor was given to a third person to hold until certain other deeds should be executed by the grantor; the grantees took possession of the deeds, and the court in holding no delivery said: "There must be an intention of the grantor to pass the deed from his possession and beyond his control. . . . Both the intent and the act are necessary to the valid delivery."

necessarily beyond his physical control."[8] These words taken in their context might appear to mean that intention alone, evidenced by some word or act, is sufficient for a valid delivery. If so, the court has relaxed the requirement of a manual transfer of the instrument in addition to intention to make the deed effective. However, some of the cases cited in support of the court's statement seem to hold that both the intent and the ceremonial passing on of the deed itself are essential to its validity.[9] Also, there is a statement in the case which reads: "But manual possession of the instrument is not essential to delivery. It is sufficient if the grantor delivers the writing to some third person for the grantee's benefit."[10] The first sentence taken alone would seem to bear out the suggested interpretation, but a perusal of the cases cited demonstrates that the first sentence cannot be supported, by itself, but must be read in conjunction with the latter sentence.

The expression "delivery," as applied to written instruments, had its beginning in connection with written conveyances of land, and the manual transfer of the instrument in early times was regarded as the symbolical transfer of the land itself, analogous to livery of seisin. The notion of physically giving the instrument to the grantee applied also in connection with written contracts, the manual transfer of the document being necessary to make it legally operative and effective. While delivery is still required in connection with negotiable and other instruments of an analogous character, the old conception of a manual transfer of the instrument as the only means of making it legally operative has been superseded in most instances by the modern view that delivery is merely a question of intention supplemented by some manifestation of that intention.[11]

In North Carolina, however, insofar as deeds are concerned, the court has in the past spoken as though a physical changing of possession of the deed were indispensable to an effectual delivery. In some North Carolina cases, holding that there was no delivery, the want of a physical transfer of the deed seems unduly emphasized in the face of quite convincing evidence of the intention of both the grantor and the grantee that the deed should become effective. In a recent case,[12] omitted from the cases cited by the court in the case at bar, a grantor placed the deed in his Bible on the dresser in his bedroom. He told his daughter, one of the witnesses, where he was putting the deed and instructed her to

[8] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). Italics added.

[9] Gillespie v. Gillespie, 187 N. C. 40, 120 S. E. 822 (1924); Lee v. Parker, 171 N. C. 144, 88 S. E. 217 (1916).

[10] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[11] Tiffany, *Real Property*, §1033 (3rd ed. 1939).

[12] Barnes v. Aycock, 219 N. C. 360, 362, 13 S. E. 2d 611, 612 (1941). Compare Tarlton v. Griggs, 131 N. C. 216, 221, 42 S. E. 591, 593 (1902).

tell the grantee where it was and to have it recorded, but this message was not delivered. The deed remained in the Bible and never came into the possession of the grantee or anyone for her. It was held that there was no delivery in spite of the fact that the grantor had expressed an intention of giving the land to the grantee and the grantee had had control of the land until the grantor's death. The court said: "To constitute delivery the papers must be put out of the possession of the maker."

In another North Carolina case,[13] deeds were placed in a lock box in a bank with the intention that they should convey to the grantor's children certain land which the grantor owned. The deeds were found after the grantor's death with the names of each of the grantees on them, and although the grantor devised all his land except that which he had purported and intended to convey by the deeds, it was held that there was no delivery since the grantor did not relinquish control of the instruments. In a Pennsylvania case,[14] the grantor put a deed in a safe among his other papers with the intention that the same should be a delivery and later made oral declarations of that intention. It was there held that there was a valid delivery of the deed. A distinguishing feature was the fact that in the latter case, the grantee had access to the safe, but the court indicated that that consideration was not controlling.

In the instant case it was pointed out that there is a presumption of delivery of a deed arising from its registration,[15] but such presumption is subject to rebuttal.[16] It has been held that where a deed is delivered by the grantor to a Register of Deeds, or even to his deputy clerk, to have it registered with the intent that title should pass, there is a sufficient delivery even though the deed is not registered;[17] but where a deed is registered for fear that it might be destroyed, and not with the intention that it should then become a deed, such evidence is sufficient to rebut the presumption of delivery arising out of registration.[18] As was held in the present case, however, mere possession of the deed by the grantor after it has been recorded is not entitled to much consideration in rebutting the presumption of delivery, especially in view of the fact that the grantor reserved an estate for a term of years.[19]

[13] Thomas v. Conyers, 198 N. C. 229, 151 S. E. 270 (1930).
[14] Kanawell v. Miller, 262 Pa. 9, 104 Atl. 861 (1918).
[15] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).
[16] Federal Land Bank of Columbia v. Griffin, 207 N. C. 265, 176 S. E. 555 (1934).
[17] In Robbins v. Rascoe, 120 N. C. 80, 26 S. E. 807 (1897), where an instrument was delivered by the grantor to a deputy clerk with instructions to have it registered before the clerk, who was then absent, the court held the delivery was complete and valid, and the grantor could not afterwards take the deed back from the deputy clerk even though the grantee did not at that time know of the conveyance and the clerk had not then registered the deed.
[18] Ellington v. Currie, 40 N. C. 21 (1847).
[19] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). See

It was pointed out in the case at bar that delivery made to a third person is effectual to transfer title,[20] and this is so even if the third person is a stranger.[21] When the maker delivers a deed to a third person for the grantee, parting with the possession of it without any condition as to how the third party shall hold it, the delivery is complete and title passes at once, though the grantee be ignorant of the facts, and neither the grantor nor anyone else can later defeat such a delivery.[22]

The present case indicates that mere possession by the grantor of the deed is not sufficient to rebut the presumption of a valid delivery arising from the registration of the deed by the grantor.[23] Further, it has been held that a deed delivered to a grantee by a grantor, but afterwards placed with a third party for safekeeping until they should both call for it is a good delivery and not an escrow.[24] Where a deed is executed and witnessed, and left on a table with both the grantor and grantee present, a presumption of delivery arises,[25] notwithstanding cases that hold contra when only the grantor is present.[26]

The third requisite of a valid delivery as enunciated by the court in the instant case is "acquiescence by the grantee in such intention,"[27] *i.e.,* by acceptance. Acceptance does not ordinarily constitute a problem in delivery, inasmuch as a grantee is presumed to accept provided the conveyance is for the grantee's benefit. The presumption is *not* that he *will* accept, but that he *does* accept,[28] and such acceptance is effectual until a contrary intent is shown.[29]

In spite of the statements and the cases cited in the instant case, which apparently indicate a contrary view, it is to be hoped that the second requirement promulgated by the court has changed North Caro-

also Faircloth v. Johnson, 189 N. C. 429, 127 S. E. 346 (1925); Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582 (1914); Helms v. Austine, 116 N. C. 751, 21 S. E. 556 (1895).

[20] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[21] Wesson v. Stephens, 37 N. C. 557 (1843).

[22] In Buchanan v. Clark, 164 N. C. 56, 80 S. E. 424 (1913), a father purchased lands and had a conveyance made to his illegitimate son, without the son's knowledge, and the son died before the instrument was sent to him, the conveyance was held to be good notwithstanding the father's attempt to obtain a second conveyance from the original grantor himself. In Hall v. Harris, 40 N. C. 303 (1848), a paper was signed, sealed, and handed to a third person, to be delivered to the grantee on a condition which the grantee afterwards complied with, the delivery of the paper was held to be effective and complete and the deed took effect at the time of the original transfer.

[23] Perkins v. Thompson, 123 N. C. 175, 31 S. E. 387 (1898); Williams v. Springs, 29 N. C. 384 (1847).

[24] Gibson v. Partee, 19 N. C. 530 (1837).

[25] Levister v. Hilliard, 57 N. C. 12 (1858).

[26] Baldwin v. Maultsby, 27 N. C. 505 (1845); Kirk v. Turner, 16 N. C. 14 (1826).

[27] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[28] Henry v. Heggie, 163 N. C. 523, 79 S. E. 982 (1913).

[29] Smith v. Moore, 149 N. C. 185, 62 S. E. 892 (1908).

lina's obsolete view of "delivery," that in addition to intention there must be a manual transfer of the instrument itself. If such is not the case, certainly there is the possibility that the court in future cases may use this well-considered statement as a springboard toward the modern and majority view that delivery is merely a question of intention to give the deed legal effect evidenced by some *word or act* indicating such an intention.[30]

GEORGE J. RABIL.

Taxation—Effect of Renunciation on the Taxability of Property Subject to Power of Appointment

In order to minimize the estate tax on the passing of property many a testator devises his property to his wife or child for life, giving the devisee the power to appoint by will the ultimate taker of the property. Usually he also provides that in the event of the failure of the donee of the power of appointment to exercise this power, the property, at the death of the donee, will go to a specified beneficiary. Whether or not the property subject to the power is taxable in the donee's estate where the appointee is also a taker in default has been the subject of much litigation and of endless legal writings.[1]

Early in the line of cases, New York declared that where the appointee took a one-fourth interest in an estate under the exercise of a power of appointment instead of the one-seventh interest which would have been his had the power not been exercised, the entire amount was taxable in the estate of the donee.[2] Then, in 1905, where the appointee had renounced all rights under the exercise of the power, the same court declared that an interest given in default of appointment vested at the death of the donor of the power, and that since the appointee would take the same interest under the power as was already vested in her in default, the interest was not taxable in the donee's estate.[3] Much later

[30] Tiffany, *Real Property*, §1033 (3rd ed. 1939).

[1] 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION §9.01 *et seq.* (1942); Eisenstein, *Powers of Appointment and Estate Taxes: I, II*, 52 YALE L. J. 296, 494 (1943) (contains a good collection of legal articles).

[2] *In re* Potter's Estate, 51 App. Div. 212, 64 N. Y. Supp. 1013 (1900); *In re* Chauncey's Estate, 102 Misc. 378, 168 N. Y. Supp. 1019 (1918) (the appointee filed a conditional election whereby she desired to take under the instrument which gave her the larger amount); *In re* Taylor's Estate, 209 App. Div. 299, 204 N. Y. Supp. 367 (1922) (the appointee could not claim part under the donor's will and the excess under that of the donee); *see In re* Delano's Estate, 176 N. Y. 486, 68 N. E. 871 (1903). *Contra:* 3 RESTATEMENT, PROPERTY §369(c) (1940) ("if the total property passing to such appointee differs from his interest in default of appointment only in that it is a larger fractional interest in the . . . thing covered by the power, the property passes . . . in default of appointment so far as the appointed interest is identical to the interest in default.").

[3] *In re* Lansing's Estate, 182 N. Y. 238, 74 N. E. 882 (1905). *But cf. In re* Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880 (1905) where the court held the interests taxable because the donor's will did not allow any default interest to vest unless and until the donee died without exercising the power.