

1968

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Recommended Citation

Delivery of Deeds in South Carolina, 20 S. C. L. Rev. 299 (1968).

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DELIVERY OF DEEDS IN SOUTH CAROLINA

It is well settled in South Carolina,¹ as in other jurisdictions,² that a deed must be delivered to be effective. In early common law, a deed was defined as, "a writing sealed and delivered by the parties."³ While the South Carolina courts have recognized the requirement of delivery, there has been a great deal of litigation as to what constituted sufficient delivery. The purpose of this note is to consider the facts and circumstances which the South Carolina courts have stated as constituting sufficient delivery.

I. INTRODUCTION

Much of the confusion that has arisen in connection with delivery comes from the fact that the term implies a manual transfer from one person to another. Thus, the term "delivery" has come to be used in two senses: first, to indicate the formal act by which a deed transfers control from the grantor to the grantee, and secondly, to describe the manual transfer of the deed. This confusion of "delivery" with manual transfer can be traced back to early English law, where delivery of a deed was closely akin to livery of seisin.

The expression "delivery," as applied to a written instrument, has its inception, it appears, 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 symbolic transfer of land itself, analogous to livery of seisin 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 con-

1. For a conveyance by deed to be operative in transferring title to land, the deed must be signed, sealed, and *delivered*. *Johnson v. Johnson*, 44 S.C. 364, 369, 22 S.E. 419, 422 (1895).

2. For cases in other jurisdictions see 23 AM. JUR. 2d *Deeds* § 79 n.20 (1965).

3. 2 BLACKSTONE, COMMENTARIES 295 (10th ed. 1787).

tinental conception of a physical change of possession thereof as a prerequisite to its legal operation⁴

Gradually, however, the law became less formal and the crude concept of manual delivery of the instrument as the only means of making it legally operative has given way to the more modern view that delivery is merely a question of intention supplemented by some manifestation of that intention.⁵

II. INTENTION

While delivery is necessary for a deed to be legally operative, it is clear that a manual transfer from the possession of the grantor to the possession of the grantee is not necessary.⁶ Rather, it is the intention of the parties that is the essential and controlling element of delivery. That intention is the "essence" of delivery was recognized by the South Carolina Supreme Court in *Powers v. Rawls*, when it stated the requirements for delivery: "Delivery of a deed includes, not only an act by which the grantor evinces a purpose to part with the control of the instrument, but a concurring intent thereby to vest the title in the grantee."⁷ It appears from this and earlier decisions that delivery in the legal sense is composed of two parts: namely, (1) an intention to deliver and (2) an act evincing a purpose to part with the control of the instrument, neither of which alone is sufficient to constitute delivery.⁸ However, the courts have not attempted to distinguish the physical acts from the necessary intent. Thus when there is any question as to whether the acts of the grantor were sufficient to constitute delivery, the courts

4. 4 H. TIFFANY, REAL PROPERTY § 1033 (3d ed. 1939); Wigmore reports: "at the same time there had already begun an effort to refine the technicality, and to deny effectiveness to a manual transfer even to the grantee himself, if it purported to be, not a true delivery But the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely the progressive conception; and it has been reserved for very modern times to repudiate this last relic of primitive formalism." 9 J. WIGMORE, EVIDENCE § 2405 (3d ed. 1940).

5. 4 H. TIFFANY, REAL PROPERTY § 1034 (3d ed. 1939).

6. "It is undoubtedly true, that it is not essential to the complete execution of a deed, that there should be a manual delivery." *Moss v. Smith*, 73 S.C. 231, 234, 53 S.E. 284, 285 (1906).

7. 119 S.C. 134, 153-54, 112 S.E. 78, 85 (1922).

8. *Carrigan v. Byrd*, 23 S.C. 89 (1885).

have used the grantors intent to supply this deficiency,⁹ and conversely, if there is a question of intent this may be provided by the physical acts of delivery.¹⁰

As to the first requirement, that the grantor must have an intent to deliver, *i.e.*, that the grantor intended to give the instrument legal effect, the intention of the parties at the time of the transaction is controlling.¹¹ There can be delivery even though the grantee might not know the terms of the conveyance,¹² or that the conveyance was made at all.¹³ Moreover, delivery may be made to a third person for the benefit of the grantee.¹⁴ Tiffany states the effectiveness of the delivery seems to result not from any particular virtue in the transfer, but from the fact that the transfer shows an intention to make the instrument legally effective.¹⁵ But it is also clear that if the delivery made to the third person was done without intent that it should become effective, it will not be effective.¹⁶ Further-

9. *See Fraser v. Davie*, 11 S.C. 56 (1878). In this case the grantor executed a deed in trust for the grantee, but with the understanding that it was to be held by the trustee and not recorded until the rest of the agreement was fulfilled. The court held that it was clear that the grantor by withholding the deed from record rendered it inoperative, and "as delivery is an act of mind as well as a manual act, presupposing consent that the deed should become operative, evidence showing the absence of consent must have weight against the inferences arising from mere manual delivery." *Id.* at 67.

10. "The ordinary and usual mode of completing the execution of a deed is by manual delivery, and when the grantor seals and signs the deed, and then makes a manual delivery of it to the grantee, it unquestionably furnishes strong evidence that he intended to convey the title. It is the nature of a presumption based upon the doctrine that a person must be regarded as intending the reasonable and natural consequences of his act." *Moss v. Smith*, 73 S.C. 231, 234, 53 S.E. 284, 285 (1906).

11. "Under all the authorities 'delivery', as applied to a deed, means not so much a manual act but the intention of the maker . . . the intent referred to is, of course, that existing at the time of the transaction not subsequently and not subject to later change of mind." *Little v. Little*, 215 S.C. 52, 60, 53 S.E.2d 884, 888 (1949).

12. *Branton v. Martin*, 243 S.C. 90, 132 S.E.2d 285 (1963).

13. *See, Larisey v. Larisey*, 93 S.C. 451, 77 S.E. 129 (1913). In *Withers v. Jenkins*, 6 S.C. 122, 124 (1875), the court stated: "If the grantor, in the absence of the grantee, and without his knowledge, has actually consummated the delivery in accord with the purpose declared on the face of the instrument, the object to be effected by it is as fully accomplished as if there had been an actual transfer of the paper from the hands of the grantor to those of the grantee." *Cf. Branton v. Martin*, 243 S.C. 90, 132 S.E.2d 285 (1963).

14. *Brooks v. Bobo*, 4 Strob. L. 38 (S.C. 1849). In *Withers v. Jenkins*, 6 S.C. 122 (1875) the court stated that "[d]elivery to a stranger for the use and on behalf of the grantee, fulfills all the purposes which the grantor proposes by the act. If the deed is valid in other respects, when he has actually passed it from control and directed it to be recorded, all his power over it is gone, and it at once becomes subject to that of the grantee." *Id.* at 124.

15. 4 H. TIFFANY, REAL PROPERTY § 1034 (3d ed. 1939).

16. *See Arthur v. Anderson*, 9 S.C. 234 (1878); *cf. Patterson v. Causey*, 119 S.C. 12, 111 S.E. 725 (1922) (dissenting opinion).

more, delivery to the grantee himself is insufficient if not with intent to convey, but rather for the purpose of having other signatures attached,¹⁷ or to enable the grantee to examine the instrument.¹⁸ Since a voluntary transfer of the instrument by the grantor to the grantee does not effect delivery, if made with no intent that the instrument shall be legally operative, the fact that the grantee has acquired possession without the grantor's consent does not make it effective, because it may have been obtained by fraud, theft or discovery.¹⁹ If the acquisition is not authorized by the grantor, it cannot be supported by the intent to make a conveyance.²⁰ However, there are a number of cases in several jurisdictions²¹ to the effect that the grantor will be estopped to deny delivery if because of his lack of care in the custody of the instrument, the grantee obtains possession of the instrument and places it in the hands of a bona fide purchaser.²² The grantor must also have intended by the act of delivery that the deed should become presently operative as such and thus pass present title. Therefore, it is evident that if the grantor intended that the property should become presently vested in the grantee, he must have intended to deliver the deed, and conversely, he could not have intended delivery if he did not intend to transfer present title.²³

The second requirement for delivery is that there must be an act evidencing a purpose to part with control of the instrument. As stated, manual transfer of the instrument is not necessary; however, there must be some act on the part of the grantor to

17. *Arthur v. Anderson*, 9 S.C. 234 (1878).

18. *Cf. Little v. Little*, 215 S.C. 52, 53 S.E.2d 884 (1949). In this case the grantor, who was the mother of the grantee, testified that the deed was not kept in hiding or locked away from him and admitted that she allowed him to read it for his information. However, other circumstances in the case tended to show that there had been delivery and the court so held.

19. *Shaw v. Cunningham*, 16 S.C. 631 (1881); *cf. Merck v. Merck*, 83 S.C. 329, 65 S.E. 347 (1909).

20. *See Robertson v. Evans*, 3 S.C. 330 (1872).

21. *See* 4 H. TIFFANY, REAL PROPERTY § 1035 (3d ed. 1939).

22. In *Merck v. Merck*, 83 S.C. 329, 65 S.E. 347 (1909), the court reasoned that when one executes a deed complete on its fact and lacking only delivery to make it complete and negligently leaves it where the grantee could, and does in fact, take it, and has it recorded, the grantor is estopped from denying its delivery.

23. In *Burke v. Burke*, 141 S.C. 1, 139 S.E. 209 (1927), the court held that for the conveyance to have become complete, it would have been necessary that the grantor should have retained no further interest in the land except the life estate. Here, the retaining of the right to mortgage the property amounted to a continuing public assertion of ownership and control that would be wholly incompatible with the delivery of a deed under which only a life interest had been retained by the grantor.

render it effective as a conveyance.²⁴ The courts in referring to delivery often speak as if transfer were essential to delivery. However, as Tiffany notes, delivery in essence, involves 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. 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.²⁵ Nevertheless, it is the rule in most jurisdictions,²⁶ that the grantor must show, by word or act, an intention to put the instrument beyond his legal control, although not necessarily his physical control.

This brings up an interesting question as to whether there can be a delivery without the grantor ever parting with possession of the instrument. South Carolina courts have spoken as if physical transfer of the deed was necessary.²⁷ However, in two early cases the court intimated that there can be a delivery without the grantor giving up possession or doing any act presumptive of an intent to deliver, except the mere execution of the deed.²⁸ In *Wood v. Ingraham*,²⁹ dicta in the court's opinion gives support to the English and New York rule that when a deed is signed and sealed, and declared by the grantor to be delivered in the presence of witnesses, this is an effective delivery.³⁰ The court in *Harris v. Saunders*³¹ affirmed the lower court's statement

that there was no prescribed formula for the delivery of the deed; that if it appeared from all the facts and circumstances, that the gift or contract was complete, without any conditions or qualifications annexed, and without anything remaining to be done, it was a valid delivery, and a perfect deed, although left in the hands of the donor.³²

Among the facts that the court felt should be considered by the jury was whether the donor had subsequently regarded the

24. *Williams v. Lawrence*, 194 S.C. 1, 10, 8 S.E.2d 838, 842 (1940): "Delivery rests not in words written, but in things done and said."

25. 4 H. TIFFANY, REAL PROPERTY § 1035 (3d ed. 1939).

26. See generally 23 AM. JUR. 2d 20, *Deeds* § 89 (1965).

27. See, e.g., *Jackson v. Inabnit*, 2 Hill Eq. 411 (S.C. 1836).

28. For discussion of the presumptive evidence that arises in some jurisdictions from the executions of the deed see Part B of Presumptions *infra*.

29. 3 Strob. Eq. 105 (S.C. 1849).

30. See also note 45, *infra*.

31. 2 Strob. Eq. 370 (S.C. 1835).

32. *Id.* at 372-73.

title transferred to the plaintiff and whether he had exhibited the deed, and spoken of it as a perfected instrument.

However, the traditional approach as stated by the courts, and other authorities,³³ is that the grantor must put the deed out of his possession. Although the *Wood* and *Harris* cases pronounce perhaps a more realistic view of delivery, the courts still emphasize the lack of physical changing of possession often in spite of strong evidence of the intention of the grantor that the deed should be effective. In *Rountree v. Rountree*³⁴ the grantor dictated a deed to his physician which proposed to give his nephew an interest in a tract of land. After his death a few days later, the deed was delivered to the grantor's executor. The grantee was a minor at the time, but his guardian had been present at the execution of the deed and testified that the grantor had declared to him that he wanted his nephew to have the land. The court, relying on the earlier case of *Merck v. Merck*,³⁵ held that there was no delivery, finding that the instrument was left at the home of the maker with no intent that it be delivered during his lifetime. Thus, in South Carolina the courts still seem to require that there be a parting of possession, in the absence of other acts, such as recording, etc., for there to be an effective delivery.

III. PRESUMPTIONS

A. Retention of Possession by the Grantor

It is generally stated that the retention of possession and control over the deed by the grantor raises the presumption of non-delivery, especially when it is in his possession at the time of death.³⁶ In *Wood v. Ingraham*,³⁷ the grantor, desiring to change her will, had certain deeds prepared to carry her intentions into effect. She later signed the deeds and had them witnessed. The

33. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 102, comment b. at 217 (Tent. Draft No. 2, 1965) states: "Otherwise, however, tradition requires that the promisor put the document out of his possession. But the change of possession need not be permanent; a delivery for the purpose of public recording, for example, may suffice even though the document is then redelivered to the promisor."

34. 85 S.C. 383, 67 S.E. 471 (1910).

35. 83 S.C. 329, 65 S.E. 347 (1909). In this case the court stated: "It is essential to delivery that the deed should pass beyond the control of the grantor. If the grantor retains the custody and control during his life, the paper cannot have effect as a deed at his death. *Id.* at 341, 65 S.E. at 351.

36. *Id.*

37. 3 Strob. Eq. 105 (S.C. 1839).

deeds were then placed in a drawer and retained by the grantor so that she could think about it for a while before she delivered them. She later decided to destroy the deeds. On the question of whether the deeds had been delivered, the court held that the delivery could not be presumed when the grantor retained the entire possession and control of the deed, and made no publication of its contents, nor declaration of her intention to deliver it.

Other evidence may be shown to rebut the presumption of non-delivery arising from the grantor's retention of possession at his death.³⁸ That a deed of voluntary conveyance was placed on record is a strong indication that it was delivered, despite the fact that it was found among the grantor's effects after his death.³⁹ Furthermore, the fact that the grantor has retained possession after it has been recorded will not rebut the presumption of delivery especially when the grantees are minors and members of the grantor's family.⁴⁰

B. Possession by the Grantee

A presumption of delivery has been said to arise when the grantee has possession of the instrument.⁴¹ This presumption is usually said to arise on the probability that the grantor gave him possession, and the improbability that the grantor would vest him with the deed unless he intended that title should pass.⁴² The presumption of delivery, however, is rebuttable, as when it

38. *Dawson v. Dawson*, Rice Eq. 243 (S.C. 1849).

39. *Id.* (syllabus). When the grantor retains possession of the deed but delivers it "to a justice to take proof of its execution and afterwards to the proper offices for the recording of deeds, where it is recorded, this will be sufficient evidence of the delivery, to pass the interests conveyed to the grantees, though the grantor became repossessed of the original deed, and it is found among his papers after his death."

40. *Folk v. Varn*, 9 Rich. Eq. 303 (S.C. 1857). In this case the court stated,

I am satisfied by the evidence, that the deed was delivered. Not that it was put into the hands of the child who was the donee, for that would have been a farcial formality, but that it was delivered to the witness for probate, and to the register for recording . . . and was afterwards retaken from the register by the donor, as the natural guardian of the child, and kept among his papers.

Id. at 306.

41. *Williams v. Sullivan*, 10 Rich. Eq. 217 (S.C. 1858). In *Wheeler v. Durant*, 3 Rich. Eq. 452, 459 (S.C. 1851), the court stated: "Considering the instrument a deed, I conclude that there was sufficient evidence of delivery. From the possession of the instrument by the person to whom the delivery should be made, and the custody committed, delivery should be presumed, in the absence of any countervailing evidence."

42. 4 H. TIFFANY, REAL PROPERTY § 1040 (3d ed. 1939). See also note 10 *supra*.

can be shown that the grantee had the instrument in his hands for another purpose⁴³—the burden of proof being on the party disputing the delivery.

O. Signing and Sealing in Presence of Witnesses

In some jurisdictions, there have been decisions to the effect that the signing and sealing of an instrument in the presence of an attesting witness raises a presumption of delivery. These decisions were based largely on the practice in those jurisdictions of making delivery of the instrument by a declaration to that effect in the presence of witnesses at the time of signing and sealing.⁴⁴ While this presumption has never been expressly rejected in South Carolina,⁴⁵ and in some cases there has been dicta recognizing this presumption,⁴⁶ it is doubtful that such a presumption could be justified, especially if the grantee were not present.⁴⁷

D. Recital of Delivery in Attestation Clause

In a few jurisdictions, the fact that the attestation clause recites the delivery creates the presumption of delivery.⁴⁸ The courts in South Carolina have never recognized such a presumption, although some early cases state that this is evidence that there was delivery.⁴⁹

E. Acknowledgement by the Grantor

Acknowledgement by the grantor of his execution of the deed has been recognized by many courts as creating a presumption of

43. See, e.g., *Little v. Little*, 215 S.C. 52, 53 S.E.2d 884 (1949); *Arthur v. Anderson*, 9 S.C. 234 (1878).

44. 4 H. TIFFANY, REAL PROPERTY § 1041 (3d ed. 1939).

45. In *Wood v. Ingraham*, 3 Strob. Eq. 105, 110 (S.C. 1849), the court stated, “[t]here is nothing in this case that is opposed to the rule that has been settled in New York since 1814, and in England, since 1826, that if a deed be signed and sealed, and declared by the grantor in the presence of attesting witnesses, to be delivered as his deed, it is an effectual delivery” *But see*, *Arthur v. Anderson*, 9 S.C. 234 (1878).

46. *Guess v. South Bound Ry.*, 40 S.C. 450, 455, 19 S.E. 68, 70 (1894): “[T]he plaintiff’s own testimony is quite sufficient to show that the deed was actually delivered, for he says that the deed was *executed* (which, of course, implies delivery) in the presence of two subscribing witnesses”

47. 4 H. TIFFANY, REAL PROPERTY § 1041 (3d ed. 1939); *cf.* *Jackson v. Inabnit*, 2 Hill Eq. 411 (S.C. 1836).

48. 4 H. TIFFANY, REAL PROPERTY § 1042 (3d ed. 1939).

49. *Folk v. Varn*, 9 Rich. Eq. 303 (S.C. 1857); *Dawson v. Dawson, Rice*, Eq. 243 (S.C. 1839).

delivery.⁵⁰ In South Carolina, the rule appears to be that such an acknowledgement is evidence bearing on the question of delivery.⁵¹ Many of the authorities are in accord with the South Carolina view and believe that the courts should refrain from the assertion of a presumption of delivery from acknowledgment—leaving it to the jury to determine whether the circumstances of a particular case show an intention by the grantor that the deed should become legally operative.⁵²

F. Recording

It is generally recognized by all the authorities on the subject that the recording of the instrument by the grantor, or leaving it with the proper official for record, raises a presumption of delivery—the rationale being that the grantor could only have intended by his leaving the instrument for record that it should become legally operative.⁵³ That this is the rule in South Carolina is beyond doubt.⁵⁴ It is also well recognized that this presumption is rebuttable by evidence that the grantor did not intend that the instrument was to operate as a conveyance.⁵⁵ Evidence that it was placed on record without authority,⁵⁶ or

50. 4 H. TIFFANY, REAL PROPERTY § 1043 (3d ed. 1939); See also 23 AM. JUR. 2d, Deeds § 119 (1965). Usually a presumption of delivery of a deed that has been acknowledged arises only when there is no evidence on the point or when the proof is balanced. In some jurisdictions, the mere fact of acknowledgment, standing alone, does not make a prima facie showing of delivery.

51. Broughton v. Telfer, 3 Rich. Eq. 431 (S.C. 1851). In this case, one William Remley executed a deed by which he conveyed certain slaves in trust. On the same day, Remley executed his will, in which he referred to and recognized the deed. The lower court stated: "Remley himself, in his will, speaks of the deed as a valid subsisting and effectual deed, by which he acknowledges himself to have disposed of the slaves mentioned in it. These are the facts mentioned as bearing on the question of delivery. I think they are sufficient to establish the due delivery of the deed." *Id.* at 435. See also, Dawson v. Dawson, Rice Eq. 243 (S.C. 1839).

52. See, e.g., 4 H. TIFFANY, REAL PROPERTY § 1043 (3d ed. 1939).

53. *Id.* § 1044; see, Dawson v. Dawson, Rice Eq. 243 (S.C. 1839).

54. Little v. Little, 215 S.C. 52, 53 S.E.2d 884 (1949); Williams v. Lawrence, 194 S.C. 1, 8 S.E.2d 838 (1940); Burke v. Burke, 141 S.C. 1, 139 S.E. 209 (1927); Morgan v. Morgan, 116 S.C. 272, 108 S.E. 110 (1921); Youmans v. Youmans, 115 S.C. 186, 105 S.E. 31 (1920); Sparkman v. Jones, 81 S.C. 453, 62 S.E. 870 (1908); McDaniel v. Anderson, 19 S.C. 211 (1883); Dawson v. Dawson, Rice Eq. 243 (S.C. 1839).

55. Little v. Little, 215 S.C. 52, 53 S.E.2d 884 (1949); Williams v. Lawrence, 194 S.C. 1, 8 S.E.2d 838 (1940); Morgan v. Morgan, 116 S.C. 272, 108 S.E. 110 (1921).

56. See Rountree v. Rountree, 85 S.C. 383, 67 S.E. 471 (1910). In this case the deed was not probated or recorded until after the death of the grantor, and was not, even then, recorded by anyone to whom it had been delivered by the grantor. The court held this overcame the presumption of delivery. *Cf.* Dawson v. Dawson, Rice Eq. 243 (S.C. 1839).

that there was no delivery⁵⁷ will overcome this presumption. As the recording of the instrument by the grantor shows, *prima facie*, an intention that it should become legally operative, likewise the transfer of the instrument to another,⁵⁸ or to the grantee himself,⁵⁹ to be recorded would also seem to show an intention to deliver.

In some jurisdictions, the fact that the purpose of the conveyance was to prevent the assertion or collection of a claim by a third party against the grantor and not to vest beneficial interest in the grantee has been said to preclude the presumption of delivery. However, this view has been criticized by certain authorities.⁶⁰ In *Little v. Little*,⁶¹ the grantor consulted a tax accountant who advised her that she might avoid or minimize inheritance taxes by making gifts to her children. The grantor executed several deeds and later had them recorded. A dispute arose over a description in one of the deeds and the grantor decided against distribution of the property. The deeds and the land had remained within the grantor's control and possession. She further alleged that the distribution had been for tax purposes and that she did not know of the presumption of delivery when she recorded the deeds. Thus, she claimed no delivery. The court held that there was delivery, stating that since the grantor's object was to avoid inheritance taxes and to take advantage of the gift tax exemptions, this purpose could not be accomplished by invalid deeds. "[S]he could not 'eat her cake and have it too.' On the contrary, the plan implied validity of

57. See *Burke v. Burke*, 141 S.C. 1, 139 S.E. 209 (1927).

58. *Withers v. Jenkins*, 6 S.C. 122 (1875); *Cloud v. Calhoun*, 10 Rich. Eq. 358 (S.C. 1858).

59. See *McGee v. Wells*, 52 S.C. 472, 30 S.E. 602 (1898). In *McDaniel v. Anderson*, 19 S.C. 211 (1883), the court declared the recording sufficient without reference to the party that recorded it. This has been justified by the fact that it is probable that it was placed on record, either by the grantor, thus showing intent on his part to make it operative, or by the grantee, whose possession of the deed itself raises a presumption of delivery. See also 4 H. TIFFANY, REAL PROPERTY § 1044 (3d ed. 1939).

60. Tiffany states:

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. 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.

4 H. TIFFANY, REAL PROPERTY § 1044 (3d ed. 1939).

61. 215 S.C. 52, 53 S.E.2d 884 (1949).

all the deeds, and, therefore, legal delivery of all of them, including the one in question.⁶²

That the grantor retains possession of the deed after it is recorded is not entitled to much consideration in rebutting the presumption of delivery.⁶³

G. Conduct of the Parties

In deciding the question of delivery, the courts often rely strongly on the conduct of the parties. If the parties act as if title has not passed, this will be strong evidence of non-delivery, even though there has been a manual delivery.⁶⁴ It is often stated by authorities that while acts of the grantor showing that title has passed are strong evidence of delivery, acts of the grantee are of little value in this regard.⁶⁵ However, when the grantee acts in such a manner that the only sensible conclusion is that title has passed, this will be strong evidence of delivery.⁶⁶

IV. CONCLUSION

It can be seen from the present discussion that delivery may be accomplished in a variety of ways. As stated by the court in *Harris v. Saunders*,⁶⁷ there is no prescribed formula for the delivery of a deed, but rather delivery must be ascertained from all the facts and circumstances. Physical acts which are sufficient in one case may not be in another, but no act of the grantor will be sufficient to constitute delivery unless there is an intent to deliver. In the usual case, there has often been

62. *Id.* at 61, 53 S.E.2d at 888.

63. See *Little v. Little*, 215 S.C. 52, 53 S.E.2d 884 (1949); *Dawson v. Dawson*, Rice Eq. 243 (S.C. 1839).

64. *Fraser v. Davie*, 11 S.C. 56 (1878). In this case the court held that even though the deed was executed by the grantor to a trustee and placed in the trustee's hands, the subsequent conduct of the parties showed that they mutually understood that withholding the deed from record was equivalent to withholding it from operating as a deed. See also *Little v. Little*, 215 S.C. 52, 53 S.E.2d 884 (1949).

65. See, e.g., 4 H. TIFFANY, REAL PROPERTY § 1045 (3d ed. 1939).

66. In *Branton v. Martin*, 243 S.C. 90, 132 S.E.2d 285 (1963), the grantor, who owned property in Myrtle Beach, executed a deed purporting to convey part of the property to all but one of her children, her daughter Laura. The grantor then gave the deed to her son who took it to Laura, and asked her to keep the deed for him. The court held that the fact that the son turned the deed over to Laura for safekeeping was strong evidence of delivery to him by the grantor. The deed was either the grantor's or a fabrication by the son. If it were the latter, it would be inconceivable that he would entrust it to the only child not included as a grantee.

67. 2 Strob. Eq. 370 (S.C. 1835).

a physical delivery of the instrument, thus showing a sufficient manifestation of intent; however, the conveyance still fails because the intent to make the conveyance legally operative is lacking. Any presumptions that may arise merely affect the duty of producing evidence; they do not take the place of the essential requirement—intent. Briefly stated again, delivery of a deed includes, not only an *act* by which the grantor evinces a purpose to part with the control of the instrument, but a concurring *intent* to vest title in the grantee.⁶⁸

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68. Powers v. Rawls, 119 S.C. 134, 112 S.E. 78 (1922).