UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 25 | Number 1 Article 14

12-1-1946

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to include actual expenses for nursing and medical service; loss of income;[54] suffering, both mental and physical;[55] and any other injury which naturally and directly are proximate consequences of the wrongful act[56] and which are not elements of damage in the death action. Punitive damages should not be awarded.[57] If there were an injury to the property of the injured person as a result of the wrongful act, such property damages must be recovered in the same action with the personal injury damages.[58] It would seem that such elements of damage as permanency of injuries and loss of earning capacity would not be included since these elements are a part of the elements of damage resulting from the death.[59] It is clear that neither interest[60] nor attorney fees[61] are recoverable as damages.

Only those questions which it is felt the court will of necessity be called upon to answer in the near future have been brought within the scope of this note. Since the principal case clarifies the existence of a cause of action which prior to 1915 did not exist and since 1915 evidently was not understood by the bar to exist, it is certain that many other questions will be presented for determination.

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Gifts of Corporate Stock—Transfer on Corporation Books to Donor and Donee Jointly

In *Buffaloe v. Barnes*[1] a purchaser of 70 shares of corporate stock directed that the certificate be issued in the names of himself and his niece "as joint tenants with right of survivorship, and not as tenants in common." He told the broker handling the transaction that he wanted it that way so that if he pre-deceased her it would belong outright to her, and if she pre-deceased him it would belong outright to him. The certificate was delivered to him and was found at his death in his safety deposit box. A dividend check payable to both had been indorsed by her and delivered to him. Alleging a gift *inter vivos,* she claimed the shares as survivor in the joint tenancy. In an action by the executor

[54] Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922); Rushing v. Seaboard Air Line Ry., 149 N. C. 158, 62 S. E. 890 (1908).

[55] Britt v. Carolina Northern R. R., 148 N. C. 37, 61 S. E. 601 (1908), *rehearing denied,* 149 N. C. 581, 64 S. E. 1135 (1908) (physical injury must accompany mental suffering).

[56] Lane v. Southern Ry., 192 N. C. 287, 134 S. E. 855, 51 A. L. R. 1114 (1926).

[57] Rippey v. Miller, 33 N. C. 247 (1850).

[58] See note 15 *supra.*

[59] Poe v. Raleigh & A. A. L. R. R., 141 N. C. 525, 54 S. E. 406 (1906); Burton v. Wilmington R. R., 82 N. C. 505 (1880).

[60] Penny v. A. C. L. R. R., 161 N. C. 523, 77 S. E. 774, Ann. Cas. 1914D 992 (1913).

[61] Crutchfield v. Foster, 214 N. C. 551, 200 S. E. 395 (1938).

[1] 226 N. C. 313, 38 S. E. (2d) 222 (1946), *petition to rehear denied,* 226 N. C. app. (Oct. 9, 1946).

to determine title to the 70 shares, heard on an agreed statement of facts, the parties conceded that she was entitled to one half of the stock in any event. The trial judge's ruling, based on the agreed facts, that she had title to all the stock was reversed on appeal, two justices dissenting. The court said that the facts agreed upon were insufficient to support that conclusion; that "it would not seem to follow [from the agreed facts] as a necessary conclusion of law that a present gift was intended."

The well known general requirements for making a valid gift of personalty are donative intent, delivery, and acceptance.[2] Where the subject of the gift is capable of manual delivery, actual delivery is necessary to consummate a gift; otherwise there must be such delivery as the nature of the property and the surrounding circumstances reasonably permit, clearly showing the donor's intention to part with title and possession and vest the same in the donee.[3] In cases where manual delivery is impossible or impracticable, delivery may be symbolical or constructive.[4] A delivery is symbolical when another object or token representing the property is handed over instead of the thing itself.[5] A constructive delivery is delivery of the means of obtaining possession and control of the subject matter of the gift, or the relinquishment in any manner to the donee of the donor's control and dominion over the property. A simple example of constructive delivery is a gift of property that is locked away by a delivery of the key.[6]

It is agreed that delivery need not necessarily be directly to the donee. It may be to a third person for him,[7] or the donor may constitute himself trustee for the donee.[8] Another rule is that the gift must be fully executed in the present, and not be intended to take effect in the future.[9] But if a valid gift be made, the fact that the donee's enjoyment of the gift is postponed until some future time, and that the donor retains possession to receive the income from the property during his lifetime do not invalidate the gift.[10] Acceptance of the gift is generally held to be a requisite,[11] but acceptance of a gift beneficial to the donee will be presumed.[12]

[2] 24 AM. JUR., Gifts §§21, 24, 40; BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY (1936 ed.) §37.
[3] Hudgens v. Tillman, 227 Ala. 672, 151 So. 863 (1933).
[4] Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898); Brown, *op. cit. supra* note 2, §41.
[5] Lavender v. Pritchard, 3 N. C. 337 (1805).
[6] Newman v. Bost, cited *supra* note 3; Brown, *op. cit. supra* note 2.
[7] Payne v. Tobacco Trading Corp., 179 Va. 156, 18 S. E. (2d) 281 (1942).
[8] 38 C. J. S., Gifts §26.
[9] Pomerantz v. Pomerantz, 179 Md. 436, 19 A. (2d) 713 (1941).
[10] Smith v. Commissioner of Internal Revenue, 59 F. (2d) 533 (C. C. A. 9th, 1932); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932).
[11] 24 AM. JUR., Gifts §40.
[12] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926).

The law applies these same age-sanctioned rules to gifts of choses in action, including corporate stock, although much difficulty is encountered due to the dissimilarity in subject matter.[13] Therefore, a gift of stock may be made by delivery of the certificate with or without indorsement to the donee, if a present gift be intended.[14] The usual statutory provision that transfer be made on the corporation books is uniformly considered to be for the benefit of the corporation only, and does not affect the validity of the gift as between the parties.[15]

The conflict in the decisions arises over the question whether transfer on the corporation books without delivery of the certificate to the donee can constitute constructive delivery sufficient to pass title.[16] With no outside evidence of delivery in its traditional sense available, the question of donative intent becomes vital.[17] An examination of the cases discloses that the results reached reflect in most instances the varying amounts of evidence present either supporting or negativing the existence of donative intent.[18] For this reason it clarifies the problem to classify the cases according to whether or not they contain evidence regarding donative intent.[19]

[13] See Mechem, *Gifts of Corporation Shares* (1925) 20 ILL. L. REV. 9.

[14] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926); Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

[15] Cases cited *supra* note 14.

[16] Annotations: 99 A. L. R. 1080; 152 A. L. R. 427.

[17] Ball v. Forbes, 314 Mass. 200, 49 N. E. (2d) 898 (1943).

[18] Cases cited *infra* note 19.

[19] **Cases upholding gifts containing evidence of donative intent:**

Gifts to donor and donee jointly: Abegg v. Hirst, 144 Iowa 196, 122 N. W. 838 (1909); Bunker v. Fidelity National Bank and Trust Co., 335 Mo. 305, 73 S. W. (2d) 242 (1934); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940); *In re* Hutchison's Estate, 120 Ohio St. 542, 166 N. E. 687 (1929); Simonton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941).

Gifts of entire ownership: Jean v. Jean, 207 Cal. 115, 277 Pac. 313 (1929); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928); *In re* Dayton's Estate, 121 Neb. 402, 237 N. W. 303 (1931); *In re* Brady's Estate, 228 App. Div. 56, 239 N. Y. Supp. 5 (1930); Crouse v. Judson, 41 Misc. 338, 84 N. Y. Supp. 755 (1903); Ellsworth v. Ellsworth, 151 S. W. (2d) 628 (Tex. 1941); Payne v. Tobacco Trading Corp., 179 Va. 156, 18 S. E. (2d) 281 (1942); Moore v. Van Tassell, 58 Wyo. 121, 126 P. (2d) 9 (1942).

Cases upholding gifts where there was no evidence regarding donative intent except the transfer on the corporation books:

Gifts to donor and donee jointly: Irvine v. Helvering, Commissioner of Internal Revenue, 99 F. (2d) 265 (C. C. A. 8th, 1938); Eisenhardt v. Lowell, 105 Colo. 417, 98 P. (2d) 1001 (1940); *In re* Martin's Estate, 266 S. W. 750 (Mo. App. 1924); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Manning v. United States National Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944).

Gifts of the entire ownership: Marshall v. Commissioner of Internal Revenue, 57 F. (2d) 633 (C. C. A. 6th, 1932); Whitney v. Whitney Elevator & Warehouse Co., 121 Misc. 461, 200 N. Y. Supp. 792 (1923); Francis v. New York and B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888); Sparks v. Hurley, 208 Pa. 166, 57 Alt. 364, 101 Am. St. Rep. 926 (1904); Robert's Appeal, 85 Pa. 84 (1877); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Phillips v. Plastridge, 107 Vt. 267,

The theory of some of the cases ruling the gifts invalid is that the transfer on the books is ineffective unless the certificate be delivered to the donee, on the view that as long as the owner holds the certificate he retains dominion and control over the stock and can revoke the gift at will; that it is an attempt to make a gift to take effect *in futuro*.[20] They say that, as far as appears, the owner had the transfer made for his own convenience rather than as a gift, and there is no evidence that he intended a present irrevocable transfer of title.[21] But significantly, in most of the cases holding this way there was evidence tending to show that there was actually no donative intent, which was the controlling element; although some of them also stated that even if a gift was intended, this transaction was ineffective as delivery.[22] Moreover, a fair proportion of these opinions declared that transfer on the books would have been a perfectly good way to make delivery except for the absence of donative intent.[23]

For example, in *Besson v. Stevens*[24] every indication was that the donor did not intend a present irrevocable gift, and it was accordingly held that such transfer was not delivery and that the donor could have revoked the gift at any time and compelled the company to re-transfer the stock to him. But the court said that that case was not inconsistent with an earlier New Jersey case[25] which upheld a similar transfer to donor and donee jointly where there was nothing to disprove donative

179 Atl. 157, 99 A. L. R. 1074 (1935); *In re* King's Estate, 49 Wyo. 453, 57 P. (2d) 675 (1936).

Cases denying the validity where there was evidence disproving donative intent:

Southern Industrial Institute v. Marsh, 15 F. (2d) 347 (C. C. A. 5th, 1926); Hudgens v. Tillman, 227 Ala. 672, 151 So. 863 (1933); Hart v. Hart, 272 Ky. 488, 114 S. W. (2d) 747 (1938); White v. White, 17 S. W. (2d) 733 (Ky. 1929); Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 Atl. 637 (1903) (joint ownership); Dover Cooperative Bank v. Tobin's Estate, 86 N. H. 209, 166 Atl. 247 (1933); Zimmerman v. Nauhauser, 119 N. J. Eq. 424, 183 Atl. 820 (1936); Crane v. I. Seymour Crane, Inc., 100 N. J. Eq. 400, 135 Atl. 782 (1927); Besson v. Stevens, 94 N. J. Eq. 549, 120 Atl. 640 (1923); Reiley v. Fulper, 93 N. J. Eq. 112, 115 Atl. 661 (1921); Frazier v. Oklahoma Gas & Electric Co., 178 Okla. 512, 63 P. (2d) 11 (1936); Figuers v. Sherrell, 181 Tenn. 87, 178 S. W. (2d) 629, 152 A. L. R. 420 (1944); Swan v. Swan's Ex'r, 136 Va. 496, 117 S. E. 858 (1923).

Cases denying the validity of gifts where there was no evidence regarding donative intent:

Speaker v. Keating, 122 F. (2d) 706 (C. C. A. 2nd, 1941); Witthoft v. Commercial Development & Investment Co., 46 Idaho 313, 268 Pac. 31 (1928); Getchell v. Biddeford Savings Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408 (1900); Matter of Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71 (1889).

[20] See note 19 *supra*.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 94 N. J. Eq. 549, 120 Atl. 640 (1923) (corporation president transferred stock to daughter on books, certificate remaining in company safe; he took an assignment back from her with an irrevocable power of attorney for him to transfer the stock on the books to him or his nominee; told her he had "put it in her name," wanted it to come back to him if she died first, and at his death to come back to the estate to enable equal distribution to all children).

[25] East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1913).

intent; perhaps implying that gifts of joint estates are exempt from the rule announced in the *Besson* case. In a Virginia case where the showing was clearly against donative intent[26] the court held that it was not a gift, but declared that this transaction was exactly the right way to pass title, making the donee prima facie owner; and in the absence of proof contrary to donative intent the latter would be entitled to it. Other cases presented in the footnote involve similar situations.[27]

A few of the opinions cited in the principal case involved joint bank deposits,[28] which have been even more fruitful of litigation than stock transfers.[29] In one case where the evidence was that no executed gift was intended[30] the court said that such a deposit certificate was prima facie evidence of donative intent, and, in the absence of facts disproving it, would be sufficient delivery make a valid gift.[31] A Massachusetts case said that the transaction with the bank would constitute delivery and effect a present gift if that result were intended; but that it was still open to the donor's executor to show by attendant facts and circumstances that a present gift was not intended.[32]

Four cases were found ruling the gifts invalid where there were no facts disproving donative intent, two of them being stock transfers.[33]

[26] Swan v. Swan's Ex'r, 136 Va. 496, 117 S. E. 858 (1923) (husband transferred stock to his wife and kept certificate, voted stock, collected dividends, listed it among his assets, made a will attempting to dispose of income from it, and erased the "s" from "Mrs." in the certificate).

[27] Southern Industrial Institute v. Marsh, 15 F. (2d) 347 (C. C. A. 5th, 1926) (shareholder directed transfer on corporation books but had the company return the certificate to him because he wanted to deliver it personally and exact an agreement from the donee reserving the dividends for life; he died before delivery).

Hudgens v. Tillman, *227* Ala. 672, 151 So. 863 (1933) (stockholder threatened with alimony suit transferred stock to daughter's name, sent certificate to son-in-law with letter disclaiming donative intent, asking latter to keep both in his safety deposit box and tell no one).

Figuers v. Sherrell, 181 Tenn. 87, 178 S. W. (2d) 629, 152 A. L. R. 420 (1944) (bank shareholder had certificate issued in nephew's name, kept certificate, had bank deliver dividend checks and a stock dividend to him, voted and pledged stock, signing nephew's name to dividend checks, proxy, assignment, and power of attorney, all unknown to nephew). Similar evidence is found in the cases disallowing gifts in cases cited *supra* note 19.

[28] Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933); Thomas v. Houston, 181 N. C. 91, 106 S. E. 466 (1921).

[29] See Harold C. Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. REV. 129; annotations: 48 A. L. R. 189; 66 A. L. R. 881; 103 A. L. R. 1123; 135 A. L. R. 993, 149 A. L. R. 879.

[30] Trenton Saving Fund Society v. Byrnes, 110 N. J. Eq. 617, 160 Atl. 831 (1932).

[31] *Id.*

[32] Ball v. Forbes, 314 Mass. 200, 49 A. (2d) 898 (1943).

[33] Speaker v. Keating, 122 F. (2d) 706 (C. C. A. 2nd, 1941) (a mother assigned mortgages to herself and daughter as joint tenants, had them recorded and kept them, taking from the daughter an authority to collect interest); Witthoft v. Commercial Development and Investment Co., 46 Idaho 313, 268 Pac. 31 (1928) (shareholder had certificates issued in names of various relatives and gave them to a business associate, telling him "I want you to be my trustee, and in case of death deliver these to the parties they are made out to"; they were kept in safe

The leading case is *Getchell v. Biddeford Savings Bank*,[34] which stated that as far as appeared the transfer was made for the donor's own convenience, or so that the donee might receive it after his death; and that if a gift was intended it was not perfected by delivery.

On the other hand there are numerous cases sustaining such gifts on the ground that transfer on the books is the equivalent of constructive delivery.[35] In about half of them the facts showed donative intent, whereas in the rest there was again merely the written transaction with the corporation, without any declarations or conduct on the part of the donor showing what had been his intention in directing the transfer.[36]

The North Carolina court sustained the survivor's right to the stock under a transfer quite similar to that in the instant case in *Jones v. Waldroup*, where, however, there was donative intent shown and the certificates were in the possession of the donee.[37] The court observed that *Taylor v. Smith*[38] decided that a joint tenancy in personalty with right of survivorship may be created by contract,[39] and it construed the Waldroup transaction as creating a joint tenancy with survivorship. Further, our court has held that a gift may be made presently passing title to the principal of a note without actual delivery, the donor keeping the note to collect the interest for life.[40] It was said there that the fact that the donee's enjoyment of the gift was postponed until the donor's death did not render the gift revocable or testamentary.

A case on all fours with the principal case is *Eisenhardt v. Lowell*,[41] where the Colorado court upheld the gift, saying that the "unequivocal

to which both had access); Getchell v. Biddeford Savings Bank, 94 Me. 452, 47 Atl. 895, 50 Am. St. Rep. 408 (1900); Matter of Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71 (1889) (bearer bonds were registered in donee's name, donor retaining certificate and collecting interest).

[34] 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408 (1900) (a bank officer and stockholder had certificates issued in his wife's name, keeping them in the bank vault, drawing dividends and receipting for them in his own name, it not appearing that she knew of the transaction; after her death he induced the bank to reissue them to him. *Held*, her estate was not entitled to the stock).

[35] See note 19 *supra*.

[36] See note 19 *supra*.

[37] 217 N. C. 178, 7 S. E. (2d) 366 (1940) (certificates were issued to "R. M. Waldroup or H. L. Waldroup," his wife; witnesses testified that he had made declarations of gift, and there was testimony that the stock had been purchased with the donee's funds).

[38] 116 N. C. 531, 21 S. E. 202 (1895).

[39] *Id.* It was held there that the statute [N. C. GEN. STAT. (1943) §41-2] abolishing survivorship in joint tenancies does not prohibit persons from contracting as to personalty so as to make the future rights of the parties depend on the fact of survivorship.

That such a joint tenancy may be created by conveyance from one to himself and another, see Irvine v. Helvering, 99 F. (2d) 265 (C. C. A. 8th, 1938).

[40] Parker v. Mott, 181 N. C. 435, 107 S. E. 500, 25 A. L. R. 637 (1921).

[41] 105 Colo. 417, 98 P. (2d) 1001 (1940) (stockholder surrendered his certificate to the corporation and had it re-issued to himself and wife "as joint tenants with right of survivorship, and not as tenants in common"; it was delivered to him and found in his safety deposit box after his death, with no indication that the wife knew of it).

declarations" in the certificate are prima facie evidence of donative intent, and in the absence of contrary proof vest a present right in the stock in the donee, even though the right of enjoyment of the whole is postponed.[42] A South Carolina case, *Copeland v. Craig*,[43] is also identical with the principal case, except that the gift was entire instead of joint, and the court there ruled in favor of the gift. It was said in a Fourth Circuit Court of Appeals decision: "Even if the certificates were not delivered to the new shareholders, the transfers on the books were sufficient to vest the title in the new owners if made by Von Ruck with that intention."[44] And the Vermont court in *Phillips v. Plastridge*[45] upheld the gift even though the certificate was not detached from the stock book and remained in the corporation's custody.[46] Thus in all of the cases examined where there were no signposts pointing in either direction to aid in the search for intent, only a very few ruled against the gift.[47] Of these only two involved stock transfers, and in neither of them was it a transfer in joint ownership.

In all this quarrel over delivery it is appropriate to recall what function delivery has traditionally been supposed to serve; namely, to be the operation whereby the donor parts with title and dominion and vests them in the donee.[48] In view of this, it is suggested that the rule in *Eisenhardt v. Lowell, supra,* that transfer on the books in joint ownership is valid constructive delivery, adequately accomplishes this purpose, especially because of the nature of the joint estate created.[49]

The transfer on the corporation books is not a barren transaction. As between the corporation and the transferee the latter comes into privity with the corporation and assumes the status of a shareholder, having the right to vote in the control of the corporation and share in

[42] *Id.*

[43] 193 S. C. 484, 8 S. E. (2d) 858 (1940) (a father had his certificate re-issued in his daughter's name, and the certificate was found in his safety deposit box at his death; she indorsed dividend checks to him, as in the principal case).

[44] Schoenheit v. Lucas, 44 F. (2d) 476, 487 (C. C. A. 4th, 1930).

[45] 107 Vt. 267, 179 Atl. 157, 99 A. L. R. 1074 (1935) (a father transferred stock to daughter's name without her knowledge, no other evidence appearing).

[46] *Id.* The court said, "Phillips had divested himself of all right and title to the stock, and the complete ownership had passed to his daughter. It was his voluntary act, affording an inference of the existence of donative intent."

In *Simonton v. Dwyer*, 167 Ore. 50, 115 P. (2d) 316 (1941) (a father retained certificates taken out in children's names) in holding it a valid gift the court said that by the transfer the donor "thereby irrevocably placed the stock beyond his control. . . . He thus placed himself in a position that any interference by him with the stock without the consent of the plaintiffs would be unauthorized and unlawful."

[47] See note 33 *supra.*

[48] See Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (1926) 21 Ill. L. Rev. 341, 354.

[49] Cases cited *supra* note 19; see Mechem, *Gifts or Corporation Shares* (1925) 20 Ill. L. Rev. 9, 27.

its benefits.[50] Now it was seen that some of the cases say that until delivery of the certificate to the donee the donor still has control over the stock and can compel the company to transfer it back to him, and can deal with it as he wishes.[51] However, he has induced the corporation to accept the donee as a stockholder, with resulting rights and liabilities on both sides.[52] Thenceforth, if the transfer was made with donative intent, it is wrongful on the part of the donor or the corporation to deal with the stock without the assent of the transferee; and throughout the cases upholding such gifts[53] it is reiterated that the donor by the transfer has put it beyond his power lawfully to sell or assign the stock or have the company re-issue it to him without the signature and consent of the donee.[54]

The fact that the donor reserves the right to the dividends during his lifetime does not invalidate the gift.[55] As one court stated it, the reservation of dividends "was merely a limitation on the quantity of the contemplated gift, and in no way affected its validity."[56] Of course, if there never was an intended gift the owner is able to have the stock re-issued to him;[57] but it has been held, where valid gifts were made in this manner and the donor later repudiated the gift, that the donee may compel the donor or the corporation to restore the stock to him.[58]

When we come to gifts creating joint ownership in donor and donee, transfer on the corporation books seems to fulfill the requirements of delivery even more adequately than in the case of a gift of the entire interest, because delivery of the new certificate back to the donor is in effect delivery to one of two joint tenants, and delivery to one is delivery

[50] Webster v. Upton, 91 U. S. 65, 23 L. ed. 384 (1875); Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921); 6 THOMPSON ON CORPORATIONS (3rd ed.) §§4394, 4335; 11 FLETCHER CYCLOPEDIA CORPORATIONS §5092.

[51] Cases cited *supra* note 19.

[52] Francis v. New York & B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888).

[53] See note 19 *supra*.

[54] Marshall v. Commissioner of Internal Revenue, 57 F. (2d) 633 (C. C. A. 6th, 1932); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); Whitney v. Whitney Elevator & Warehouse Co., 121 Misc. 461, 200 N. Y. Supp. 792 (1923); Francis v. New York & B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888); Simpnton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941); Manning v. U. S. Nat'l Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944); Robert's Appeal, 85 Pa. 84 (1877); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Ellsworth v. Ellsworth, 151 S. W. (2d) 628 (Tex. 1941); Phillips v. Plastridge, 107 Vt. 267, 179 Atl. 157, 99 A. L. R. 1074 (1935); CHRISTY, THE TRANSFER OF STOCK (1929) §220; 2 COOK ON CORPORATIONS (8th ed.) §308; MACHEN, MODERN LAW OF CORPORATIONS (1908 ed.) §1006.

[55] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926).

[56] Smith v. Commissioner of Internal Revenue, 59 F. (2d) 533 (C. C. A. 9th, 1932).

[57] Hotaling v. Hotaling, 187 Cal. 695, 203 Pac. 745 (1922).

[58] Jean v. Jean, 207 Cal. 115, 277 Pac. 313 (1929); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928).

to both, just as possession of one is possession of both.[59] Moreover, since in this situation the donor is not giving away his entire interest in the property, but is retaining an undivided one-half interest with right of survivorship, it is not at all inconsistent with a valid gift for him to retain dominion and control to the extent of his interest,[60] as long as he does not exercise sole dominion; and this he cannot do because the donee's assent is necessary for any disposition he makes of the stock.[61] If the donee indorse dividend checks to him, he receives the proceeds by the donee's act and not from the corporation, thus recognizing the donee's ownership.[62]

Thus it seems that transfer in joint ownership accomplishes what actual delivery is supposed to do—provide the donee with means of obtaining dominion over the gift, as far as the nature of the property and the extent of the gift allow.[63] Of course, if there is anything present to cast doubt on the donative intent, the transaction is ineffective to pass title, just as would be actual delivery of a chattel without donative intent.[64] But in our problem, lacking any evidence on intent, the language of the certificate itself should permit an inference sufficient in the absence of a contrary showing to make a prima facie case of donative intent.[65] It should testify that the donor has consciously attempted to create a present joint estate.[66] When this intent is translated into delivery by transfer on the books, the donor has performed an act changing the character of his possession from that of sole owner to that of a co-tenant.[67]

[59] Abegg v. Hirst, 144 Iowa 196, 122 N. W. 838 (1909); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Mechem, *supra* note 13, at 27.

[60] Cases involving joint gifts cited *supra* note 19. In *East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie,* cited *supra* note 59, the court said that the donor, "as joint tenant with right of survivorship, had such an interest in his right of survivorship as permitted him to hold and manage the joint property for the best advantage of all concerned."

[61] See note 54 *supra.*

[62] Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940).

[63] See Mechem, *supra* note 13, at 27; Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341, 354.

[64] See note 2 *supra.*

[65] Edmonds v. Commissioner of Internal Revenue, 90 F. (2d) 14 (C. C. A. 9th, 1937); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Eisenhardt v. Lowell, 105 Colo. 417, 98 P. (2d) 1001 (1940); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Simton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941); Manning v. U. S. Nat'l Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944).

[66] In *Eisenhardt v. Lowell,* cited *supra* note 65, the court said, "The unequivocal declarations of the new certificate are taken as *prima facie* disclosing the apparent intention of Mr. Lowell to create a joint estate." In *Manning v. U. S. Nat'l Bank of Portland,* cited *supra* note 65, it was said, "We find in the written instruments convincing proof of the existence of such intent."

[67] Napier v. Eigel, 350 Mo. 111, 164 S. W. (2d) 908 (1942).

This rationale was not followed in the principal case; rather it was intimated that even if donative intent were conceded, this transaction fell short of the requisite delivery.[68] It is submitted that the decision contains an inconsistency. While the majority opinion recognized that a joint tenancy in personalty may be created by contract,[69] it ruled that the donee was not entitled to all the stock as survivor, but granted her the half interest which had been conceded by the parties.[70] But in order for any part of the title to vest in her by gift there must have been donative intent and delivery.[71] By conceding her the half interest the parties conceded donative intent and delivery; and although the court was only determining title to that portion of the stock which was in dispute, yet this concession of the parties created a necessary inference which was a part of the agreed case. Therefore, if donative intent and delivery were present it would be an executed gift in joint ownership, and she should take all by the right of survivorship incorporated in the instrument creating the gift.[72]

In the final analysis, the parties here stipulated certain facts. Whether there was constructive delivery with donative intent was the crucial fact to be determined, the answer being an inference of fact. The dissent said that the majority opinion conceded that there were permissible inferences of fact yet undetermined,[73] but ruled against the donee because not enough facts were stipulated on which to base a definite decision.[74] The dissent contended that the cause should have been remanded for further proceedings to determine fully the facts, citing cases in which that was done when the case agreed did not state enough

[68] In a memorandum in *226* N. C. app. stated not to be binding on the court, but rather in explanation of the denial of the petition to rehear, it was said, "A joint tenancy in stock with a provision for survival of ownership, where the donor retains custody of the stock, nothing else appearing, in our opinion, does not meet the definition of a gift *inter vivos*. The possession of a joint tenant is not that exclusive, absolute, and unconditional possession contemplated in a gift *inter vivos*."

[69] Citing Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[70] The court said, "We note that appellants concede that Rossie Mae Barnes was entitled to one half interest in the 70 shares, upon the view that the statute (G. S. 41-2) converted the joint tenancy into tenancy in common, and that by virtue of his right to partition under G. S. 46-42, the testator retained control over his property to the extent of his interest therein."

G. S. §41-42, however, does not convert joint tenancies into tenancies in common; it merely abolishes survivorship as an incident to existing joint tenancies where it would occur by operation of law, and does not prohibit persons from contracting in such manner as to create survivorship. (See note 39 *supra*.) And as the dissent stated, the fact that G. S. §46-42 gives a joint tenant the right to petition for partition has no bearing on the question of delivery or whether the joint estate was created. He had that right no matter who held the certificate and regardless how the estate was created. "The estate created and not the retention of the certificate gave him the right."

[71] Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898).

[72] Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

[73] Buffaloe v. Barnes, cited *supra* note 1, at 319.

[74] *Id.* at 324 (dissenting opinion).

facts for a fair conclusion of law to be drawn.[75] If the gift is not to be approved under the theory suggested herein, then it would seem preferable to take the action urged by the dissenting opinion.[76] If no additional facts could be stipulated, it would be an appropriate case for a jury to determine whether there was donative intent and delivery.[77]

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[75] Trustees of Elon College v. Elon Banking & Trust Co., 182 N. C. 298, 109 S. E. 6 (1921); Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3 (1926). To the same effect see Hood v. Johnson, 208 N. C. 77, 178 S. E. 855 (1935); Sedbury v. Southern Express Co., 164 N. C. 363, 79 S. E. 286 (1913).

However, in the court's memorandum denying the petition to rehear, cited *supra* note 68, it was said that even if donative intent or other inferences were drawn from further findings of fact, it could not cure the lack of absolute delivery of the stock to the donee which is necessary in a gift *inter vivos*.

[76] In *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349 (1915), our court allowed the question of delivery to go to the jury when the evidence on the whole tended to show that there had been no delivery. And in *Grissom v. Sternberger*, 10 F. (2d) 764 (C. C. A. 4th, 1926), it was held error for the trial judge to rule as a matter of law that there was no gift; it was for the jury to say what inferences were to be drawn.

[77] The opinion in the principal case did not refer to the applicability of the Uniform Stock Transfer Act [N. C. GEN. STAT. (1943) §§55-81 to 55-104], enacted in North Carolina in 1941. The general purpose of the Act is to confer attributes of negotiability upon stock certificates; as a corollary, the importance of the transfer on the corporation books is diminished. For discussion of the general problem see Mechem, *supra* note 13, at 28; Notes (1941) 19 N. C. L. REV. 469, (1939) 37 MICH. L. REV. 480, 48 YALE L. J. 897.