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Requirement of Delivery in Gifts of Personalty - Schenker v. Moodhel

REQUIREMENT OF DELIVERY IN GIFTS OF PERSONALTY

Schenker v. Moodhe[1]

Plaintiff-appellee brought this bill in equity against the administrator of the estate of one Coleman, to compel the surrender of property alleged to have been given her by the decedent. Plaintiff had assisted the decedent on several occasions before his last illness, and the decedent had expressed an intention to reward her. When the decedent realized that death was imminent, he told the plaintiff that he had purchased a cemetery lot and that she would find a

[1] 200 A. 727 (Md. 1938). For the same litigation, on a separate bill of complaint and appeal, see Moodhe v. Schenker, 4 A. (2nd) 453 (Md. 1939).

receipt for it among his papers. He then directed her to the places where he had secreted his papers, bank books and other valuables. He told her that she would find the number of his safe deposit box among the papers, and that she should hold the bank book, papers and other valuables, as well as the contents of the safe deposit box, for the purpose of paying his funeral and other expenses, and that the balance was to be her own. Upon being taken from the house to the hospital, from which he did not return, the decedent told the plaintiff to get his keys from the pocket of his trousers in his room. Upon warning of the contagious character of the disease of the decedent, the plaintiff did not take possession of any of the property, but it was turned over to the administrator.

The Court of Appeals declared that, in order for the plaintiff to recover, the facts must support either a gift causa mortis, a gift inter vivos, or a gift by way of a declaration in trust, and held that since the plaintiff did not take possession of the property during the life of the decedent, there could be no gift causa mortis or inter vivos, as in both of these an essential element is the delivery of the property intended to be transferred, during the life of the donor.

The Court pointed out that although delivery is essential to a valid gift, it may be either actual or constructive, but to be a valid constructive delivery, it must not only be accompanied by words sufficient to show a donative intent, but must be of such a character as completely to divest the donor of dominion and control over the donation and to place it "wholly under the donee's power." The Court distinguished the principal case from the case of *Brooks v. Mitchell*[2] simply upon the ground that in that case the intended donee took possession of the property before the death of the donor, saying that in the principal case the donor could have taken possession and had control of the property up to the time of his death. It will be noticed that this leaves the completion of the gift entirely up to the actions of the donee, and it is possible to argue, especially in the principal case, that the property was here "wholly under the donee's power."

Pointing out the development of the law from the early common law requirement of actual manual tradition to transfer absolute property in a chattel[3] to the present rules

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[2] 163 Md. 1, 161 A. 261, 84 A. L. R. 547 (1932).

[3] Irons v. Smallpiece, 3 B. & Ald. 551 (1819), to the effect that no parol gift of a chattel capable of manual tradition is valid without delivery thereof by the donor to the donee.

allowing constructive and symbolical delivery, commentators[4] have contended that there is a tendency on the part of the courts to relax the requirement of delivery in gifts of personal property. The first relaxation of the requirement of actual manual tradition came in the case where the chattel, because of its size, was not capable of actual delivery.[5] Delivery of the effective means of acquiring or coming to the use of the subject of the gift was held to suffice. Further relaxation of the requirement of delivery was accepted where the article, although smalll in size, and hence susceptible of manual delivery, was never-the-less not present.[6] Thus both size and location of the subject of the gift are considered by the Court in reaching its conclusion upon the existence of a constructive delivery. One of the most familiar examples of this latter type of gift, where the subject of the gift is capable of actual manual delivery, but is not present at the time of the gift is where the contents of a safe deposit box are given to a donee, the only delivery being the delivery of the key to the box.[7] One commentator[8] points out that some of the cases have gone so far as to permit a constructive delivery when the subject of the gift was present and capable of manual delivery. An example of this is an Oregon case[9] where a father pointed out to his daughter the places on his farm where money was buried and made a positive declaration of gift of the money to her. She did not remove the money from the places where it was buried until after her father's death. The Court found that there was a valid gift. A similar result was reached in regard to bank stock in a safe, where the donor intrusted the donee with the combination of the safe, but the donee did not take possession before the death of the donee.[10] Professor Roberts[11] submits that the cases show the direction in which the law on the subject is developing and that

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[4] Note, *Relaxation of the Requirement of Delivery in Gifts of Personal Property* (1937) 6 Fordh. L. Rev. 106; Roberts, *The Necessity of Delivery in Making Gifts* (1926) 32 W. Va. L. Q. 313.

[5] Jones v. Selby, Prec. Ch. 300, 24 Eng. Repr. 143 (1710); Ward v. Turner, 2 Ves. Sr. 431, 28 Eng. Repr. 275 (1752).

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

[7] Maryland requires that the donor surrender complete control. In In re Bauernschmidt's Estate, 97 Md. 35, 54 A. 637 (1903), B rented a safe deposit box in the names of himself and wife, as joint tenants, the survivor to have access to the box, and each was given a key. The Court held that there was no completed gift as there was no complete delivery of possession and dominion of the contents of the box.

[8] Note, 6 Fordh. L. Rev. 106, *supra* n. 4.

[9] Waite v. Grubbe, 43 Ore. 406, 73 Pac. 206 (1903).

[10] Teague v. Abbott, 51 Ind. App. 604, 100 N. E. 27 (1912).

[11] *Op. cit. supra* n. 4.

it is only a question of time until the courts will sustain gifts at least between the alleged donee and third parties where there is not even a semblance of symbolical delivery but where they are satisfied that the alleged donor intended to make a gift. In support of this proposition he suggests that one might argue that in all probability the requirement of delivery in the case of gifts was largely evidential, and that today, since the parties themselves may generally be called as witnesses and many other means of proof are now possible that were formerly forbidden, the courts, if they are fully satisfied that there was a gift, are not going to allow the ancient requirement of delivery to stand in the way of their sustaining the gift.

On the other hand, a leading authority[12] on the subject of gifts strongly contends that the requirement of delivery should not be discarded as arbitrary and outmoded, but that it should be preserved as resting on the basis of sound public policy. In the requirement of delivery, Professor Mechem sees a valuable aid to the preservation of three *desiderata* in the transaction of gifts. First, by requiring that a gift shall not take effect until delivery, the donor is protected from making ill-considered and impulsive donations. The manual tradition of the subject of the gift presents vividly to the donor the fact that he is relinquishing all ownership and enjoyment of his property in favor of the donee. Secondly, the actual delivery of possession presents strong concrete evidence that the donor really intended to part with dominion over the goods. It corroborates the words of gift, which might otherwise be misunderstood or poorly remembered. Thirdly, the possession given to the donee furnishes him with positive and concrete evidence of his assertion that the donor made to him a gift of the property in question.[13]

Whatever the direction other courts are taking, the Maryland court appears to brook no further relaxation of the requirement of delivery. In the principal case, quoting from *Whalen v. Milholland*,[14] the Court says:

> " 'These deathbed donations, to be upheld, ought to be above question or suspicion at all times, but more especially when they render inoperative, as they would in this case, the provisions of a will made at a calmer and more collected moment. The evidence to support

[12] Mechem, *The Requirement of Delivery in Gifts of Chattels* (1926) 21 Ill. L. Rev. 341, 457, 568.

[13] See also Brown, Personal Property, Sec. 38.

[14] 89 Md. 199, 43 A. 45, 44 L. R. A. 208 (1899).

> them ought to be clear and free from uncertainty, for the temptation to seize upon disjointed sentences, uttered when the physical frame is prostrated and the mental faculties are failing, and to convert them into a deliberate gift of the bulk of a dying person's estate, might be too often yielded to, under the influence of interest or the promptings of avarice, and produce most grievous wrongs. The facility with which such gifts sometimes are proved is suggestive of great caution in weighing the evidence adduced to sustain them. To doubt them ought to be to deny them. "Around every other disposition of the property of the dead the legislature has thrown safeguards against fraud and perjury. Around this mode (donatio mortis causa) the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proven devices." Keepers v. Fidelity Co., 56 N. J. L. 302, 28 A. 585 (23 L. R. A. 184), 44 Am. St. Rep. 397. Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made while he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation, whether it be a donation inter vivos or mortis causa. Even then fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number.' "

In *Brooks v. Mitchell*,[15] mentioned above, where the court found a completed gift causa mortis, the donor, realizing death was imminent, told the donee to take a suitcase, and the key to the suitcase, from his room, and told the donee that everything in it but an insurance policy was hers. She took the suitcase and key to her room, but did not open it until after the donor died. The only essential difference between that case and the principal case is that the donee acted immediately upon the donor's expression of his intention to give, while here the donee, for what may be considered as a good reason to the ordinary individual, refrained from so acting.

The soundness of the result of these two cases might be said to rest upon the determination of whether delivery is an essential element of a gift, or merely evidence to support

[15] *Supra* n. 2.

it. As generally stated, the essential elements of a gift[16] are the intention to give, the delivery of the subject of the gift, and the acceptance, with the added requirement in gifts causa mortis that they be made under the inflence of the donor's belief that his death is imminent (and on the express or implied condition that it shall take effect only on the death of the donor). The delivery required is the same in both gifts inter vivos and causa mortis, as is recited by the court in the principal case to be the settled Maryland rule. Acceptance, if not express, will be presumed in the absence of an express repudiation, as in the case of a delivery to a third party.[17] The requirement of the intention to give has not been relaxed in any jurisdiction and must always be shown.[18] Where there has been an actual delivery, the purpose of that delivery may be shown, and if there was no intention to give the proprety to the one to whom it was delivered, there is no gift.[19] However, although a clear intention to give is shown, the purpose of the retention[20] by the donor is treated as immaterial (except in the case of a declaration of trust) if delivery is taken to be an essential element to a perfected gift. But, if on the other hand, delivery were only evidential, the gift could be established upon the sufficient showing, by other evidence, of the intention to give. The tone of the Maryland cases seems to predict adherence to the older view of delivery as a separate essential element of the gift.

A second phase of the opinion seems to emphasize that equity will not enforce a gift that fails at law, either on the theory that it was a transfer in trust, or that it amounted to a declaration of trust in the intended donor (at least in the absence of appropriate proof of intention to create a trust). It is well established law that to make a transfer in trust the requisites of the law must be met in getting title to the intended trustee,[21] and, as was stated by the court in the principal case, "it would seem that equity, in its recognition of trusts and in the enforcement of them, requires the same formalities in passing of the subject mat-

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[16] Deeds of gift are not considered in this discussion.

[17] 28 C. J. 644.

[18] Prince De Bearn v. Winans, 111 Md. 434, 74 A. 626 (1909).

[19] 28 C. J. 627; Hutson v. Hutson, 168 Md. 182, 189, 177 A. 177 (1935).

[20] Distinguish the case where the chattel, after delivery to the donee, is re-delivered to the donor for some purpose not inconsistent with the continued ownership of the donee. See 28 C. J. 642, Sec. 36d.

[21] See Restatement, Trusts, Secs. 17-73. The plaintiff's contention that she held as trustee for the payment of the debts of the decedent, with remainder to her is met by the same requirement of delivery as an essential element.

ter of the gift as is required at law." While a declaration of trust may be proved by parol and requires no particular formality, except for special provisions of the law such as the Statute of Frauds dealing with land, Maryland has earlier followed[22] what is the weight of authority, that equity will not find the intention to make a declaration of trust from the mere attempt to make a gift which fails for want of delivery. As the court expressed it in *Pope v. Safe Deposit and Trust Co.*:[23]

> "In order to establish a declaration of trust by parol, the trust must be clear and the evidence of it convincing. There must be an intention to transfer a present interest to the *cestui que trust,* and this requirement is not gratified by evidence which merely shows that the party with title and possession of the *res* intended it to belong, after his death, to another."

The possibility of the proof of an oral declaration of trust has been used as an argument for the relaxation of the requirement of delivery to perfect a gift at law. For example, if A, owning a book, says to B, "I hold this book in trust for you," (which in effect means "I give you the equitable title") and B goes away leaving the book on A's table, equity will enforce the gift, as a declaration in trust.[24] But if A, owning the book, says to B, "I give you this book," (which is in effect saying "I give you the equitable and legal title to this book") and B goes away leaving the book on the same table, B has nothing that either a court of law or equity will enforce.[25] The actual result, then, appears to be that where the donor's intention is actually to give more, the donee actually gets nothing. A possible argument on this basis, however, is merely technical. The more potent argument for relaxation of the requirement of delivery is that based upon the social value of the more liberal modern trend of some of the courts.

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[22] Pennington v. Gittings, 2 G. & J. 208 (1830); and Baltimore Retort and Brick Co. v. Mali, 65 Md. 93, 3 A. 286 (1886).

[23] 163 Md. 239, 249, 161 A. 404 (1932).

[24] Milholland v. Whalen, 89 Md. 212, 43 A. 45, 44 L. R. A. 205 (1899), where the Court held that a valid trust of personal property may be created by parol declaration that the declarant holds the property as trustee for another, and such a trust may be enforced in favor of a volunteer. In this event, the Court says, from the very nature of the transaction there can be no delivery to the trustee, because he already holds the property.

[25] This is the result of the doctrine of the principal case.