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WILLS - GIFT'S - CONSTRUCTION OF INSTRUMENT

WILLS — GIFTS — CONSTRUCTION OF INSTRUMENT — Decedent had lived with plaintiff and her parents. In 1932, after telling plaintiff's parents that he had some money in the bank, decedent said, "I got a will here. . . I understand I have got to have two signatures." Both parents, at his request, signed the instrument below.

"Dear Carlotta

"I give to you my money in Live Stock Bank.

"Hans Larsen

"April 16, 1932

"Witness: Michael C. Kelley
"Mamie V. Kelley."

Decedent put the instrument in his bank book and took it into the other room where plaintiff was sitting. He said, "Carlotta, I will give you this," and then he handed her the bank book with the instrument inside. He was in good health at the time the instrument was made but he died two months later. Plaintiff, having previously tried unsuccessfully to have the instrument probated as a will, sought in this action to recover the bank deposit on the basis of a gift. The supreme court reversed the decision of the lower court and *held* that there was a good gift. *Henley v. Live Stock Nat. Bank*, (Neb. 1934) 257 N. W. 244.

An intention to pass title to the property immediately, coupled with such actual or constructive delivery as divests the donor of all dominion over the property, will constitute a valid gift *inter vivos*.[1] The court found no difficulty with the requirement of delivery because the bank book had been turned over to the donee [2] but it did not consider fully the facts indicating the actual intent of the decedent at the time he made the transfer. The intent of the transferor can be determined only by an analysis of all the facts of the particular case. Some of the factors that should be considered are the form of the instrument,[3] the possession of the property,[4] the relation of the parties, and the expressions of the transferor at the time of the transfer.[5] The court seemed to base its decision solely on the language used in the instrument itself, but no one of these facts should be controlling. Moreover, it would seem that the evidence to establish a gift *inter vivos* should be clear and convincing if the transferor is deceased at the time of the controversy.[6] If the giver intended a will, and that intention failed for want of some requisite of a will, the intention cannot be effected by sustaining the transaction as a gift, though all the other elements essential to a gift are present.[7] Nor can the donative intent of the testator be carried out by construing the instrument as a promise to make a gift in the future because here there was no consideration for the promise.[8] Neither was there a good gift *causa mortis* because the transfer was not made in the expectation of immediate death. The latter must be a conditional gift, made in what the donor believes to be his last sickness, in expectation of death, to take effect at death.[9] Inasmuch as the problem involved was primarily a fact question, the supreme court might have given more weight to the decision of the trial court which was better able to pass upon the credibility and testimony of the witnesses.

E. W. A.

[1] Besson v. Stevens, 94 N. J. Eq. 549, 120 Atl. 640 (1923); Matthews v. Hanson, 145 Va. 614, 134 S. E. 568 (1926).

[2] Snidow v. Brotherton, 140 Va. 187, 124 S. E. 182 (1924). See note in 40 A. L. R. 1249 (1926) for a discussion of a gift of a savings deposit by delivery of pass book.

[3] Moye v. Kittrell, 29 Ga. 677 (1860).

[4] Atchley v. Rimmer, 148 Tenn. 303, 255 S. W. 366 (1923).

[5] Clayton v. Liverman, 29 N. C. 92 (1846); Moody v. Macomber, 159 Mich. 657, 124 N. W. 549 (1910).

[6] In re O'Connell, 33 App. Div. 483, 53 N. Y. S. 748 (1898).

[7] Mitchell v. Smith, 33 L. J. Ch. (N. S.) 596 (1864).

[8] Walker v. Crews, 73 Ala. 412 (1882); Gray v. Nelson, 77 Iowa 63, 41 N. W. 566 (1889); Board of Supervisors of Sanilac County v. Auditor General, 68 Mich. 659, 36 N. W. 794 (1888).

[9] Devol v. Dye, 123 Ind. 321, 24 N. E. 246 (1890). See 63 A. L. R. 552 (1929).