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PERSONAL PROPERTY-GIFTS-BENEFICIARY'S LETTER DIRECTING TRUSTEE TO TRANSFER ACCUMULATED INCOME AS A GIFT

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PERSONAL PROPERTY—GIFTS—BENEFICIARY'S LETTER DIRECTING TRUSTEE TO TRANSFER ACCUMULATED INCOME AS A GIFT—The donor was entitled to the income of a trust for her life. Income in the amount of $9,000 had accrued in the hands of the trustee and was subject to the immediate call of the donor. While a resident of Spain, the donor wrote a letter addressed to the trustee in New York reciting that she was in poor physical condition and desirous of distributing her American money. The letter directed the trustee to transfer the

accumulated income to the donee.[1] Because of troubles with the Spanish Government the donor did not wish to mail the letter directly to New York. She sealed the letter in an envelope addressed to the trustee, and enclosed it together with a note of explanation in another envelope, which she mailed to the donee in Tangier. Before this envelope with enclosures reached the donee, the donor died. There being neither will nor heirs, the Public Administrator claimed the fund on the ground that the gift was ineffectual. *Held*, there was a valid gift. The terms of the letter addressed to the trustee, coupled with the fact that it was mailed to the donee, showed an intent to make the transfer immediately effective. In view of the fact that the subject matter of the gift was virtually impossible of delivery, the mailing of the letter to the donee sufficed for delivery. Since delivery was completed when the letter was deposited in the mails, the gift was effectual even though the donor died before the letter was received.[2] *In re Kaufman's Estate*, (N.Y. Surrogate's Court, 1951) 107 N.Y.S. (2d) 681.

Probably the most important function of the requirement of delivery in legally effective gifts is its evidentiary value as to the intent of the donor. In most cases an actual physical surrender of possession of the res is satisfactory to show the donor's intent to make a final and binding gift. On the other hand, lack of such action tends to show that no present gift was intended, since it is only natural that physical delivery accompany a gift.[3] Yet, in many cases it is clear that the requisite intent exists even though for varying reasons physical delivery is not made. In order to sustain these transactions as gifts, where reliable evidence of intent exists and the absence of delivery is readily explainable, the courts have adopted the so-called constructive or symbolic delivery concept by disregarding the requirement of manual delivery where, for example, the key to a safe deposit box is delivered,[4] the property is already in the possession of the donee,[5] or the parent-donor retains possession for the child-donee.[6] The case under discussion raises one of the most difficult problems in the area, that of constructive delivery of an intangible res.[7] By their very nature intangible property and choses in action are incapable of possession and thus physical delivery is impossible. The same safeguard which physical delivery of tangibles provides can

[1] The letter directed four transfers in all, the transfer to the claimant being residuary in nature. The question of the effectiveness of the gift as to the other donees was not raised.

[2] The court also implied acceptance of the gift, even though the donee did not learn of it until after the donor's death. Discussion of this point is outside the scope of this note.

[3] For an excellent discussion of the many problems of delivery and of the solutions which the courts have reached see Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments," 21 ILL. L. REV. 341, 457, 568 (1927). For an outline of the history of the requirement of delivery, see Harlan F. Stone's note in 20 COL. L. REV. 196 (1920).

[4] In re Schreihart's Estate, 223 Wis. 218, 270 N.W. 71 (1936).

[5] Northern Trust Co. v. Swartz, 309 Ill. 586, 141 N.E. 433 (1923).

[6] Haynes v. Gwin, 137 Ark. 387, 209 S.W. 67 (1919).

[7] See Bruton, "The Requirement of Delivery as Applied to Gifts of Choses in Action," 39 YALE L.J. 837 (1930). And in reply Williston, "Gifts of Rights under Contracts in Writing by Delivery of the Writing," 40 YALE L.J. 1 (1930).

be maintained when the subject of the gift is a documented intangible. In those cases the document, such as a stock certificate, is regarded as so closely allied with the intangible property that manual delivery of the document furnishes strong evidence of donative intent.[8] In cases where no such document exists, courts are faced with a dilemma: they can either (1) relax to a dangerous degree the safeguards which delivery has supplied or (2) make gifts of such intangibles impossible by requiring manual delivery. The principal case indicates a reasonable solution to the problem. The donor by writing an "assignment" and delivering the writing to the donee has in effect created a document which for the purpose of delivery should be treated the same as ordinary documented intangible property and choses in action. By manual delivery of the writing the donor has provided a sufficient objective basis upon which the court can judge the donative intent and guard against fraud. In addition, the overt act provides a dividing line between mere expressed intention to make a gift and a completed gift.[9] On the facts of the instant case, however, it might be seriously doubted that the letter written by the donor showed sufficient donative intent. The donor must intend to make a present and final disposition. Thus the court concedes that if the letter had been mailed directly to the trustee, the requisite intent could not be found, for in that case the letter would have been a mere direction to an "agent" and as such revoked by the donor's death. On the facts of the case it would have been reasonable to conclude that, because of her desire not to deal directly between Spain and the United States, the donor intended to use the donee as a mere conduit for her letter to the trustee; thus there was no intention to deliver to the donee the means of getting possession or of enforcing the donor's rights.[10]

Another interesting point raised by this case is its holding that the gift was effectuated upon deposit in the mails rather than upon receipt of the letter by the donee. There is little authority on this point and that which exists is

[8] For a summary of the law of gifts of documented intangible property and choses in action, see generally 38 C.J.S. 822 et seq. (1943).

[9] See Copland v. Commissioner, (7th Cir. 1930) 41 F. (2d) 501; Leedham v. Leedham, 218 Iowa 767, 254 N.W. 61 (1934); In re Gosman's Estate, 83 N.Y.S. (2d) 81 (1948) (dictum); Luther v. Hunter, 7 N.D. 544, 75 N.W. 916 (1898); Bond v. Bunting, 78 Pa. 210 (1875); Ries v. Ries' Estate, 322 Pa. 211, 185 A. 288 (1936); Cowen v. First Nat. Bank of Brownsville, 94 Tex. 547, 63 S.W. 532, 64 S.W. 778 (1901). See also Matter of Cohn, 187 App. Div. 392, 176 N.Y.S. 225 (1919). Two theories are available for giving the transaction effectiveness: first, that, in view of statutory abolition of the distinction between sealed and unsealed instruments, the transaction is a valid contract; second, that physical delivery of the writing constitutes constructive delivery of the res.

[10] A bill of exchange drawn by the drawer-donor and presented to the payee-donee is merely an order to the drawee to pay the sum indicated. Consequently, delivery of such an instrument is not a completed gift. BROWN, PERSONAL PROPERTY 171 (1936). Perhaps the drawing of an analogy would necessitate the conclusion that, even if the donor intended that the donee take possession of the letter to the trustee in her own right, there would be no gift. However it is submitted that the rule in regard to gifts of bills of exchange is peculiar to the law of commercial instruments as there is no assignment of an interest in a particular fund as in the principal case.

in disagreement.[11] If the most important function of delivery is to show donative intent, it would seem that the mere fact that it is possible to intercept an undelivered letter should not be controlling. The donor undoubtedly did not have in mind this possibility and intended to make a final disposition. The note of finality attaching to transfer of possession of the res is equally present upon deposit in the mails.

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[11] That the transaction was complete upon deposit of the instrument in the mails: Waller v. Capper, 143 Kan. 164, 53 P. (2d) 836 (1936); Lynch v. Johnson, 171 N.C. 611, 89 S.E. 61 (1916); M'Kinney v. Rhoads, 5 Watts (Pa.) 343 (1836); Taylor v. Sanford, 108 Tex. 340, 193 S.W. 661 (1917). *Contra:* Deere v. Nelson, 73 Iowa 186, 34 N.W. 809 (1887); Pikeville Nat. Bank & Trust Co. v. Shirley, 281 Ky. 150, 135 S.W. (2d) 426 (1936). These cases are collected in 5 A.L.R. 1660 (1920) and 126 A.L.R. 919 (1940).