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Gifts-Delivery-Choses in Action

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COMMENT

GIFTS—DELIVERY—CHOSES IN ACTION

In the case of *In re Russell's Estate,* 385 Pa. 557, 123 A.2d 708 (1956), the Pennsylvania Supreme Court indicated that it has not relaxed the requirement of delivery in the gratuitous transfer of a chose in action not represented by some tangible instrument.

In November of 1952 decedent gave to appellant a check for $55,000. He told her that at a later time he might want some of the money back but that the rest was to be split between her and her brother. The money was deposited in appellant's account. She did not add it to the account balance but noted it as a separate item against the initials of the deceased. About a year later decedent requested a return of $20,000, telling appellant that the rest was hers as a wedding gift and reaffirming that she was to share it equally with her brother. Appellant noted the withdrawal against the initial entry. Several weeks later decedent died. The widow, taking against the will, protested the failure to include the amount in the estate. The lower court found there had been a gift to appellant and her brother of $17,500 each.

In reversing the decision of the lower court the Supreme Court held that the transaction of November, 1952, gave rise to a debtor-creditor relationship. Therefore, at the time of the second transaction the decedent had merely a chose in action to give; and that when a chose in action is not embodied in an instrument which is the tangible representative of the obligation, the law requires either the delivery of a receipt acknowledging payment in full, a written assignment, or some equivalent act or instrument.

The problem in the *Russell* case has plagued the courts ever since it was recognized that choses in action, originally not transferable at all,[1] could be the subject of gift or transfer. Recent decisions have relaxed the requirement of delivery for gifts of choses in action.[2] This relaxation is based on the recognition of the theory that legal delivery is largely a matter of intention; and, therefore, where intention is clear, delivery should be found.[3] Despite this readiness to relax the rule, most courts adhere, at least in dicta, to the follow-

[1] BROWN, PERSONAL PROPERTY, § 58 (2d ed. 1955).

[2] Millet v. Temple, 280 Mass. 543, 182 N.E. 921 (1932) (failure to request repayment for twelve years held sufficient act of delivery); Lewis' Estate, 139 Pa. 640, 22 Atl. 635 (1891) (interest indorsed on backs of mortgage retained by mortgagee held good gift); Campbell's Estate, 274 Pa. 546, 118 Atl. 547 (1922) (gift of check drawn on decedent's savings account but not cashed before his death held a good gift of the account).

[3] Scott v. Union and Planters Bank and Trust Co., 123 Tenn. 258, 130 S.W. 757 (1910).

ing declaration in Kent's Commentaries:[4] "If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." [5]

Before the *Russell* case the Pennsylvania court had evinced an apparent liberal trend in allowing the oral gratuitous transfer of a debt. Two cases should be compared.

In 1904 the court decided the case of *Hawn v. Stoler.*[6] The deceased, ill and on her way to the hospital, committed to her friend for safekeeping $595. The friend deposited the money in the bank in her own name. Later, fearing the death of the alleged donor, she made a request as to the disposition of the fund. The deceased told her friend to give $300 to her sister. In an action against the executor by the alleged donee for payment of the $300 the court said that there was no gift. "The money was transformed from a chattel in the possession of deceased, into a chose in action. Therefore she had nothing to give except a chose in action, and to transfer this the law requires an assignment or some equivalent instrument and the transfer must be actually executed."

In 1953 the same question was before the court.[7] This time the deceased had a savings account. Desiring to make a gift of it he asked the alleged donee, who was caring for him, to give his bank book to an agent of the debtor-bank and to tell the agent to visit the deceased. The alleged donee did this, and that afternoon the debtor's agent went to visit the deceased. The deceased then told the agent that he desired the donee to have the fund. The agent agreed to make the change, but before he did so the deceased died. In sustaining the gift the court said, quoting from Bogert, Trusts and Trustees,[8] "An oral direction to the bank to pay the intended donee, accepted by the bank, has been held to effect a gift of the account."

The court in *In re Russel* distinguishes this case on the ground that the direction to the debtor was accompanied by the delivery of the bank book to the donee and by the latter to the bank. But Pennsylvania law is definite that the mere handing of a bank book, even though accompanied by words, is not a sufficient delivery to constitute a gift of the account.[9] It must follow that

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[4] Vol. 2, § 439 (12th ed. 1893).

[5] For an excellent illustration of this see Millet v. Temple, *supra* note 3.

[6] Hawn v. Stoler, 208 Pa. 610, 57 Atl. 1115 (1904).

[7] Bloses' Estate, 374 Pa. 100, 97 A.2d 358 (1953), noted in 58 DICK. L. REV. 88.

[8] Vol. IA, § 142, p. 22.

[9] Walsh's Appeal, 122 Pa. 177, 15 Atl. 470 (1888); Kata's Estate, 363 Pa. 359, 7 A.2d 351 (1950).

the delivery of a bank book prior in time to the oral direction did not constitute a good gift; and, therefore, at the time of the oral direction the decedent had a mere chose in action to give. Although this direction was unexecuted at the time of his death, the court concluded that a completed transfer had been made.

In both the *Hawn* and the *Blose* cases the gift of a debt was in issue. It is suggested by the writer that both cases could have been decided on contract law. To have done so the court would have had to find a legally sufficient consideration for the debtor's promise. This would have required the implying of a release to the debtor in exchange for his promise to pay the donee, or a novation in which the presence and assent of all parties—creditor, debtor, and donee—would have been required. The court did not seem to decide on such a basis. It said: "What deceased did was to assign a chose in action by acknowledging as much to his debtor and obtaining from the latter an agreement to pay the debt to the assignee." [10] The court could not have intended that a mere acknowledgment to the debtor of his intention to make a gift coupled with the debtor's assent created a binding contract. Confirming of intention to give is not a sufficient consideration for the debtor's promise. The court also noted that had the debtor paid, the creditor would then have been estopped from bringing an action for recovery of the money from the debtor. If contract were the basis of the court's decision, then the promise being unexecuted and the debtor having suffered no detriment, estoppel would not have served as a substitute for a legally sufficient consideration.

Whatever implications may have been created by the *Blose* decision are put at rest by the instant case. The court does not hesitate in arriving at its position that delivery is something independent of the intention to transfer, and a mere oral declaration will not do.

That the court was not prepared to follow the *Blose* decision to its ultimate conclusion is confirmed in its refusal to allow the gift to the brother. Here were the very elements upon which the court in the *Blose* case said its decision was based. At the time of the second transaction between the deceased and appellant, deceased told appellant that she was to give half of the remainder to her brother. Appellant accepted on that basis. There was the oral direction to the debtor, an acknowledgment to the debtor, and an assent on the part of the debtor.

It is not the purpose of this comment to criticize or defend the rule requiring a delivery, nor to attempt to determine whether this requirement is

[10] Bloses' Estate, *supra* note 7, at page 102.

one of substantive law or merely the best evidence of intention. Both have been the subject of ample analysis.[11]

One dissenting justice focused on an additional issue summarily decided by the majority of the court. He pointed out that he agreed with the law applied to the court's conclusions, but disagreed that a debtor-creditor relationship had arisen and that therefore this law applied. This question could have vitally affected the outcome of the case and merited more serious consideration. Where the subject matter of donation is in the possession of the donee, a redelivery is a meaningless and useless ceremony, and in the case of gifts inter vivos the all but unanimous authority is in favor of the validity of the gift without any formal delivery.[12] In this case upon deposit of the $55,000 an obligation arose on behalf of the bank to pay, upon demand, the appellant. There is no evidence that appellant treated this obligation as her own by adding it to the balance of her account. Rather the evidence shows that she merely noted the amount as a separate item against deceased's initials. The majority recognizes this, for it states in the opinion that "she was receiving it merely as a custodian with a definite obligation to return it or any part of it on demand." [13]

It would seem that such facts more nearly comprise the elements of a bailment. The inability to return the exact money does not defeat this conclusion, for by modern authority there may be a bailment even though there is a constantly changing mass of fungible goods.[14] Applying this law, the court could have decided that the problem of delivery was not in issue and that intent alone would control.

It should be open to question, however, whether in the same setting a result must depend on whether the initial transaction is called a bailment or a debt, in one case the intention alone being enough, and in the other something more being required. To do so makes the requirement of delivery seem somewhat meaningless, or at best confirms the theory that delivery is merely the best evidence of intention. When intention is clear, as it was here, in fairness to the donor, the gift should not fail.

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[11] Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926); Williston, *Gifts of Rights Under Contracts in Writing by Delivery of the Writing*, 40 YALE L. REV. 1; COMMENT, 6 FORDHAM L. REV. 106.

[12] Wing v. Merchant, 57 Me. 383 (1869) (funds of father in custody of daughter, from which she gave him from time to time such sums as he requested; held good gift by words of donation alone); BROWN, PERSONAL PROPERTY, § 44 (2d ed. 1955).

[13] 385 Pa. at 559, 123 A.2d at 711.

[14] BROWN, PERSONAL PROPERTY, § 78 (2d ed. 1955).