COMMENTS

GIFTS — SUFFICIENCY OF DELIVERY BY DEPOSIT IN A RECEPTACLE TO WHICH BOTH DONOR AND DONEE HAVE EQUAL ACCESS. A mother owned a trunk in which she stored linens, blankets and other materials. During her lifetime she designated this trunk as her youngest daughter's "Hope Chest," which is defined as a receptacle in which a young lady places things in anticipation of marriage. Subsequently, the mother deposited in the trunk a blanket which she explicitly stated her daughter was to have. Due to the prior designation of the trunk as the daughter's hope chest, and to the fact that the daughter would have no immediate use for such an item until she married and established a home, the blanket remained in the trunk where placed. However, both the mother and the daughter considered the blanket to be the daughter's. After placing the blanket in the trunk, both the mother and daughter had equal access to the trunk and the mother continued to deposit or remove articles from time to time. Sometime after the mother's death, the daughter took possession of the blanket in accordance with her mother's expression that she should have it. Almost two years after the death of her mother, the daughter found three bags containing $950.00 sewed in the blanket. This sum of money was claimed by the administrator as part of the estate, while the daughter claimed it as a gift inter vivos. The New York Surrogate Court of Cayuga County held that there was a valid gift inter vivos, reasoning that placing the blanket in the trunk constituted a symbolic delivery by the mother.[1]

There are two essentials to a valid parol gift of a chattel—the intent to give and a delivery of the subject matter of the gift.[2] The delivery requirement serves not only to evidence the gift intent, but also to assure that the donor realizes the significance of what he is doing in parting with his property.[3] It

1. *In re* Tardebone's Estate, 196 Misc. 738, 94 N.Y. Supp. 724 (Surr.Ct. 1949).

2. Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments,* 21 ILL. L. REV. 341 (1926). Cochrane v. Moore, 25 Q.B.D. 57 (1890).

3. Hurley v. Schuler, 296 Ky. 118, 176 S.W.2d 275 (1943); *In re* Jackson's Estate, 300 Ill. App. 566, 21 N.E.2d 792 (1939); *In re* Allshouse's Estate, 304 Pa. 481, 156 Atl. 69 (1931).

is submitted that the delivery requirement, and perhaps also the gift intent, were absent in the principal case. On proper proof of the statement by the mother that her daughter was to have the blanket, there could be no doubt that an intent to give the blanket was present. It does not necessarily follow, however, that the mother intended that her daughter should have the money which the blanket contained. The mother could have been ignorant of the money's presence in the blanket, or she could have intended to remove it at a later time since she still had ready access to it. In either case, there would have been a lack of gift intent. The court, however, assumed that the mother had sewed the money in the blanket herself. This is perhaps a more rational assumption than one of ignorance of the money's presence, but, even assuming the mother knew the presence of the money, there was still the possibility of an intent later to remove it and the court never discussed this possibility.

Granting, however, that the mother intended that her daughter should have the money, it appears that delivery of the blanket was insufficient in the principal case. The common notion of delivery is that of manual tradition, or actual transfer of *exclusive* possession from donor to donee.[4] It is obvious that there was no such delivery in the principal case since the mother, instead of handing over exclusive possession of the blanket, placed it in the trunk to which both she and her daughter had subsequent access. Hence, the mother did not relinquish that exclusive control required of a manual tradition. In order to determine whether the court was justified in upholding the gift without such delivery, it is necessary to consider how the courts have generally interpreted the requirement of delivery for a valid parol gift of a chattel. Of course, it stands to reason that manual tradition is not the *sina qua non* of a parol gift inter vivos. If this were true, it would often be impossible to effect the gift of a chattel so bulky as to be unsusceptible to manual tradition. Again, strict adherence to the requirement of manual tradition might be unjust in those situations where such delivery is highly inconvenient or impracticable. Generally, it is said that

when anything is incapable of manual tradition or where

4. *In re* Wright's Estate, 304 Ill. App. 87, 25 N.E.2d 909 (1940); *In re* Smith's Estate, 226 Wis. 556, 277 N.W. 141 (1938).

> the situation of the parties or the circumstances of the case will not admit of it, delivery may be symbolic or constructive.[5]

In other words, where it is physically impossible to deliver the gift manually, or where the circumstances or situation is such that it would be physically unreasonable to require a manual delivery, something less will suffice. The principal case cannot be justified under this rule because it is obvious that here it was not impossible or unreasonable for the mother to hand the blanket over to her daughter manually. However, some courts have further liberalized the delivery requirement by holding that the requirement of manual tradition should not be allowed to defeat a clearly established gift intent on the part of the donor—that, in such cases, as in the case of impossibility or unreasonableness, something less should suffice.[6] The proponents of this view reason that manual tradition is, after all, only the best evidence that a gift was intended, and when the intent is clear without such a delivery there is no need for it. The court in the principal case appears to have based its decision upon this view. In emphasizing the intent element, the court said:

> It was the definite intention of the decedent that the said sum of money should belong to her daughter Mary.[7]

Of course, the rule which emphasizes the intent factor over that of manual tradition does not suppose that the gift intent can be established without something in the nature of a delivery of the subject matter of the gift. There is, for example, a manifest inconsistency in a situation where a person says, "I give you this watch," after having said which he returns the watch to his pocket. Words alone, without some overt act in the nature of a delivery, can never establish the gift intent. Hence, when a court, as in the principal case, speaks of a "definite intention" to give, what is really meant is an expressed intent plus some act or acts by the donor which are similar to manual tradition, and which serve to corroborate the expressed intent of the donor. Just what the corroborative act or acts must be is a question concerning which there is no little amount of disagreement. Whatever the type of substituted delivery, however, it should

5. Hillebrant v. Brewer, 6 Tex. 45 (1851).
6. Copeland v. Craig, 193 S.C. 484, 8 S.E.2d 858 (1940); Hammond v. Lummis, 106 Conn. 276, 137 Atl. 767 (1927).
7. *In re* Tardebone's Estate, 196 Misc. 738, 94 N.Y. Supp. 724, 727 (Surr. Ct. 1949).

not be open to an interpretation inconsistent with an intent to give.[8]

As noted above, the courts which insist that actual manual tradition should be dispensed with only when such delivery is impossible or unreasonable require as a substitute a symbolic or constructive delivery. Hence, it is safe to assume that the more liberal courts, which have enlarged the rule by permitting a clearly established gift intent to negative the requirement of manual tradition, would find a symbolic or constructive delivery sufficient to corroborate the expressed intent of the donor. Whether such courts would be satisfied with acts or conduct which would approach less closely to manual tradition than would the commonly accepted idea of a symbolic or constructive delivery will be discussed later. However, it is submitted that in either case, validation of the gift in the principal case was unjustified because, not only was there no symbolic or constructive delivery in the sense that those terms are normally used, but the acts here substituted for manual tradition—the deposit of the blanket in the trunk—were not sufficient to justify a corroboration of the expressed intent so as to warrant validation of the gift.

The distinction between a symbolic and constructive delivery is stated by one authority as follows:

> A constructive delivery is one which gives to the donee a physical access or some element of physical control over the res, while a symbolic delivery is one which gives to the donee no such element of control, but it may give him a striking piece of evidence or symbol of right.[9]

In either case the delivery should approach as closely as possible to manual tradition. In the principal case, the court's finding was that the mother had made a symbolic delivery sufficient to create a valid parol gift. As noted from the excerpt above, the most important requisite of a symbolic delivery is the granting of a "striking piece of evidence or symbol of right" to the donee. To *give* one a "symbol of right" presupposes handing something over to the donee manually, and this has been the usual notion of a symbolic delivery. Nothing of the like was

---

8. Figuers v. Sherrill, 181 Tenn. 87, 178 S.W.2d 629 (1944); Beach v. Holland, 172 Ore. 396, 142 P.2d 990 (1943); Pattberg v. Gott, 102 N.J. Eq. 371, 140 Atl. 795 (1928).
9. Mechem, *supra* note 2, at 471.

done in the principal case. The only act of the donor was that of placing the blanket in the chest to which both she and her daughter had equal access. It therefore appears that there was no symbolic delivery in the principal case, at least in the sense that the term is normally used. Perhaps the court was forming a new and peculiar type of symbolic delivery, since the deposit of the blanket in the hope chest was expressly labeled as such by the court which was at great pains to point out the peculiar nature of a hope chest, which the court noted was defined by Webster as a receptacle used by a young lady to accumulate things in anticipation of marriage. Placing the blanket in such a place by the mother then, would be the "symbol of right" required of a symbolic delivery. The court said:

> The Court holds that where a so called "Hope Chest" is designated by a mother for her daughter in anticipation of marriage and she places articles therein for that purpose there is thereby made a symbolic delivery.[10]

The fact remains, however, that nothing was actually handed over to the daughter as a symbol of right, and it is submitted that without such tradition, no act was performed by the donor which could be termed a symbolic delivery. To hold that the deposit of an article in a place to which both donor and donee have equal access constitutes a symbolic delivery would eliminate the requirement that such delivery approach as nearly as possible to manual tradition.

Did the deposit of the blanket in the chest by the mother constitute a constructive delivery? Ordinarily, a constructive delivery is one in which the donor surrenders to the donee an element of physical control over the res. Instead of manual tradition, the donor delivers to the donee the means of obtaining possession and control of the subject matter, or in some other manner relinquishes to the donee power and dominion over it. By far the most common type of constructive delivery is that which occurs when a key to a locked receptacle is delivered to the donee or a third party as the means of gaining possession and control over the contents.[11] In the principal case, the donor did surrender some element of physical control over

---

10. *In re* Tardebone's Estate, 196 Misc. 738, 94 N.Y. Supp. 724, 726 (Surr. Ct. 1949).

11. Newman v. Bost, 122 N.C. 524, 29 S.E. 348 (1898); Harrison v. Foley, 206 Fed. 57 (8th Cir. 1913).

the blanket when she transferred it from her sole possession to a trunk in the joint possession of herself and her daughter. But, actually, very little control was given up by the donor, since she could remove and replace articles at will. In view of these circumstances it cannot be said that the donor surrendered any real power and dominion over the blanket, and the amount of control actually surrendered appears insufficient to support the finding of a constructive delivery.[12] If the evidence had shown that the receptacle belonged to or was under the exclusive control of the donee, then the deposit of the blanket with the money permanently sewed in it would undoubtedly have constituted a valid constructive delivery.[13] Such was not the case, however, for the delivery was accomplished by deposit in a place to which the donor an donee had equal access.

Even though there was no constructive or symbolic delivery, we have seen that often those courts which emphasize the intent element over manual tradition are satisfied with acts or conduct on the part of the donor which fall short of acts generally accepted as a valid symbolic or constructive delivery.[14] Even so, such acts should go to corroborate the expressed intent of the donor and should not be susceptible to an interpretation inconsistent with such intent. In the principal case the act of the donor consisted of placing the blanket in a trunk which she designated as her daughter's "Hope Chest." Concurrent with this act she stated that her daughter was to have the blanket. The court noted that a hope chest was defined as a receptacle in which a young lady placed things "in anticipation of marriage." Since it was the mother who designated the hope chest, it might be reasoned that this blanket was "given" to the daughter "in anticipation of marriage." Therefore, though the problem was not considered by the court, the gift involved could conceivably have been one subject to a condition precedent, in which case it would have been invalid. If the condition of a gift is precedent to the vesting of any present right in the donee, postponing his enjoyment and right to the subject matter to

12. Patterson v. Greensboro Transt. Co., 157 N.C. 13, 72 S.E. 629 (1911); Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 Atl. 637 (1903).

13. Reiley v. Fulper, 93 N.J. Eq. 112, 115 Atl. 661 (1921).

14. MacKenzie v. Steeves, 98 Wash. 17, 167 Pac. 50 (1917); Shaffer v. Stevens, 143 Ind. 295, 42 N.E. 620 (1896).

a future date, the attempted gift is *in futuro* and fails.[15] On the other hand, if the condition does not necessarily precede the vesting of such right, but may accompany it or follow it, the condition is a condition subsequent[16] and the gift is valid. Though there is no implied-in-fact condition involved, nor does it appear that the law would imply one, there is the problem as to whether things given by a mother to her youngest daughter "in anticipation of marriage" makes the gift subject to an express condition precedent. The facts show that the daughter was unmarried at the time of placing the blanket in the chest, but do not disclose whether or not she was married at the time of her mother's death. Thus, the acts of the donor in the principal case are entirely consistent with the possibility that the mother made a gift subject to a condition precedent, yet the court easily found that such acts corroborated an intent to make an absolute gift inter vivos. It is submitted that the court placed too much emphasis on the statement by the mother, and that the facts, being open to an interpretation inconsistent with the statement, were not sufficient to validate a parol gift of the blanket, much less the money contained therein.

IRVING MALNIK

TORTS — A WIFE'S RIGHT TO RECOVER FOR LOSS OF CONSORTIUM DUE TO THE NEGLIGENT INJURY OF HER HUSBAND. Plaintiff's husband was negligently injured by one of defendant's employees. As a result of the severe bodily injuries sustained by her husband, the plaintiff was deprived of any future sexual relations with him.

She brought an action to recover for the negligent injury to her consortium. In reversing the lower court's dismissal of the complaint, the court recognized that all other jurisdictions denied recovery to the wife under such circumstances. Nevertheless, the Court of Appeals chose to disregard the numerous precedents holding the wife has no cause of action on the ground that those precedents were based on faulty reasoning. In a comprehensive opinion, Judge Clark exhaustively reviewed the cases denying recovery and rejected the reasons for the denial

15. Walden's Administrators v. Dixon, 5 T.B. Mon (Ky.) 176 (1827); Moore v. Layton, 147 Md. 244, 127 Atl. 756 (1925).

16. Beatty's Estate v. Western College, 177 Ill. 280, 52 N.E. 432 (1898).