TRUSTS

Imperfect Gift as a Trust

The owner of certain stocks placed them in a safety deposit box to which his wife had access and to which she went three times. Thirteen witnesses, some against interest, testified that he had declared the stock belonged to his wife. All stocks were in his name, unassigned and unindorsed. The court held that as between donor and donee, documented choses in action generally may be the subject of gift without assignment or indorsement. To make an effective gift, however, of such choses in action, transferring all the property rights which they represent, there must be a present intention to give plus delivery. The court found that the owner of the stock had intended his wife to have the securities and that he supposed he had effectuated his desire, but that he had failed in his purpose because there was not the necessary compliance with the law respecting consummation of a gift—no delivery. *Bolles* v. *The Toledo Trust Co., Ex's. et. al.*, 132 Ohio St. 21, 4 N.E. (2d) 917, 7 Ohio Op. 60 (1936).

Since the case of *Ex Parte Pye*, 18 Vis. 140 (1811), it is considered settled that no consideration is necessary in order to create a valid trust. The delivery of a writing, insufficient as a deed, purporting to make a gife of a bond without delivery of the subject matter to the donee was held equivalent to a self-declaration of trust. *Morgan* v. *Malleson*, L.R. 10 Eq. 475 (1870); *Richardson* v. *Richardson*, L.R. 3 Eq. 686 (1867). After these decisions, the court of equity became more and more reluctant to aid disappointed donees by converting defective gifts into self-declarations of trust. *Heartley* v. *Nicholson*, L.R. 19 Eq. 233; 44 L.G. Ch. 277; 31 L.T. 821; 23 W.R. 374 (1874); *Richards* v. *Delbridge*, L.R. 18 Eq. 11; 43 L.J. Ch. 459, 22 W.R. 584 (1874).

Delivery of the subject matter is essential to the validity of a gift. *Bryant* v. *Parker*, 188 Ark. 598, 66 S.W. (2d) 1061 (1934); *Perry* v. *First Nat. Bank*, 228 Mo. App. 486, 68 S.W. (2d) 927 (1934). Delivery must put the subject matter of the gift beyond the power of the donor to revoke. *Brooks* v. *Brooks*, 54 Ga. App. 276, 187 S.E. 687 (1936); *Pabst* v. *Haman*, 120 N.J. Eq. 451, 185 Atl. 500 (1936). Delivery to third person for purposes of delivering to the donee constitutes that third person an agent for that purpose, and there is a valid gift if the res is delivered to the donee before revocation or death of the donor. *Green* v. *Hynes*, 183 Pac. 568, [Cal. App.] (1919);

Smith v. *Simmons*, 99 Colo. 227, 61 Pac. (2d) 589 (1936); *Gellert* v. *Bank of Calif., Nat. Assn.*, 107 Ore. 162, 214 Pac. 377 (1923). A gift may also be completed by delivery to a third person as trustee or completed without delivery if held by the donor as trustee to the use of the donee. *In re Rusk's Estate*, 206 Ill. App. 518 (1918); *Goodan* v. *Goodan*, 184 Ky. 79, 211 S.W. 423 (1919); and such a gift is not revocable by the donor unless he has reserved power to revoke or has obtained the consent of those beneficially interested, *Schoellkopf* v. *Marine Trust Co. of Buffalo*, 242 App. Div. 11, 272 N.Y.S. 613 (1934); *Alderman* v. *Alderman*, 178 S.C. 9, 181 S.E. 897 (1935); *Skillin* v. *Skillin*, 133 Me. 347, 177 Atl. 706 (1935); *Fidelity & Columbia Trust Co.* v. *Williams*, 268 Ky. 671, 105 S.W. (2d) 814 (1937). A "gift" is distinguished from a "voluntary trust" in that the thing itself passes to the donee where there is a gift while in the case of a trust the actual, beneficial or equitable title passes to the *cestui que* trust, while legal title is transferred to a third person or retained by the person creating it to hold for the purpose of the trust. *Lindner and Boyden Bank* v. *Wardrop*, 10 N.E. (2d) 144 (Ill., 1937); *Miles* v. *Miles*, 78 Kans. 382, 96 Pac. 481 (1908); *Littig* v. *Mt. Calvary Protestant Church*, 101 Md. 494, 61 Atl. 635 (1905); *Cox* v. *Hill and Sprigg*, 6 Md. 274 (1854); *Flanders* v. *Blandy*, 45 Ohio St. 108, 12 N.E. 321 (1887).

There has been some confusion on the part of courts resulting from failure to distinguish between situations involving agency and those pertaining to trusts. In *Smith* v. *Simmons*, *supra*, the court held that the one in possession was an agent of the donor, since he did not have legal title which must necessarily be in him as trustee. However, in a recent Ohio case, *Streeper* v. *Myers*, 132 Ohio St. 322, 7 N.E. (2d) 554 (1937), on very similar facts, the court reached the conclusion that there was a good gift in trust. There was no indication that the bank where the res of the gift was deposited had been transferred legal title to hold as trustee, nor had the donor clearly manifested an intention to make a self-declaration of trust. The courts ignored the same obstacles and found gifts of trust in *Cazallis* v. *Ingraham*, 119 Me. 240, 110 Atl. 359 (1920); *Grant Trust and Savings Co.* v. *Tucker*, 49 Ind. App. 345, 96 N.E. 487 (1911). Gifts are most frequently challenged after the death of the donor, and in order to make them valid, when delivered to a third persons, it is necessary for the courts to follow the theory of creation of a trust, rather than delivery to an agent, since death of the donor before the execution of his intention to make a gift operates as a revocation of the agency. *Gellert* v. *Bank of Calif., Nat.*

Ass'n., supra; Green v. *Hynes, supra; Smith* v. *Simmons, supra; Farmers' Loan and Trust Co.* v. *Winthrop,* 238 N.Y. 477, 144 N.E. 686 (1924). This, however, should not influence the court, because there is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was not in contemplation. *In re Ashman,* 223 Pa. 543, 72 Atl. 899 (1909); *Trubey* v. *Pease,* 240 Ill. 513, 88 N.E. 1005 (1909); *Flanders* v. *Blandy, supra.*

Mere expression of a wish to give, unaccompanied by acts executing the purpose, will not be enforced, but acts or words manifesting a present execution of the donor's intention to give may be sustained by means of a trust if all the essential elements thereof are present. *Ginn's Adm'x.* v. *Ginn's Adm'r.,* 236 Ky. 217, 32 S.W. (2d) 971 (1930); *American Bible Soc.* v. *Mortgage Guarantee Co.,* 217 Cal. 9, 17 Pac (2d) 105 (1932). In a self-declaration of trust, there is no absolute need of delivery either of the trust property or of a document declaring the trust. *Murray* v. *O'Hara,* 195 N.E. 909 (Mass., 1935). Where testator deposited money in the bank and declared to friends that it belonged to her son, the court refused to hold it a trust on the grounds that she had merely indicated an intention to create a trust in the future. *Smithwick* v. *Bank of Corning,* 95 Ark. 463, 130 S.W. 166 (1910). On the other hand, where the settlor signed an instrument certifying that he had given certain lands to his son, his words seemed to indicate an attempt to make a gift, but nothing was delivered and the court held this a valid self-declaration of trust. *Matter of Brown,* 252 N.Y. 366, 169 N.E. 612 (1930). Also an insured's written assignment to his wife of life policies payable to his estate was held sustainable, without delivery, as a trust. *In re Mackintosh's Estate,* 140 N.Y. Misc. 12, 249 N.Y.S. 534 (1931).

In the principal case, with no delivery to the donee, no gift was made. It is consistent with fundamental principles of the law that an invalid gift should not be converted into a trust merely to enable the donee to take. However, the testimony of the thirteen witnesses, some testifying against interest, as to the declaration of the donor would indicate as clearly as the instrument in *Matter of Brown, supra,* that the donor had manifested his intention to presently establish a self-declaration of trust. If the donor created a valid trust, it is novel to suggest that it could not take effect because it was not also a valid gift.

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