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Personal Property--Delivery of Gifts in Kentucky

J. Leland Brewster
University of Kentucky

officials refuse to act. It strikes fear in the hearts of would-be criminals. The very fact that it will meet at stated intervals serves as a check on local officials and insures that they will carry out their duties in a proper manner. Therefore, it is clear that a provision should be made for periodic calling of the grand jury. Section 114 of the American Law Institute Code of Criminal Procedure provides that "No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county." The requirement of empaneling a grand jury each year has been criticized on the ground that it would subject some counties to needless expense since grand juries are not always needed that often. It has been suggested that the grand jury should be convened only when the prosecuting attorney asks the judge for the assistance of one or whenever the judge himself thinks there is a necessity for one.[25] However, it is believed that if the calling of a grand jury is to have the desired effect on the public, it should be called at periodic intervals. The judge or prosecuting attorney for reasons of his own may not desire the calling of such a body. Therefore, it is apparent that a provision should be made for the periodic calling of a grand jury, since this will enable any aggrieved person to present complaints. If no complaints are presented, the grand jury can be dismissed.

In summary, there should be no objection to a system which would authorize the prosecution of all felonies by either information or indictment and which would still allow the court an opportunity to summon a grand jury if one were deemed necessary, and, in any event, at least once a year. It is believed that the return of an indictment by a grand jury, in each and every case, is no longer necessary for a certain and safe administration of justice.

Beauchamp E. Brogan

PERSONAL PROPERTY—DELIVERY OF GIFTS IN KENTUCKY

There are three traditional requirements for a valid gift: (1) donative intent, (2) delivery by the donor, and (3) acceptance by the donee.[1] This note is concerned only with the requirement of

[25] Morse, supra note 22 at 364-365.

[1] Brown, Personal Property, 132 (1936). This author states that the requirement of acceptance is frequently omitted in modern cases in view of "the well-nigh universal holding that when the gift is beneficial the presumption is that the gift is accepted by the donee." The Kentucky Court of Appeals subscribes

delivery in Kentucky, whether actual, constructive or symbolic. It defines the three types of delivery, discusses certain Kentucky decisions illustrating recurring delivery situations, and suggests a step-by-step procedure for determining the type and validity of delivery in specific cases.

I

At the early common law delivery was a relatively simple matter. As stated by Bracton, no gift of a chattel was complete without tradition of the subject of the gift.[2] To the medieval mind such a requirement was not onerous; it flowed naturally from the rule requiring livery of seisin for the transfer of land. As a modern concept, however, manual tradition would be extremely confining. Under the burden of such a requirement, attempts to give choses in action, bank deposits, shares in jointly owned property and many other common types of personal property would be consistently frustrated. It is not surprising, therefore, that the courts have developed the concepts of constructive and symbolic delivery and have broadened the concept of actual delivery beyond its historical limits. In keeping with this development, the Kentucky Court of Appeals has often said that delivery may be actual, constructive, or symbolic,[3] and has frequently upheld gifts that would have shocked Bracton and his thirteenth century colleagues.

However, the Court has not conclusively defined or limited any of the three types of delivery, and frequently does not label the type

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to this view, stating, in the recent case of Aubrey's Adm'x. v. Kent, 292 Ky. 740, 167 S.W. 2d 831, 833 (1942), that a valid gift only requires a "delivery of possession, actual, constructive, or symbolic, with the intention to transfer title, permanently if inter vivos, either conditionally or permanently if causa mortis." This statement of the Kentucky requirements, of course, is broad and includes both gifts *causa mortis* and *inter vivos* between which, for purposes of this note, no distinction need be made. For situations involving only gifts *inter vivos* the court has been more explicit, requiring the following: (1) that there be a competent donor, (2) that there be an intention on his part to make a gift, (3) that there be a donee capable to take it, (4) that the gift be complete with nothing left undone, (5) that the property must be delivered and go into effect at once, and, (6) that the gift be irrevocable. See Hurley v. Schuler, 296 Ky. 118, 176 S.W. 2d 275 (1943); Lyle v. Snowden's Adm'x, 295 Ky. 505, 174 S.W. 2d 691 (1943); Gernert v. Liberty National Bank and Trust Co. of Louisville, 284 Ky. 575, 145 S.W. 2d 522 (1940); Hart v. Hart, 272 Ky. 488, 114 S.W. 2d 747 (1938). It is suggested that the first, third and fourth of these are implicit in the traditional requirements and, therefore, that the formula prescribed here would apply equally well to gifts *causa mortis* save for the sixth point which is peculiar to gifts *inter vivos*.

[2] 1 Bracton, De Legibus, 128 (1640).

[3] Hardy v. St. Matthews' Community Center, 267 S.W. 2d 725 (Ky. 1954); Aubrey's Adm'x v. Kent, 292 Ky. 740, 167 S.W. 2d 831 (1942); Farris v. Farris, 269 Ky. 466, 107 S.W. 2d 299 (1937); Drake v. Security Trust Co., 203 Ky. 733, 263 S.W. 4 (1924); Taylor v. Purdy, 151 Ky. 82, 151 S.W. 45 (1912).

of delivery at all, saying only that a delivery must be made in such a way as the nature and circumstances of the gift permit.[4] Occasionally the court uses the terms constructive and symbolic delivery, but refuses to distinguish between them.[5] And in one case,[6] it has even called symbolic delivery a type of constructive delivery. This consistent refusal to describe the delivery in concrete terms has caused unnecessary confusion which can only be eliminated through careful definition of each of the types of delivery and use of these definitions by the Court in making its decisions.

In attempting to define actual, constructive, and symbolic delivery one is forced to admit that the Kentucky court is not without some justification for its avoidance of the terms. Except for actual delivery, which is generally considered to be synonymous with manual tradition, there is considerable confusion and difference of opinion in the authorities as to the delivery situations included in each category. Ballentine, for instance, defines symbolic and constructive delivery in terms of each other, describing constructive delivery as a type of symbolic delivery and symbolic delivery as a variety of constructive delivery.[7] On the other hand, Mechem, in perhaps the most exhaustive treatment of this subject available, states that the authorities are in general agreement that the principal distinction between a symbolic and a constructive delivery is in the amount of control vested in the donee by the delivery.[8] Thus, the former is defined as "a substitute for manual tradition which gives to the deliveree a symbol of or evidence of right, *but gives him no control over the res,*"[9] and the latter is distinguished as "a substitute for manual tradition, which to a greater or less degree confers on the deliveree a physical access to or control over

[4] Bryant's Adm'r v. Bryant, 269 S.W. 2d 219 (Ky. 1954); Pikeville National Bank v. Shirley, 281 Ky. 150, 135 S.W. 2d 426 (1939); Scherzinger v. Scherzinger, 280 Ky. 44, 132 S.W. 2d 537 (1939); Taylor v. Purdy, 151 Ky. 82, 151 S.W. 45 (1912); Stephenson's Adm'r v. King, 81 Ky. 425 (1883).

[5] Dickerson v. Snyder, 209 Ky. 212, 215, 272 S.W. 384, 385 (1925), where the court said ". . . and where the circumstances are such that the given property cannot be physically delivered it may be done so symbolically or constructively. A frequent illustration of the latter character of delivery is where the given property is not in the immediate presence of the donor and its nonaccessibility prevents him from transferring its custody from himself to the donee or his selected representative or agent, in which case the donor must deliver something to symbolize the corporeal property which is the subject matter of the gift, and which frequently is a key to some sort of receptacle in which the property is kept and wherein it was contained at the time." In lumping symbolic and constructive delivery together as one type the court obviously is ignoring any distinction between them.

[6] McCoy's Adm'r v. McCoy, 126 Ky. 783, 31 Ky. Law Rep. 1189, 104 S.W. 1031 (1907).

[7] Ballentine, Law Dictionary with Pronunciations, 1930.

[8] Mechem, Delivery of Gifts of Chattels, 21 Ill. L. Rev. 341, 457, 568 (1926).

[9] Id. at 471; see also Brown, op. cit. supra note 1, at 92.

or possession of the res."[10] On the surface this distinction appears helpful, but in reality it makes symbolic delivery an empty category and overburdens the constructive delivery category to the point of uselessness. This results from excluding from the symbolic category all deliveries in which the means of control is passed. In very few cases will the delivery of a mere token or symbol suffice to divest the donor of his dominion and control, an oft-cited requisite for the showing of a complete and unequivocal delivery.[11] Therefore, in all cases where actual delivery is impossible it would be necessary to classify the delivery as constructive, making this a vague, catch-all category. This would increase, not decrease, the confusion.[12]

In view of the inadequacies in the generally accepted definitions just discussed, it may be helpful to state the writer's own definitions of the three types of delivery before undertaking a classification of delivery situations in the Kentucky cases. The definitions stated are designed to achieve at least five objectives: (1) to satisfy the basic requirement of delivery, that is, stand as an unequivocal act which will make the donor's purpose clear, (2) to include in the three categories as a whole all valid deliveries and to exclude therefrom all invalid deliveries, (3) to establish a distinct line of demarcation between categories, (4) to insure that each category will represent a type of valid delivery and will not be an empty category, and (5) to be as consistent as possible with the Kentucky decisions to be discussed.

Actual delivery is simply the absolute, most unequivocal delivery of the res possible. Although this will require manual tradition of the subject in most cases, in gifts of intangibles, chattels of great bulk and some few other subjects a transfer of something other than the subject may be sufficient even though it does not serve as the means of con-

[10] Ibid.

[11] Pikeville Nat. Bank and Trust Co. v. Shirley, 281 Ky. 150, 135 S.W. 2d 426 (1939); Goodan v. Goodan, 184 Ky. 79, 211 S.W. 423 (1919); Dick v. Harris' Ex'r, 145 Ky. 739, 141 S.W. 56 (1911); McCoy's Adm'r v. McCoy, 126 Ky. 783, 31 Ky. Law Rep. 1189, 104 S.W. 1031 (1907).

[12] Such confusion would arise from the commingling under the one term two types of cases, one being the situation mentioned above wherein the means of control is passed, the other being that group of cases where actually no delivery is made but where the donor clearly manifests his intention to make a gift, a truly constructive delivery. Such a case is Swafford v. Spratt, 93 Mo. App. 631, 635, 67 S.W. 701 (1902), wherein the court said: "A constructive delivery is when, without actual transfer of the goods or their symbol, the conduct of the parties is such as to be inconsistent with any other supposition than that there has been a change in the nature of the holding; . . ."

Kentucky, without labelling the delivery has found a valid gift in several such situations. Bryant's Adm'r v. Bryant, 269 S.W. 2d 219 (1954) (Joint ownership of store); Collins v. Collins' Adm'r, 242 Ky. 5, 45 S.W. 2d 811 (1931) (Bank deposit made in name of donee—no passbook delivered); Simmonds v. Simmonds' Adm'r, 133 Ky. 493, 118 S.W. 304 (1909) (Subject at time of gift in possession of another).

trol over the property. Symbolic delivery is defined as a substitute for actual delivery where the nature of the gift or circumstances of the case make actual delivery impossible *at the time of the gift,* and where the symbol delivered vests the control of, or access to, the property in the donee. The fact that an actual delivery might have been made at another time is of no consequence in determining the validity of the delivery actually made. Constructive delivery is defined as a substitute for actual delivery where the donor performs some equivocal act which might be construed as an act of delivery and which is made certain by a strong manifestation of donative intent. This type of delivery is clearly distinguishable from symbolic delivery and is limited in scope only by the decision of the court in the particular case as to the sufficiency of the donor's manifestation of intent. The usefulness of these definitions is clearly demonstrated in applying them to illustrative Kentucky cases under each category.

II

ACTUAL DELIVERY

Two similar cases falling for the most part outside the classic concept of manual tradition but within the suggested definition of actual delivery are *Goodan* v. *Goodan's Adm'r*[13] and *Gray's Adm'r* v. *Dixon.*[14] In the *Goodan* case the donor delivered to one of the donees an endorsed note, a title bond, and a certain amount in cash, to be distributed among the other donees according to the donor's instructions. In a settlement of donor's estate, the court sustained the gift, finding an actual delivery of the note, bond and cash. In the *Gray* case the donor on his deathbed handed the donee a government bond and certain notes; the court sustained the gift because the delivery was sufficient. Obviously, the manual tradition of the money in the *Goodan* case satisfied the strictest definition of actual delivery. And it is submitted that the delivery of the bonds and notes in both cases is also properly classified as an actual delivery, because it would be impossible in any circumstances to transfer the real subject matter—the future right to the money owed. The transfer, then, of the only tangible existence of that future right constitutes the most absolute, unequivocal delivery possible. In effect, it is no different than delivery of the money.

[13] Supra note 12.
[14] 255 Ky. 239, 73 S.W. 2d 6 (1934).

A similar situation exists where the subject matter of the gift is corporate stock.[15] Clearly, no more absolute method for transferring such intangibles as the right to vote or the right to share in corporate earnings can be found than the delivery of the certificate which entitles one to these rights. The Kentucky court recognized this in two cases where delivery of the certificate was unquestionably made by failing to question in any way the sufficiency of the delivery.[16] Conversely, the court has consistently turned down attempted gifts of corporate stock where delivery of the certificate, even though properly endorsed, has not been made.[17]

An unusual instance of actual delivery is illustrated in a recent case where the donor purchased a lottery ticket in the name of her niece and delivered the ticket with statements of gift to her sister for her niece's benefit.[18] The donor had a change of heart when the ticket won a new automobile, but the court upheld the gift. The opinion refers to the delivery as symbolic, but it is clear that an actual delivery was in fact made, because the ticket was the only tangible existence of the subject capable of delivery. No more absolute transfer of the intangible chance to win could have been made.

SYMBOLIC DELIVERY

The *Goodan* and *Gray* cases already discussed afford an excellent opportunity to distinguish between actual delivery and symbolic or constructive delivery. In both of these cases, in addition to the notes and bonds previously mentioned, there was an attempted gift of a bank deposit. In the *Goodan* case, the donor made delivery of a joint bank certificate, subsequently causing a new certificate to be made out in the donee's name. The court called this a constructive delivery, but it is more properly classified as a symbolic delivery, since there was a transfer of the means of control, thus eliminating the necessity for recourse to the weaker concept of constructive delivery. But is it possible that there was no need for recourse to the symbolic delivery concept either, on the ground that the certificate was the only tangible existence of the money on deposit? The answer is no. The certificate

[15] This classification of the delivery of stocks, bonds, notes and other such papers which merely evidence the intangible subject finds support in the law of assignment. It is there that the name specialty-choses-in-action is generally applied to them, and it is well settled that the delivery of the "specialty" transfers with it the intangible right which it represents.

[16] York's Ancillary Adm'r v. Bromley, 286 Ky. 533, 151 S.W. 2d 28 (1941); Trevathan's Ex'r v. Dees' Ex'rs, 221 Ky. 396, 298 S.W. 975 (1927).

[17] Dawson v. Dawson's Adm'x, 272 S.W. 2d 666 (Ky. 1954); Biehl v. Biehl's Adm'x, 263 Ky. 710, 93 S.W. 2d 836 (1936).

[18] Hardy v. St. Matthews' Community Center, supra note 3.

was not the only tangible existence of the subject matter, because the subject was *presently* available. The money itself might have been delivered, and therefore the most absolute delivery possible was not made. Only the means of control passed, so only a symbolic delivery was made.

In the *Gray* case there was delivery of the passbook to a checking account. The court, refusing to find a distinction between a checking and a savings account, found a valid delivery even though, it said, the accepted means of control over a checking account is by check.[19] There was no actual delivery here for the same reason advanced in discussing the *Goodan* case. Since the donor could have made an actual delivery of the money, nothing less than that may be considered an actual delivery. In fact, since the passbook to a checking account in no way represents the means of control over the money, transfer of it may not even properly be called a symbolic delivery. Instead, there was a constructive delivery here, because the validity of the gift turned primarily on the strong manifestation of intent to renounce dominion and control and vest them in the donee. Although the delivery was equivocal, the intent was strong, and in such a case the court will indulge in a fiction to sustain the gift; it will find a delivery where the existence of one in fact is doubtful.[20]

[19] Clearly, the court here is not in agreement with the majority of Kentucky decisions regarding the validity of a gift by check. Kentucky follows the general rule that a check is merely an order to pay, revocable at any time prior to payment. The Kentucky view was clearly stated in Foxworthy v. Adams, 136 Ky. 403, 407, 124 S.W. 381, 382, 27 L.R.A. (N.S.) 308 (1910), where the court said, "The rule is that a gift of one's own check is incomplete until the check has been paid or accepted by the bank. 'A check, being a mere order or authority to the payee to draw the amount called for, when given without consideration, may be countermanded or revoked by the maker so long as it remains unacted on in the hands of the payee. . . .'" A difference must be noted, however, between an ordinary personal check and cashier's checks or bank drafts. This is illustrated in the case of Pikeville National Bank and Trust Co. v. Shirley, 281 Ky. 150, 135 S.W. 2d 426 (1939), where the donor, a suicide, mailed a cashier's check to his wife. The court clearly distinguished between this and an ordinary check as to the validity of the delivery but failed to spell out the reason. It might be argued that the reason is that a cashier's check so approximates money itself that a delivery of it constitutes an actual delivery. This is refutable, though, since the money itself is presently available and only a delivery of the money could constitute an actual delivery. Instead, this is a valid symbolic delivery, because the donor vested a complete control in the donee over the money represented by the check. In no way could he revoke the gift after control passed to the donee.

[20] The findings in these cases on this point have been substantiated in later cases. In Aubrey's Adm'x v. Kent, 292 Ky. 740, 745, 167 S.W. 2d 831, 833 (1942), the court said, "The delivery of the savings account passbook consummates its gift and transfers the money on deposit to the donee if that was the intention and purpose of the donor. This, it is generally said, is because such book is equivalent to a certificate of deposit, *the presentation of which authorizes withdrawal of the funds.*" (Writer's italics) Likewise, in Scherzinger v. Scherzinger, 280 Ky. 44, 132 S.W. 2d 537 (1939), the delivery by donor of a certificate of deposit with the statement that donee was to have her name added

In at least one class of cases, those involving delivery of a key, the court has labeled the delivery as symbolic. To the extent that the key in question represents the means of control over the subject, this is a correct categorization. In *Moore* v. *Shifflett*,[21] for instance, the invalid donor directed a trusted friend to lock the money in question in a dresser and then entrusted the dresser key to the friend to be delivered subsequently to the donee. This undoubtedly effected a transfer of the means of control. The same was true in *Farris* v. *Farris*,[22] where the donor made a gift of stock by delivering to a third party attorney the key to the safety deposit box containing the certificates. Control clearly passed to the donee.

CONSTRUCTIVE DELIVERY

Constructive delivery cannot be defined as precisely as the other two types because the emphasis is on the donor's manifestation of intent. Clearly the donor's intent needs to be very strong, since it must, to a certain extent, replace the act of delivery which itself is required primarily for the purpose of making certain the donor's intentions. In short, the gift must be sustained almost solely on intent. Therefore, any limits to the category can be determined only on the facts of the particular case. This is forcefully illustrated in the case of *Simmonds* v. *Simmonds' Adm'r*.[23] There the donor attempted to make a gift of certain notes which were in the possession of her daughter, who refused to surrender them for delivery to the donee. Despite this, the court enforced the gift on the strength of abundant uncontradicted testimony showing strong donative intent. In addition, it was apparent that the actions of the daughter were intended to upset the gift, which worked to her disadvantage. The court simply circumvented the accepted delivery requirements and sustained the gift primarily on the basis of strong intent coupled with an equivocal act of attempted delivery. Though admittedly an extreme case, it is an example of a valid constructive delivery.

Similarly, in the recent case of *Bryant's Adm'r* v. *Bryant*,[24] title to a store was given to the donee, even though no unequivocal act of delivery either actual or symbolic was made, because of the joint pur-

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was held a valid gift. In each case the transfer was less than the most perfect delivery to be made of the subject but did constitute delivery of the most effective means of control of that subject. Thus, in each case a clear cut symbolic delivery was made.

[21] 187 Ky. 7, 216 S.W. 614 (1920).
[22] 269 Ky. 466, 107 S.W. 2d 299 (1937).
[23] 133 Ky. 493, 118 S.W. 304 (1909).
[24] 269 S.W. 2d 219 (1954).

chase and joint operation of the store. Validity of the gift was allowed to turn on the basis of testimony establishing that the donee had filed a declaration of ownership to which the donor had frequently declared his assent, and on other testimony showing that donee had been allowed to act as sole owner. No one act on the part of the donor constituted a delivery, but taken *in toto* all of his acts clearly evidenced his intent to make a gift. Therefore, the court properly sustained it even though the delivery was necessarily constructive.

Another situation for the constructive delivery is illustrated in *Collins* v. *Collins' Adm'r*,[25] where the donor made a savings bank deposit in the names of his infant children but made no delivery of the passbook to them. The children made no use of the account. The donor used the account but all of his checks and deposits were made in the names of the donees. In spite of conflicting evidence, the court found that the presumption of intent to make a gift raised by the deposit in the name of the donee was not overcome, saying:

> A thorough consideration of the authorities here and in other jurisdictions leads to the conclusion that, in order to perfect a gift by the deposit of money in the bank in the name of an infant donee, it will be assumed that it was intended as a gift unless that presumption is rebutted by facts indicating a different purpose. If the deposit is accompanied by declarations or acts showing an intention of divesting control over the fund and of vesting it in the donee, it will be given effect as a completed gift.[26]

The term constructive delivery was not used in the opinion but it seems clear that the court's statements support the proposed definition of the category. The deposit of the money, an equivocal act at best, can serve as the delivery peg on which to hang the gift, but its support comes from the clear manifestation of donative intent.[27]

Kelley-Koett Mfg. Co. v. *Goldenberg*[28] is a good example of a case where the donor's intent is not sufficiently strong to overcome an inconclusive act of delivery. The directors of the defendant corporation voted to issue the plaintiff, their employee, one share of stock. This was substantiated by the corporate records. However, the minutes of the meeting and the share of stock were never signed by the president,

[25] 242 Ky. 5, 45 S.W. 2d 811 (1931).
[26] Id. at 13, 45 S.W. 2d at 815.
[27] It is worthy of note that the virtually extinct requirement of acceptance may be controlling in these cases. In the case of an infant, as in the Collins case, it will be presumed and a constructive delivery will thus be found. Where the donee is an adult, though, actual acceptance must be shown in order for the court to fictionalize a delivery. See Peter's Adm'r v. Peters, 224 Ky. 493, 6 S.W. 2d 499, 59 A.L.R. 969 (1928), where the court refused to find such a gift to an adult son on the ground that without any knowledge or acceptance complete control and power to revoke remained in the donor.
[28] 207 Ky. 695, 27 S.W. 15 (1925).

the share was never detached from the stock book, neither the share nor the stock book was ever delivered to the plaintiff, and nothing further was done by either party to transfer ownership during the remaining year and a half of plaintiff's employment or during the remaining nine years before the suit was filed. In view of the mere evidentiary nature of corporate records and the weight of parol evidence tending to contradict them, the court properly held that no delivery had been made. The case clearly falls outside of our definition of constructive delivery since there was insufficient manifestation of intention.

III

In view of the definitions posed at the beginning and the illustrative decisions discussed, is there some predictable basis or pattern for determining the nature and validity of a delivery in Kentucky? The answer to this question seems to lie in a step-by-step procedure for evaluating the facts of each case. The first and most basic consideration in any such procedure must be an exact determination of the subject of the gift. Only after this is established may one proceed to a categorization of the delivery involved. To do this one first asks, is there evidence that the least equivocal, most absolute delivery of the subject matter possible was made? If so, there is a valid actual delivery. If not, the gift may be invalid unless a symbolic or constructive delivery can be found. Therefore, is the delivery as complete and absolute as the nature and the circumstances of the gift will permit at the time the delivery is made? If not, the gift is invalid, but if the delivery does meet this test, it is either symbolic or constructive. In order to determine which it is, does the thing delivered give the donee control of the subject? Is it the means of control? If it is, a valid symbolic delivery has been made. If not, the gift is invalid, unless a constructive delivery can be made out. The question then narrows to this: do the facts of the case show any act, even an equivocal one, which can serve as an act of gift when coupled with a clear manifestation of donative intent and renunciation of control? If so, a valid constructive delivery has been made.

The usefulness of this formula is best illustrated by applying it to some of the more difficult borderline gift cases. An early case of this sort was *Brown* v. *Brown's Adm'r*,[29] where the donees were the illegitimate sons of the donor. Although unable to provide for them as part of his family, the donor sought to help them by paying a promissory

[29] 43 Ky. 535 (1844).

note of theirs on which he was surety. The note was never delivered to the donees, who lived some seventy miles away, but it was mentioned frequently by the donor, who stated his intention to "help the boys" in this way.

What was the subject of this gift? The court, influenced by the more strict delivery requirements of the time, treated the money as the subject and held that an actual delivery of the subject had been made upon payment of the note. In view of the modern development of the delivery concept, however, it would seem more realistic to treat the note as the subject. Although it is obvious that the money was delivered, it was not delivered to the donees or to anyone for them. It was given to the bank and might well have been given to buy the note for investment purposes. The note, on the other hand, is subject to none of these limitations. Moreover, it was the item in question between the parties; it was in fact the subject of the dispute. Was the delivery of the note the least equivocal, most absolute delivery of the subject that could have been made? Since the note was found among the donor's papers upon his death, the answer clearly is no. Therefore, no actual delivery was made. But, was as complete and absolute a delivery of the note made as the nature and circumstances of the gift would permit at the time of its making? In this particular case the gift was not clearly made at any one time, and so this question cannot be answered with certainty. One must then determine if the delivery transferred the means of control of the subject to the donee. Certainly it did not, because nothing at all was actually given the donee. Therefore, no symbolic delivery could have been made. Finally, then, do the facts show any act, though equivocal, which might have served as an act of gift and which was solidly supported by the clear manifestation of the donor that a gift was intended? The act of purchasing the note, though equivocal, serves this purpose. In fact, the court settled the case upon this act. Support this with the clear, convincing evidence presented to show the donor's manifestation of donative intent and there is a clear case of constructive delivery, an equivocal act made certain by the manifestations of the donor. Although there is no difference in result, this basis for enforcing the gift is more realistic than that used by the court.

A difficult problem is found in *Taylor* v. *Purdy*,[30] where a creditor of the deceased donor attacked as testamentary in character a deed of gift to the donees. The deed conveyed all of the donor's "right, title, and interest in any real estate and all the personal estate of every kind"

[30] 151 Ky. 82, 151 S.W. 45 (1912).

which he then had or might have at the time of his death. The court held that the gift of personal property when evidenced by a written instrument executed by the donor was valid although no manual delivery of the property was made, but chose not to rationalize this. In analyzing the case it is no problem to answer our first question. The subject of the gift is undoubtedly all of the "right, title, and interest" that the donor had in any real estate or personalty. This makes our second question a difficult one to answer. Was this the most absolute delivery that could possibly have been made? Clearly, the delivery of the realty by deed was the most absolute possible; this is the normal and unquestioned method of conveying title to property absolutely. However, the real problem here is in regard to the personal property. Was the delivery of the deed to the personalty the most absolute possible? Certainly, delivery of a deed of gift to any *single* item would not be, since manual tradition would generally be possible. Neither should the deed in such a case be considered a symbolic delivery, though such a categorization is frequent, for the simple reason that no control is passed. Instead, the delivery is constructive, the writing constituting a very clear manifestation of the donor's intent and thereby strengthening what would otherwise be an equivocal, token delivery. However, in the instant case where the donor seeks to give all of his personalty in one fell swoop, is it not more realistic to say that manual tradition of the entire lot is virtually impossible and that delivery of a deed to the personalty thereby constitutes the most absolute delivery possible? The answer must be yes, and therefore, it is a valid actual delivery. As in the Brown case, there is a concurrence with the court in result, but concurrence on a more logical basis.

Another difficult delivery problem is presented in joint possession cases such as *Morgan* v. *Williams*,[31] where the donor sought to give an automobile to the donee, who lived with her. There was substantial testimony for each side. The plaintiff donee showed clearly that the car was purchased with intent to give it to her and that she had the unrestricted use of the automobile after its purchase. The defendant showed that, despite this, the automobile was registered and insured in donor's name, that donor paid all expenses of operation, kept it in her garage and even authorized an agent to sell the auto shortly before her death. The court, weighing this evidence, sustained the gift, saying:

> To be effectual, delivery must be according to the nature and character of the thing given and where donee lives with donor and the gift of the automobile, as well as the right to use and control it with-

[31] 179 Ky. 428, 200 S.W. 650 (1918).

> out the permission of the donor, is clearly shown, the mere fact that the donor keeps the machine in her garage, or wishes to supplement her kindness by paying all the expenses incident to the operation of the machine cannot be regarded as the retention of such dominion over the machine as to render the gift ineffective.[32]

In analyzing this case it is apparent that the subject of the gift is the automobile. And it is equally clear that the absolute, most unequivocal delivery possible would be a single act of giving the keys and the car simultaneously. In view of this there was no actual delivery here. But was there a symbolic delivery;—a transfer of the means of control, the keys to the car? Undoubtedly there was, not once, but many times. But since in daily life such a transaction is a very common occurrence, it might well be inconsistent with a gift and indicative of only a bailment. Therefore, to find any concrete basis for enforcing the gift it is necessary to rely on the constructive delivery concept. Since the delivery of the keys was equivocal, yet clearly an act possible of construction as a gift, the validity of the gift rests finally on the donor's manifestation of intention. Did the donor manifest so strong an intent to give that the gift should be sustained despite an equivocal act of delivery? The court felt that she did. In view of the conflicting nature of the evidence and the apparent equal weight on each side, it seems more realistic to say that she did not, that no clear manifestation of intent was shown. But this, it would seem, is an inevitable difference of opinion in such cases. This case undoubtedly represents the extremity of the constructive delivery concept where final determination of validity must rest on opinion.

J. Leland Brewster

REAL PROPERTY—NOTICE OF RESTRICTIVE COVENANTS IN KENTUCKY

Restrictive covenants that run with the land are enforceable against a subsequent purchaser only if he has notice of them.[1] This note discusses the various ways of obtaining notice of restrictive covenants in Kentucky including actual, implied, inquiry, and constructive notice. For classification purposes the kinds of notice may be defined as follows: Actual notice is information concerning the existence of the

[32] Id. at 431, 200 S.W. at 652.

[1] A purchaser will be bound, either by his knowledge o fthe covenant or by constructive notice from the record thereof. Patton on Titles, 1036 (1938). Also note 14 Am. Jur. Covenants, Conditions, and Restrictions, 659-663.