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Gifts *inter vivos*

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STUDENT NOTES

GIFTS INTER VIVOS

In the recent Kentucky case of *Farris v. Farris*¹ the intestate wished to make a gift of a certificate of one hundred shares of stock to his nephew. The certificate was in his safety deposit box and he was suffering from a stroke of paralysis. He told his attorney, who had possession of the key to the box, of his desire and evidently his nephew, who also told the attorney. The attorney and the intestate's banker intended to deliver the certificate when so directed and it was taken out of the box for that purpose, but through inadvertence replaced, and the vault door locked with the time lock. They told the intestate of this and then asked him if he wanted the bequest inserted in his will. He nodded his head and then signed the will and died about twenty-four hours later. The court held that there was a completed gift *inter vivos*. Apparently the nephew could not take under the will because of the widow's prior claim under an antenuptial contract, which was greater than the value of all the securities. The death of the donor was not made a condition of the completed gift, so, even though it did occur immediately, this was not a gift *causa mortis*.

In this case it is evident that two of the three requisites of a valid gift,² the intention of the donor to give and the acceptance of the donee, were present. The third, delivery, is a matter of some doubt. That it is necessary is well-settled law,³ but what constitutes it is not so well-settled.⁴ In this case there is not just a simple delivery, but the court holds that it is one involving two well-recognized exceptions, symbolical delivery and delivery to a third person as agent or trustee for the donee. When the conditions are so adverse to actual delivery as to make a constructive or symbolical delivery as nearly perfect as the circumstances will allow it is permissible.⁵ They were adverse in this case, as the certificate was locked in the bank by a time lock. Delivery to a third person as agent or trustee for the donee is sufficient.⁶ It has also been held that a combination of the two, constructive delivery to a third party, is proper.⁷

¹ 269 Ky. 466, 107 S. W. (2d) 299 (1937).

² Brown, *Personal Property* (1936), Sec. 37, p. 76.

³ *Kelley-Koett Mfg. Co. v. Goldenberg*, 207 Ky. 695, 270 S. W. 15 (1924); *Drake v. The Security Trust Co.*, 203 Ky. 733, 263 S. W. 4 (1924); *Cochrane v. Moore*, L. R. 25 Q. B. D. 57 (1890).

⁴ Roberts, *The Necessity of Delivery in Making Gifts* (1926) 32 W. Va. L. Q. 313; Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, (1926, 27) 21 Ill. L. Rev. 341, 457, 568.

⁵ *In re Van Alstyne*, 207 N. Y. 298, 100 N. E. 802 (1913).

⁶ *Goodan v. Goodan*, 184 Ky. 79, 211 S. W. 423 (1919).

⁷ *Szabo v. Spechman*, 73 Fla. 374, 74 So. 411, L. R. A. 1917D, 357 (1917).

The court was undoubtedly right as to what might constitute delivery but there is some question as to its application to the facts in this case. Although the key to the safety deposit box was not actually delivered to the attorney for the purpose of this particular gift, it was in his possession for the general purpose of doing what the donor requested, and the donor did not ask for its return when informed that the gift could not be immediately completed.

The chief difficulty comes in the holding that the donor constituted the attorney and the banker agents or trustees for the donee and thereby relinquished all control over the subject of the gift. The attorney and the banker were the agents of the donor and could not hold the key in that capacity as there would have been no relinquishment of control, which is essential.⁸ Possession in the capacity of the agent is not enough, even when the agent is also the donee.⁹ It is characteristic of the position that the third person have a close relation to the donee. He may be, for example, the donor's bank,¹⁰ banker,¹¹ father,¹² husband,¹³ or nephew.¹⁴ It is possible to have a valid gift, even when there is apparent ability to revoke it. In one case the donor did attempt to revoke it and was not permitted to, because a trust had been created.¹⁵

There is a case¹⁶ in which the third party was the donor's attorney and gift was held incomplete, not because of that fact, but because the circumstances showed no clear intention to make the gift at that time. It would seem that the circumstances surrounding the making of the gift are all-important. There is one class of case,¹⁷ that in which property was given to the third party for delivery after the donor's death, which, while not analogous to this, show what the courts consider in determining that the third party holds as agent or trustee and that there has been an irrevocable transfer. The fact that the third party is a trustee is usually made expressly clear by parol declaration¹⁸ or writing.¹⁹ Subsequent acts of the donor are also evidence of his intention.²⁰ In the present case the words and acts of the donor are very few. There was nothing directly constituting the attorney and the banker trustees and the court did not find that there was. It merely stated

⁸ *Stark v. Kelly*, 132 Ky. 376, 113 S. W. 498 (1908); *Brewer's Admr. v. Brewer*, 181 Ky. 400, 205 S. W. 393 (1918).

⁹ *Hahn v. Dean*, 108 Me. 555, 82 Atl. 107 (1911).

¹⁰ *Grant Trust & Sav. Co. v. Tucker*, 49 Ind. App. 345, 96 N. E. 487 (1911).

¹¹ *Pyle v. East*, 173 Iowa 165, 155 N. W. 283 (1918).

¹² *Packer v. Clemson*, 269 Pa. 1, 112 Atl. 107 (1920).

¹³ *Jarrel v. Crow*, 30 Tex. Civ. App. 629, 71 S. W. 397 (1902).

¹⁴ *Meriwether v. Morrison*, 78 Ky. 572 (1880).

¹⁵ *Jones v. Nicholas*, 151 Iowa 362, 130 N. W. 125 (1911).

¹⁶ *Trubey v. Pease*, 240 Ill. 125, 88 N. E. 1005 (1909).

¹⁷ See 3 A. L. R. 902.

¹⁸ *Giddings v. Giddings' Admr.*, 51 Vt. 227, 31 Am. Rep. 682 (1878).

¹⁹ *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604, 3 A. L. R. 896 (1915).

²⁰ *Grant Trust & Sav. Co. v. Tucker*, 49 Ind. App. 345, 96 N. E. 487 (1911).

that "in the light of all that occurred" it could not be doubted that it was effected. The only thing that occurred after the donor learned that the gift could not be immediately completed was that he nodded his head when asked if he wanted the bequest in his will. Also, as the court points out, he did not ask for the return of the key. He did absolutely nothing to constitute the attorney and the banker trustees. Some courts have declared that in cases of doubt the presumption is that the third person takes as the trustee of the donee,²¹ but others have reached the opposite conclusion.²² Such a presumption is not relied on in this case. It is questionable whether or not the donor ever had the intention that the attorney and the banker be trustees for the donor. If he still wanted to complete the gift in his lifetime, he probably thought that he could do it when it was possible to get the certificate out of the bank. If he no longer had that idea, he probably thought his will would take care of it.

It really seems that the court holds that a gift was made when there was not a completed delivery. It is, in effect, saying that all that is necessary for a gift *inter vivos* is a clear intention to make the gift and, when delivery is impossible, some positive act in that direction.

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CRIMINAL NEGLIGENCE—A WORKABLE DEFINITION

Although the courts seem to be agreed that criminal negligence must be something more than the negligence necessary to impose civil liability for damages,¹ there is a great diversity of opinion as to what are the essential ingredients necessary to constitute criminal negligence. In the final analysis, the question is one which is vague and unsettled. It is our purpose in this note to attempt to derive a definition for criminal negligence which will be broad enough to be of use in the solution of criminal cases.

In the civil field, we find the question of negligence virtually settled. In *Palsgraf v. Long Island R. Co.*,² the court said that "negligence is the absence of care according to the circumstances." In *Young v. State*,³ we learn that "negligence is the failure to do what a man of ordinary care and prudence would do under the same or like circumstances. "These definitions have been universally accepted, and courts in civil cases have no difficulty in incorporating them into their instructions to the jury. However, since, as we have stated above, criminal negligence must be something more than ordinary negligence, we cannot successfully apply this accepted tort definition in criminal cases. Uniformity of decisions in our courts is highly desirable. Because of

²¹ In re *White's Estate*, 129 Wash. 544, 225 Pac. 415 (1924); *Kennedy v. Nelson*, 125 Neb. 185, 249 N. W. 546 (1933).

²² *Clapper v. Frederick*, 199 Pa. 609, 49 Atl. 218 (1901).

¹ *State v. Lester*, 127 Minn. 282, 149 N. W. 297 (1914); *State v. McComb*, 33 Wyo. 346, 239 Pac. 526, 41 A. L. R. 717 (1925).

² 248 N. Y. 339, 162 N. E. 99 (1928).

³ 120 Tex. Cr. Rep. 39, 47 S. W. (2d) 320 (1932).