



1933

Chose in Action--Gratuitous Assignment

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Recommended Citation

Mellor, William (1933) "Chose in Action--Gratuitous Assignment," *Kentucky Law Journal*: Vol. 22 : Iss. 1 , Article 11.
Available at: <https://uknowledge.uky.edu/klj/vol22/iss1/11>

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STUDENT NOTES

CHOSE IN ACTION—GRATUITOUS ASSIGNMENT.—A indorsed a certificate of stock, of which he was owner, to B, his wife, but kept it in his possession until his death, after which time B came into possession of it. Action was brought by the administrator of A's estate to recover the certificate from B. *Held* that where there is no evidence of a parol trust for the donee and it is shown that the assignor's intention was to make an outright gift inter vivos of the chose in action, there must be a delivery and an acceptance before the death of the assignor because that event will revoke the gratuitous assignment. *Cincinnati Finance Co. v. Atkinson's Administrator*, 235 Ky. 582, 31 S. W. (2d) 890 (1932).

The right to give is as clearly incident to the right of property as is the right to sell, and choses in action are as much within this principle as are chattels and lands. *Polly v. Hicks*, 58 Oh. St. 218, 50 N. E. 809 (1898). But to constitute a valid irrevocable gift of a chose in action, as is the case of a gift of tangible property, it must be satisfactorily established that there is present the intention to make the gift, together with an actual or constructive delivery of the thing proposed to be given without power of revocation. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119 (1908). The Kentucky court in the case of *Taylor v. Purdy*, 151 Ky. 82, 151 S. W. 45 (1912), added that there must be a parting by the donor of all present and future legal power and dominion over the thing in action.

Because of the fact that it is physically impossible to deliver a chose in action, an intangible thing, it is not necessary that there be a manual delivery of the thing given. It will be sufficient if the delivery be as complete as the thing and the circumstances permit. *Seminary v. Robbins*, 128 Ind. 85, 27 N. E. 341 (1891).

The most common method employed for a gratuitous transfer of a chose in action is by the delivery of a written instrument of such a nature as is capable of transferring the title to the donee without consideration. *Taylor v. Purdy*, supra; *City of Louisville v. Lenehan*, 149 Ky. 537, 149 S. W. 932 (1912). The general rule is in accord with the Kentucky decisions. *Jacobs v. Jolley*, 29 Ind. A. 25, 62 N. E. 1028 (1902). Although it is not necessary that there be a delivery of anything other than the writing, yet the writing itself must be delivered, either to the donee, *Taylor v. Purdy*, supra, or to a trustee to hold for the donee, *Meriwether v. Morrison*, 78 Ky. 572 (1880). Dictum of the principal case adds that an intention on the part of the donor to create a trust, even if it is in himself, must clearly be established by evidence, circumstantial or otherwise.

Gifts of choses in action may also be made irrevocable by the delivery of a tangible token which is essential to the right of recovery. *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641 (1895); *Marcus v. The St. Louis Mutual Life Ins. Co.*, 68 N. Y. 625 (1877). The Kentucky decisions are in accord. *Williams v. Letton*, 228 Ky. 371, 15 S. W. (2d) 296 (1929); *Hale v. Hale*, 189 Ky. 171, 224 S. W. 1078 (1920). Such tangible tokens have been allowed to complete valid assignments on the ground that the donor no longer has any control over the chose in action. In a few cases, the Kentucky court has gone even further, allowing delivery of a token which is not essential to the right of recovery, to constitute an irrevocable assignment of the chose in action, *Stephenson's Administrator v. King*, 81 Ky. 425 (1883); *Jones' Administrator v. Moore*, 102 Ky. 591, 44 S. W. 126 (1898), saying that when the donor delivers that which is evidence of his right, and when delivery of the thing itself is impossible, then the donor has done all that he can do under the circumstances and, hence, should have his intention carried out by the enforcement of the assignment. However, today, because of the later case of *Taylor v. Purdy*, supra, which required a parting by the donor of all dominion over the chose in action to constitute a valid assignment, the court would probably require the token to be one that is essential to the enforcement of the right.

The other defence against revocation by the donor is that of estoppel. Where the donee has incurred liability relying on the gratuitous assignment, the donor, or his estate, may be estopped to deny its validity as a gift on the ground of the equitable principle that, after allowing the donee to incur obligations, the donor is estopped to plead want of consideration. *Lisle v. Tribble*, 92 Ky. 304, 17 S. W. 742 (1891); *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N. W. 74 (1887); *Ohio Wesleyan Female College v. Higgins*, 16 Oh. St. 20 (1852). But the obligations and expenditures on the part of the donee must be directly in line with the purpose for which the gift was intended. *Ohio Wesleyan Female College v. Higgins*, supra. The test seems to be whether the assignor should reasonably expect the assignment to induce the action or forbearance which actually did take place on the part of the donee.

It is well settled in this state and in the majority of other jurisdictions that, until the assignment inter vivos is legally perfect and complete, a locus penitentiae remains, and the owner may make any other disposition of the chose in action that he or she may deem proper. *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45 (1899); *White v. White*, 229 Ky. 666, 17 S. W. (2d) 733 (1929). Such an incomplete gift is also revocable by the death of the assignor. *McNamara v. McDonald*, 69 Conn. 484, 38 Atl. 54 (1897); *Bowles v. Rutroff*, 216 Ky. 557, 288 S. W. 312 (1926). The law in regard to assignments causa mortis is somewhat different from that relating to gifts inter vivos. A gift causa mortis is made with the belief by the donor that death is imminent, and, although completed by delivery, it may be revoked by the donor at any time during his life. But death makes the assign-

ment irrevocable. *Drake v. The Security Trust Co.*, 203 Ky. 733, 263 S. W. 4 (1924); *Duryea v. Knapp*, 160 N. Y. S. 553 (1916).

From the foregoing, it seems clear that the principal case was correctly decided from the standpoint of this state, as well as from that of the majority of other jurisdictions.

WILLIAM MELLOR.

CRIMES—MALICIOUS MISCHIEF—RULE OF COMMONWEALTH V. WING.—

The defendant discharged a gun at a wild fowl, with knowledge and warning that such would injuriously affect the health of a sick person in the neighborhood. Such effect was produced by the discharge of the gun. The defendant was found guilty at common law and punished for the commission of the crime of malicious mischief. *Commonwealth v. Wing*, 9 Pick. (Mass.) 1, 19 Am. Dec. 347 (1829).

Parker C. J. in his opinion stated, "The facts proved in the case, namely, the defendant's previous knowledge that the woman was so affected by the report of the gun as to be thrown into fits, the knowledge he had that she was within hearing distance, the earnest request made to him not to discharge his gun; show such a disregard of the safety and even the life of the afflicted party as to make the firing a wanton and deliberate act of mischief."

Malicious mischief is defined as "any willful physical injury to the property of another, from ill will or resentment toward the owner, or as held by some courts from wantonness, and not *animo furandi*, as in case of larceny." Clark's Criminal Law, 3rd Ed., Sec. 110.

A multitude of penal enactments, the special purpose of which was to provide against malicious mischief, were from the time of Henry VIII until within the present century made the subject of legislative action in England. Our common law includes not only these early English statutes, but the ancient customs, traditions and usages comprising the English common law prior to statutory enactments.

It may, therefore, with certainty be concluded, that malicious mischief as a public offense and misdemeanor existed in the United States anterior to any legislative enactment. *People v. Smith*, 5 Cow. (N. Y.) 258 (1825); *State v. Watts*, 48 Ark. 55, 2 S. W. 242 (1886).

Conceding malicious mischief is punishable at common law, if accompanied by circumstances making it a breach of the public peace, the acts must be directed against and cause injury to property. *Henderson v. Commonwealth*, 8 Grat. (Va.) 708, (1852). *Injury to property* and *malice* are the necessary elements at common law as well as under statutory provisions. The offense of malicious mischief is based upon *malicious injury to property*. *State v. Robinson*, 3 Dev. & B. (N. C.) 130, 32 Am. Dec. 661 (1838); *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419 (1837).

Under some of the statutes, and at common law, it has been held that malice must be directed against the owner of the property, and that mere cruelty or general malice and wantonness are not enough.