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## Personal Property

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## PERSONAL PROPERTY

## GIFT OF RING — CONSTRUCTIVE DELIVERY

*Texas. Wells v. Sansing*<sup>1</sup> was an action to recover a diamond ring allegedly given to the plaintiff, Sansing, by the defendant's wife, since deceased. The plaintiff, who was a cousin of the deceased, Mrs. Wells, testified that the deceased gave her the key to her lock box so that she could obtain the diamond. She also testified that deceased expressed an intent that the diamond should be hers. Three witnesses testified concerning statements by Mrs. Wells indicating that she had given the ring to plaintiff. One of plaintiff's witnesses stated that deceased had told her that she had given "Little Leslie" the diamond ring and the key to the lock box in Houston where the ring was.

The bank would not open the box for the plaintiff without a court order, which was obtained. In the envelope which contained the ring was a slip of paper which read, "For Little Leslie." This phrase was in the handwriting of the deceased. The deceased's contract of rental provided that only she would have access to the box, although she could have authorized entry by another.

The trial court directed a verdict for defendant and entered a judgment accordingly. The court of civil appeals reversed on the ground that a fact issue was presented. The supreme court reversed and affirmed the judgment of the trial court.

The supreme court emphasized the fact that the plaintiff never had "physical, manual or actual possession" of the ring to the date of Mrs. Wells' death. The court stated the general rule that to constitute an inter vivos gift there must be a delivery of the subject matter by the donor to the donee, plus the intent of the donor to vest in the donee unconditionally and immediately title to the property delivered. Some weight was put on the fact that Mrs. Wells knew the requirements of the bank before an entry

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<sup>1</sup>.....Tex., 245 S. W. 2d 964 (1952).

could be made and therefore realized or should have realized that plaintiff would be prevented from entering unless the lock box contract was changed or some type of authorization given to the plaintiff.

It is well established that actual manual delivery is not necessary to effectuate a gift in all cases. "But what will amount to a delivery must depend on the nature of the thing and the circumstances of the case."<sup>2</sup> A distinction has been made between a symbolic delivery and a constructive delivery. A delivery is deemed to be symbolic when, instead of the object itself, something else is handed over in its name. A delivery is constructive when, in the place of actual delivery, the donor delivers to the donee the means of securing possession and control of the subject matter. The usual type of constructive delivery is depicted in the principal case, that is, when a key is given as the means of obtaining possession and control of personal property.

The majority of courts will sustain constructive delivery as a substitute for actual delivery whenever it is impractical or inconvenient actually to deliver the object.<sup>3</sup> However, some courts deem it insufficient if a key is delivered and the receptacle or box is near enough to be brought into the physical presence of the donor and donee.

It is submitted that in the principal case actual delivery was impractical and inconvenient in that the bank was located two hundred miles away. For all practical purposes the intestate surrendered all the possession and control that she had. When actual delivery is not practical and convincing proof can be adduced to show the donor's intent accompanied by the delivery of the only means by which possession can be obtained, then the gift should be upheld even though actual delivery is only approximated. It may be argued that delivery should be merely a convenient test for

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<sup>2</sup> *Hillebrant v. Brewer*, 6 Tex. 45, 50, 51 (1851).

<sup>3</sup> *BROWN, PERSONAL PROPERTY* (1936) '95.

objectively showing the gift transaction. This is not to say that mere intention without delivery, actual or constructive, should be sufficient to sustain an inter vivos gift of personalty.

An early Texas case,<sup>4</sup> took a "liberal" position as to this problem. In that case it was held that the donor's branding of his cattle with the brand of the donee constituted a good constructive delivery. It is worthy to note that there was no surrender of physical dominion over the cattle; yet it would be difficult to find clearer evidence of the donor's intent to give. An authority<sup>5</sup> considers the decision as "eminently reasonable."

The fact that the intestate, in the principal case, knew or should have known that by the terms of her renting contract anyone but her would be prevented from gaining access to the safe deposit box should not be conclusive in holding that a valid inter vivos gift had not been consummated.

The court held that a Texas statute<sup>6</sup> controlled the disposition of this case. The statute declares, "No gift of any goods or chattels shall be valid unless by deed or will, duly acknowledged or proven up and recorded, *or unless actual possession shall have come to, and remained with, the donee or some one claiming under him.*" (Italics supplied by the court.) The statute seems clear and positive in requiring that "actual possession" come to and remain with the donee. The court said that the reason for the requirement of delivery, as provided for in the statute, "is based upon both public policy and convenience, to prevent mistakes, misunderstanding, imposition and perjury."<sup>7</sup> It was thought that the evidence introduced, "when considered in connection with the unmistakable terms of the statute, plainly shows that the requirements exacted by the statute to support a parol gift were not met."<sup>8</sup>

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<sup>4</sup> Hillebrant v. Brewer, 6 Tex. 45 (1851).

<sup>5</sup> BROWN, PERSONAL PROPERTY (1935) 94.

<sup>6</sup> TEX. REV. CIV. STAT. (Vernon, 1948) art. 3998.

<sup>7</sup> 245 S. W. 2d at 965.

<sup>8</sup> *Id.* at 966.

On the basis of statutory language the decision may well be approved, and the policy of insisting on an actual change of possession to manifest and consummate a gift has much to commend it. But it is to be observed that the decision may mean that gifts of tangible chattels by constructive delivery are eliminated or reduced to a minimum in Texas.

*Donald R. Mopsik.*