
Property - Public Policy and its Effect on the Proof of Parol Gifts Causa Mortis

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often it costs more money to excavate the land and set up the forms for the foundation than to pour it.

In Illinois the precise issue raised by the present case had not previously been before the courts. However, in earlier cases the courts had applied equitable estoppel where an owner, in reliance upon affirmative acts of the city, had made expensive improvements or had otherwise relied upon such acts to his detriment.¹² In the present case, the defendant had relied upon his building permit and caused the building site to be rough graded, excavations for foundations and footings dug and pumped dry, underground sewer, drainage, water, and gas lines installed, and form work for column and line wall footings and foundations installed. The defendant had incurred liabilities upon the construction contracts amounting to approximately \$600,000.00. Most of the work had been done upon contracts entered into before the permit was even issued. However, the court made no distinction between the work done upon contracts entered into before and upon those entered into after the permit was issued. The Illinois Court followed the more equitable rule of the *Glissmann* and *Crow* cases.

The result obtained in the present case would seem to be the more reasonable and equitable one in a society where zoning regulations are so important. It protects a person when he should be protected, namely, where he has relied upon existent zoning ordinances in undertaking construction contracts and work upon his premises. In states strictly following the rule of the *Brett* case that zoning laws are not contracts by the government and may be amended unless a great deal of work has been done, the property owner will be forever waiting for subsequent amendments before undertaking construction. Even after all the wasteful waiting, an amendment may still be passed affecting the property before construction is "far enough along" so as to give the owner a vested right. This will result in much unfairness and the purposes of the zoning ordinances will be defeated because people will be less inclined to rely upon them in fear of subsequent amendments.

PROPERTY—PUBLIC POLICY AND ITS EFFECT ON THE PROOF OF PAROL GIFTS CAUSA MORTIS

Plaintiff was a nurse who, in the course of her employment, frequently visited Emily Collinson, aged sixty-nine and in ill health. When Emily Collinson's health took a turn for the worse, the plaintiff arranged to admit her to a hospital. During the ride to the hospital, Emily Collinson said to the alleged donee, "Here is a box, I am giving it to you, and if I die, it is yours. I don't want anyone else to have it." Emily Collinson died

¹² *Hurt v. Hejhal*, 259 Ill. App. 221 (1930); *The People v. Thompson*, 209 Ill. App. 570 (1918).

of her ailments and the plaintiff now asserts a right to the contents of the box containing over eleven thousand dollars in cash, as against the executor of the estate, claiming a valid gift causa mortis. The Supreme Court of Indiana, in an evenly divided decision, held that it was contrary to public policy to permit an alleged gift causa mortis to be proved on the sole uncorroborated testimony of the alleged donee. *In the Matter of the Estate of Collinson*, 108 N.E. 2d 700 (Ind., 1952).

This decision throws an interesting light on one of the areas of conflict that exist in the field of proof necessary to establish the elements essential to a valid gift causa mortis.

The elements necessary to establish a parol gift causa mortis, at common law, have long been recognized to include three things, namely: 1. it must be made with a view to the donor's death; 2. the donor must die of that ailment or peril; 3. there must be a delivery, actual or constructive, to the donee, who accepts, or to a third person for the donee, with title to vest in the donee conditionally upon the death of the donor.¹ There has, however, been a conflict as to the degree of proof necessary.

The *Collinson* case illustrates the difficulty in deciding the following propositions:

1. Whether possession is prima facie proof of delivery,² or not.³
2. Whether delivery is prima facie proof of a parol gift causa mortis,⁴ or not.⁵
3. Whether the elements of a parol gift causa mortis must be proven beyond all doubt,⁶ or beyond reasonable doubt,⁷ or merely by a fair preponderance of the evidence.⁸
4. Whether the alleged donee may testify,⁹ and if such testimony be

¹ *Devol v. Dye*, 123 Ind. 321, 24 N.E. 246 (1890); *Gymes v. Hone*, 49 N.Y. 17 (1872).

² *Stiglets v. McDonald*, 135 Fla. 385, 186 So. 233 (1938); *McKeon v. Van Slyck*, 223 N.Y. 392, 119 N.E. 851 (1918); *Cutler v. Lindstrom*, 320 Ill. App. 360, 51 N.E. 2d 206 (1943); cf. *In Re Ewing's Estate*, 2 N.E. 2d 591 (Ill. App., 1936).

³ *Hecht v. Shaffer*, 15 Wyo. 34, 85 Pac. 1056 (1906); cf. *Salmon v. McCrary*, 71 Ga. App. 262, 30 S.E. 2d 444 (1944).

⁴ *Bedell v. Carll*, 127 N.Y. 74, 33 N.Y. 581 (App. Div., 1865); *Mechem, Delivery in Gifts of Chattels*, 21 Ill. L. Rev. 341 (1926).

⁵ *Myers v. Tschiffely*, 73 F. 2d 657 (App. D.C., 1934); *Kenney v. The Public Administrator*, 2 Bradf. 319 (N.Y., 1853).

⁶ *Citizens' Sav. Bank v. Mitchell*, 18 R.I. 739, 30 Atl. 626 (1894).

⁷ *Stewart v. Stokes*, 177 Mo. App. 390, 164 S.W. 156 (1914); *Foley v. Harrison*, 233 Mo. 460, 136 S.W. 354 (1911).

⁸ *In re Williams Estate*, 278 N.Y. 538, 16 N.E. 2d 94 (1938); *Foley v. Coan*, 272 Mass. 207, 172 N.E. 74 (1930); *Baber v. Caples*, 71 Ore. 212, 138 Pac. 472 (1914).

⁹ *Gledhill v. McCoombs*, 110 Me. 341, 86 Atl. 247 (1913). The court held that a person who claims property by parol gift is competent to testify in an action to recover the property from the administrator of the deceased donor.

uncorroborated, although undisputed, will it be sufficient to prove the elements,¹⁰ or not.¹¹

In the present case, as a standard by which the facts should be judged, the court established two criteria, 1. the rules of common law, and 2. the public policy of the State of Indiana.¹² The rules of common law, adduced from the case of *Devol v. Dye*,¹³ are not substantially different from those of the cases noted,¹⁴ but the introduction of public policy as a consideration, materially alters the concept that the common law entertained of the necessary proof.

The court conceded that at common law, no specific number of witnesses is required.¹⁵ However, it made the assumption that delivery must be accompanied by clear and convincing evidence, and the claimant has the burden of proof, which is heavier than in the case of a gift inter vivos. Though there is no difficulty in finding authority to sustain that view,¹⁶ authority to the contrary is as easily found. For instance, it has been held that the claimant has established a prima facie case when he shows that all the requisites prescribed are present;¹⁷ and that he need not negative matters of defense;¹⁸ that only the quantum of evidence required in other civil cases is needed;¹⁹ that just a fair preponderance is required;²⁰ that where no fraud or undue influence has been alleged, only slight evidence is needed.²¹

The view advanced by Professor Phillip Mechem that delivery gives the donee prima facie evidence in favor of an alleged parol gift,²² if coupled with a test which seeks to determine whether or not the alleged

¹⁰ E.g., *In re Sherman*, 227 N.Y. 350, 125 N.E. 546 (1919).

¹¹ *Quarles v. Fowlkes*, 147 Va. 493, 137 S.E. 365 (1927); cf. *Gambill v. Hogan*, 30 Tenn. App. 465, 207 S.W. 2d 356 (1947) wherein is found a suggestion of the reasoning employed by the court in the *Collinson* case. Public policy is presumed to be against permitting uncorroborated testimony regarding the promise of a deceased promisor.

¹² *In re Collinson's Estate*, 108 N.E. 2d 700 (Ind., 1952).

¹³ 123 Ind. 321, 24 N.E. 246 (1890).

¹⁴ Authorities cited notes 2 and 3 supra.

¹⁵ 38 C.J.S. § 118b, p. 923 (1943).

¹⁶ *Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237 (1911); *Hatch v. Atkinson*, 56 Me. 324 (1868).

¹⁷ *In re Sherman*, 227 N.Y. 350, 125 N.E. 546 (1919); *In re Collinson's Estate*, 108 N.E. 700 (Ind., 1952) dissenting opinion of Emmert, J.; 38 C.J.S. § 116b, p. 919 (1943).

¹⁸ 38 C.J.S. § 116b, p. 919 (1943).

¹⁹ *Baber v. Caples*, 71 Ore. 212, 138 Pac. 472 (1914).

²⁰ *In re Williams*, 278 N.Y. 538, 16 N.E. 2d 94 (1938).

²¹ *McBride v. Mercantile-Commerce Bank and Trust Co.*, 330 Mo. 259, 48 S.W. 2d 922 (1932).

²² Mechem, *Delivery in Gifts of Chattels*, 21 Ill. L. Rev. 341 (1946).

donee had the *opportunity* to acquire possession in a manner inconsistent with a gift,²³ might operate to resolve this conflict. It can readily be seen that no prima facie evidence ought to be inferred in favor of the alleged donee in possession where he was the agent of,²⁴ or in a confidential relation to,²⁵ the alleged donor, or where fraud, or undue influence is alleged.²⁶ But where there was no opportunity for the alleged donee to obtain possession in a manner other than that consistent with the delivery of a gift, and the claimant has the alleged gift in his possession, only slight additional evidence, in the absence of contrary allegations, ought to be sufficient to establish delivery, as a matter of law.

Two Illinois cases have been decided on just such principles. In *Chicago Savings Bank and Trust Co. v. Cohn*,²⁷ the court refused to uphold the alleged gift because the wife of the alleged donee had access to the room of the alleged donor whose physical state prevented speech. In *Simpson v. Heberlein*²⁸ the gift causa mortis of an unindorsed promissory note was upheld on the uncorroborated testimony of the donee who had no opportunity to acquire possession in a manner inconsistent with a gift.

The court, in the *Collinson* case, found that gifts causa mortis are not especially favored in law; but failed to note that neither are they opposed.²⁹ Although the court found that such gifts are not contrary to public policy,³⁰ it went to the statutes concerning testamentary grants to determine what the public policy was. The statutes provided, *inter alia*, that a will must be attested by two or more competent witnesses,³¹ and that an unwritten will must be proved by two competent witnesses.³²

It might be pointed out in this connection, that since the legislature found it necessary to change the common law regarding wills, and did not find it necessary to change the common law regarding gifts causa mortis, it would seem that it intended the common law to remain un-

²³ *Salmon v. McCrary*, 71 Ga. App. 262, 30 S.E. 2d 444 (1944). See, for an analysis of what is considered an opportunity for acquiring such possession, *Hecht v. Shaffer*, 15 Wyo. 34, 85 Pac. 1056 (1906).

²⁴ *Beebee v. Peterson*, 285 Pac. 616 (Kan., 1930).

²⁵ *Slack v. Rees*, 66 N.J. 447, 59 Atl. 466 (1904).

²⁶ E.g., *Whitmire v. Kroelinger*, 42 F. 2d 699 (W.D.S.C., 1930), containing an excellent and entertaining exposition of undue influence—its psychological and philosophic bases.

²⁷ 197 Ill. App. 326 (1916).

²⁸ 259 Ill. App. 579 (1931).

²⁹ *Ridden v. Thrall*, 125 N.Y. 572, 26 N.E. 627 (1891).

³⁰ *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 52 N.E. 465 (1899).

³¹ *Burns Ind. Stat.*, Tit. 7, § 201, p. 256 (1933).

³² *Burns Ind. Stat.*, Tit. 7, § 202, p. 258 (1933).

disturbed, and that this was public policy, as indeed, other courts have done.³³

Of course, if one holds that it is against public policy to allow parol gifts *causa mortis* to be established on the sole, uncorroborated testimony of the donee, the *Collinson* case may be decided on that one fact, making further discussion academic. However, if the conclusion is that such gifts may be so established, it follows that the alleged donee may testify in his own behalf, although in some jurisdictions, statutes prohibit such testimony. As pointed out by Emmert, J. in a vigorous dissent,³⁴ the modern tendency has not been to extend the class of incompetent witnesses beyond the clear provisions of the statutes.³⁵

Further, the dissent argued, that if the alleged donee may testify, and that testimony is unimpeached and uncontradicted in any material matter, and every circumstance and reasonable inference both from her conduct and testimony corroborated her evidence as to the gift, a trial court, as a matter of law, may not disregard it.³⁶

Thus, we are led to the crux of the conflict. It is a conflict that transcends the law of gifts *causa mortis*, and may fairly be said to be one of the continuing, and most perplexing problems of our legal system: how far should a court go in varying the common law which derived great force from custom in regard to observance?

Since our legal system permits the legislative will of the people to be manifest, it would seem that courts ought to be chary of inferring that a change in one facet of the previous law by legislative enactment, gives sanction to a court to change another via judicial fiat.

TAXATION—CONTEST PRIZES HELD TAXABLE

A philanthropist established a contest in 1945 wherein he offered \$25,000 for the best symphony written by an American composer. The winning symphony was to remain the property of the composer subject to certain conditions.¹ The appellant, hereinafter referred to as the taxpayer, a musician, composer, and college professor by profession, had composed a symphony during the years 1937, 1938, and 1939.

³³ *McKeon v. Van Slyck*, 233 N.Y. 392, 119 N.E. 851 (1918). The court concluded that corroboration is not essential as a matter of law and it is error to instruct the jury otherwise.

³⁴ *In re Collinson's Estate*, 108 N.E. 2d 700 (Ind., 1952).

³⁵ 2 Wigmore, *Evidence*, §§ 578, 578a (3rd ed., 1940).

³⁶ *In re Collinson's Estate*, 108 N.E. 2d 700, 707 (Ind., 1952).

¹ The conditions were in part that the Detroit Orchestra, Inc., a nonprofit organization, shall have all synchronization rights as to motion pictures and all mechanical rights as to phonograph recordings, electric transcriptions, and music rolls; exclusive right to authorize the first performance of the composition; right to designate the publisher; right to give a broadcast performance within one year.