SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 13 | Issue 3

1962

Personal Property--Gifts Causa Mortis in Ohio

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on the person in charge of the corporation's office will not invalidate the service.

In *Sours v. State*[10] the same members of the Supreme Court of Ohio held an attempted residence service invalid when the summons was left in a place where the defendant could not reasonably have been expected to find it. In that decision the court stated in dictum that ". . . where, if the provisions of the statute are strictly followed, it is reasonably probable that the person so served will receive the notice, the fact that in some instances the person does not actually receive that notice does not invalidate the service."[11] This line of reasoning would imply that valid service can be obtained by compliance with the procedure and requisites set out in the service statute regardless of whether there is actual notice. If Ohio courts should follow this reasoning in cases where the sheriff serves a non-employee, who fails to bring such summons to the attention of the chief or subordinate officers of the defendant corporation, will not the corporation be subjected to an undue burden?

Though the *Moriarty* decision can be defended in the light of the corporation's receipt of actual notice of the summons, it is difficult to discern whether the court defined valid service in terms of statutory compliance or in terms of actual notice. Because the court found it necessary to invoke both theories the law remains uncertain.

WORTH A. FAUVER, JR.

PERSONAL PROPERTY — GIFTS CAUSA MORTIS IN OHIO

Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961)

The donor, during his last illness, gave a check for $6000 issued by the Ohio Industrial Commission and endorsed by him to the defendants and instructed the defendants to hold the check for his seven children until his death. If the donor survived the illness, the check was to be returned. Upon hearing of the donor's death, the defendants deposited the check in their own account and later made disbursements.

July 9, 1958, the plaintiff, administratrix of the donor's estate, filed for a declaratory judgment in the Probate Court of Cuyahoga County against the defendants to determine the ownership of the Industrial Commission check. After a hearing, the probate court entered judgment for the plaintiff,[1] and this judgment was affirmed by the Court of Appeals for Cuyahoga County.[2] The defendants appealed to the Ohio Supreme Court on three theories: first, that the donor had established

10. 172 Ohio St. 242, 175 N.E.2d 77 (1961).
11. *Id.* at 244, 175 N.E.2d at 78.

a revocable inter vivos trust, which became irrevocable upon the death of the settlor;[3] second, that the defendants had an attorney's lien on the check;[4] and finally, that the donor effected a valid gift causa mortis to the defendants for the donees. The attention of this article is directed to the latter issue — the theory of gift causa mortis.[5]

From the testimony in the *Adams* case, two opposing inferences emerged. Certain parts of the testimony indicated that the title to the check was to vest at the moment of delivery. Other parts indicated that the donor did not intend the gift to vest in the donees until his death.[6] Thus, the evidence that the donor intended to part with his interest in the property before his death was not found to be clear and convincing. This ineffective delivery was held to have resulted in a testamentary disposition rather than a gift.

The Ohio Supreme Court has not favored gifts causa mortis because of their similarity to legacies, which are provided for in the statute of wills and laws of descent and distribution.[7] Yet gifts causa mortis are in

1. The conclusions of law found by the probate court were that the donor did not effect a gift, that there was no agency power coupled with an interest, and that the defendants were bailees or custodians of the check. The court also found that the $6000 check vested in the donor's estate immediately upon his death. Adams v. Fleck, 80 Ohio L. Abs. 48 (P. Ct. 1958).

2. Adams v. Fleck, 171 Ohio St. 451, 453, 172 N.E.2d 126, 128 (1961).

3. In rejecting the trust theory, the court held that in the present case the evidence neither clearly nor convincingly established the existence or terms of the purported trust. The court stated that any trust enabling the donor to exercise substantial dominion and control over the trust property must be established by clear and convincing evidence. The purported trust was a revocable inter vivos trust under which the settlor could retain the income and the right to have the trust property returned. The court refused to decide whether there ever could be sufficient evidence to justify recognition of the validity of such a trust, in the absence of a formal agreement.

In Smyth v. Cleveland Trust Company, 172 Ohio St. 489, 179 N.E.2d 60 (1961), the Ohio Supreme Court held valid as against the widow's statutory right to take against the will a formal inter vivos trust, the terms of which allowed the settlor to reserve to himself the income for life and an absolute power to revoke the trust in whole or in part, as well as the right to modify terms of settlement and to control investments. See also discussion in *Trusts* section, p. 538 *infra.*

4. The court observed that since the administratrix had placed in controversy the attorney's fees arising from the settlement of a claim against the Industrial Commission, the Commission should determine the amount of the fees pursuant to Ohio Revised Code section 4123.06 and that the defendants could not have an attorney's lien to an amount they might determine without regard to the Commission's determination. Adams v. Fleck, 171 Ohio St. 451, 459-60, 172 N.E.2d 126, 132 (1961). See also discussion in *Workmen's Compensation* section, p. 551 *infra.*

5. "[T]he essential attributes of a gift causa mortis are: (1) It must be of personal property; (2) the gift must be made in the last illness of the donor . . . under the apprehension of [imminent] death . . . , and subject to the implied condition that if the donor recover from the illness, or if the donee die first, the gift shall be void; and (3) possession of the property given must be delivered at the time of gift to the donee, or to some one for him, and the gift must be accepted by the donee." Johnson v. Colley, 101 Va. 414, 416, 44 S.E. 721, 722 (1903). See BROWN, PERSONAL PROPERTY § 51 (2d ed. 1955).

6. Adams v. Fleck, 171 Ohio St. 451, 455, 172 N.E.2d 126, 130 (1961).

7. Gano v. Fisk, 43 Ohio St. 462, 3 N.E. 532 (1885). The court held that the laws relating to written and nuncupative wills should not be defeated, except in clear cases of gifts causa mortis.

theory distinct from testamentary dispositions, wherein title remains vested in the donor until his death. Gifts causa mortis take effect *in praesenti* with a complete surrender of all dominion and control over the property;[8] while title thereto is subject to divestment upon the donor's recovery, or his revocation of the gift.[9] Therefore, in *Adams v. Fleck*,[10] the Supreme Court of Ohio held that the attempted gift causa mortis lacked this essential classical requirement, in that the evidence was not sufficiently clear and convincing to show title to the gift was to vest in the donees before the donor's death.

While, on the one hand, the court in the *Adams* case emphasized that, as exceptions to the statute of wills, gifts causa mortis are contrary to the policy of the law,[11] on the other hand, it did not emphasize effectuation of the donor's manifest intent to make a valid disposition of personal property. The degree of emphasis with which evidence of the donor's intent should be considered in cases of property disposition was expressed by another court:

> [I]t is the duty of courts to enforce all lawful rights, so as to carry out the intention of the parties. That intention should always be observed if lawfully expressed; and it is only incumbent on legal tribunals to be very careful to ascertain the facts. There is much room for frauds and mistakes in cases of this kind, and, therefore, care should be used to sift the evidence. But where there is no doubt about the facts, it would be a legal wrong and gross injustice to refuse to act upon them fairly and without hesitation.[12]

There is no doubt that gifts causa mortis are exceptions to the statute of wills. They permit a disposition of property after death without the safeguards and formalities of a will. Even so, gifts causa mortis can be justified by the letter and spirit of the law. As one writer put it:

> Under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his

8. One court declared that "to constitute such a gift, there must be . . . a complete surrender of all dominion and control over the property, effected by an absolute delivery, subject only to the condition that delivery to the donee not be made until the death of the donor." Koehler v. Koehler, 113 Ohio App. 192, 194, 171 N.E.2d 360, 362 (1960). Wisconsin apparently is the only state that does not make a distinction with regard to vesting of title before or after the donor's death. Title may vest in the donee either before or after the donor's death. Nol's Estate, 251 Wis. 90, 28 N.W.2d 360 (1952).

9. "[S]ome quasi-testamentary acts, — such as gifts *causa mortis*, where delivery takes the place of the execution of a will, — may even enable essentially testamentary dispositions to be effected without compliance with the statutes governing wills. To be sure the delivery, actual or symbolic as the case may be, marks a gift *causa mortis* off from a strict testamentary disposition, but the revocable nature of the gift makes that distinction very slight, and in those jurisdictions where the title to the thing delivered as a gift *causa mortis* does not pass until the donor dies, the distinction becomes microscopic. Nevertheless the distinction is well established." Costigan, *Constructive Trusts*, 28 HARV. L. REV. 237, 240-41 (1915).

10. 171 Ohio St. 451, 172 N.E.2d 126 (1961).

11. *Id.* at 454, 172 N.E.2d at 129.

12. Ellis v. Secor, 31 Mich. 185, 187 (1875).

> successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of this power.[13]

When the majority of American courts sustain gifts causa mortis, they are giving effect to this right and power.

The weight of American authority[14] supports the court's proposition that there can be no valid gift causa mortis if the death of the donor was a condition precedent to the vesting of title in a third party for the donee, or in the donee himself. In the *Adams* case death was a condition precedent to the vesting of title of the check in the donees.

Ohio, with the majority of American courts, realizes the inherent possibility of fraud in gifts causa mortis.[15] A few courts are liberal in their requirement,[16] but all demand clear and convincing evidence to support gifts causa mortis.[17] New Hampshire, for example, requires two disinterested parties to witness such gifts.[18] Once the donor has manifested an intent to make a gift and effects a valid delivery, most courts subsequently sustain the gifts.[19] Ohio has held that they should not ordinarily be sustained except in a very clear case.[20]

In the *Adams* case the Ohio Supreme Court for the first time expressed doubt as to the validity of gifts causa mortis in Ohio law.

> It may be observed that, although this court has sometimes considered . . . whether certain facts were sufficient to establish a gift *causa mortis*, this court has never actually held in a case reported with an opinion that there can be that kind of a gift under the law of this state.[21]

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13. Gulliver & Tilson, *Classification of Gratituitious Transfers*, 51 YALE L.J. 1, 2 (1941).

14. See, *e.g.*, Basket v. Hassell, 107 U.S. 500 (1882); Ridden v. Thrall, 125 N.Y. 572, 26 N.E. 627 (1891); Mackenzie v. Steeves, 98 Wash. 17, 167 Pac. 50 (1917). See BROWN, PERSONAL PROPERTY § 53 (2d ed. 1955).

15. For the Ohio view, see Gano v. Fisk, 43 Ohio St. 462, 3 N.E. 532 (1885). For cases in other states see, *e.g.*, In the Matter of Estate of Collinson, 231 Ind. 360, 108 N.E.2d 700 (1952); Scott v. Union & Planters' Bank & Trust Co., 123 Tenn. 258, 130 S.W. 757 (1910); Begovich v. Kruljac, 38 Wyo. 365, 267 Pac. 426 (1928). See BROWN, PERSONAL PROPERTY § 56 (2d ed. 1955).

16. Puscash v. Dry Dock Sav. Institution, 140 Misc. 579, 251 N.Y. Supp. 184 (N.Y. City Ct. 1931). A donee took actual possession of a bankbook the day after the donor's death. As the donor's intent to constructively deliver the bankbook a day earlier was proved, the court held that it was a valid gift causa mortis. *Accord*, Nol's Estate, 251 Wis. 90, 28 N.W.2d 360 (1952).

17. Gano v. Fisk, 43 Ohio St. 462, 3 N.E. 532 (1885); In the Matter of Estate of Collinson, 321 Ind. 360, 108 N.E.2d 700 (1952); Gambill v. Hogan, 30 Tenn. App. 458, 207 S.W.2d 356 (1947).

18. N.H. REV. STAT. ANN. § 551:17 (1955).

19. See BROWN, PERSONAL PROPERTY § 56 (2d ed. 1955). Gifts causa mortis have been approved by statute in four states. CAL. CIV. CODE §§ 1149-53; GA. CODE ANN. § 48-201 (1937); MONT. REV. CODES ANN. §§ 67-1709-13 (1953); N.D. CENT. CODE §§ 47-1109-13 (1947).

20. Flanders v. Blandy, 45 Ohio St. 108, 12 N.E. 321 (1887); Gano v. Fisk, 43 Ohio St. 462, 3 N.E. 532 (1885); Van Pelt v. King, 22 Ohio App. 295, 154 N.E. 163 (1926); *In re* Meyers, 26 Ohio N.P. (n.s.) 57 (1925).

21. Adams v. Fleck, 171 Ohio St. 451, 456, 172 N.E.2d 126, 130 (1961).

Of the alleged gift causa mortis cases which have passed before it, the supreme court has sustained two: *South v. Fair*[22] and *Galbraith v. Sutton.*[23] All others lacked some prerequisite: Delivery was incomplete;[24] vesting of title was a condition subsequent to the donor's death;[25] the subject was improper for a gift;[26] the donor was not capable of making a gift;[27] or the donees failed to present clear and convincing evidence of the donor's intent.[28]

It is submitted that Ohio courts will continue to sustain these gifts — but only if valid in all prerequisites, especially that requiring vesting of title before the donor's death.

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22. 60 Ohio St. 595 (1899). The case is described in 41 WEEKLY LAW BULLETIN 343 (1899). The court affirmed a court of appeals decision sustaining a gift causa mortis. The lower court permitted a wife to make a gift of all her personal property in contemplation of death.

23. 11 Ohio C.C.R.(n.s.) 262, *aff'd,* 82 Ohio St. 421 (1908). All five judges concurred. The court of appeals held: "The evidence shows that all the elements of a gift *causa mortis* were present in this case." 11 Ohio C.C.R.(n.s.) at 263.

24. Phipps v. Hope, 16 Ohio St. 586 (1866); Hammor v. Moore, 8 Ohio St. 239 (1858).

25. Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961).

26. In Simmons v. Cincinnati Savings Society, 31 Ohio St. 457 (1877), the donor attempted to give his personal check as a gift causa mortis. The check was not presented for payment until after the donor's death. The court held that the donor's check was not an effective gift for the amount named therein until it was either paid or accepted for payment before the donor's death.

27. Koehler v. Koehler, 113 Ohio App. 192, 171 N.E.2d 360 (1960).

28. Flanders v. Blandy, 45 Ohio St. 108, 12 N.E. 32 (1887); Gano v. Fisk, 43 Ohio St. 462, 3 N.E. 532 (1885).

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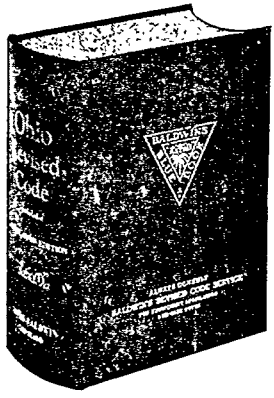

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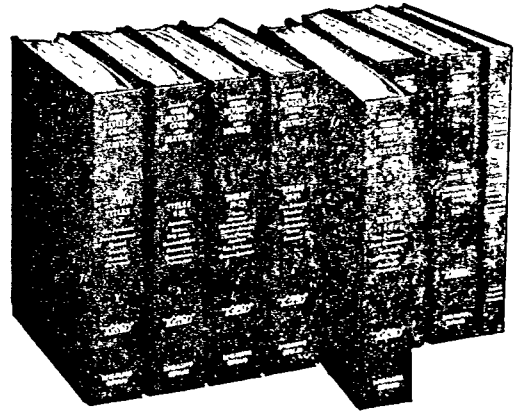

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WESTERN RESERVE LAW REVIEW
Volume 13, Pages 613 to 797

WESTERN RESERVE LAW REVIEW

Member, National Conference of Law Reviews

Published quarterly by students of THE SCHOOL OF LAW OF WESTERN RESERVE UNIVERSITY, *Cleveland 6, Ohio.*

Application to mail at second-class postage rates is pending at Oberlin, Ohio. Subscriptions: $5.00 per annum payable in advance; $2.00 for single issues; $2.50 for Volume 13, Number 2; $3.00 for Volume 12, Number 2. If subscription is to be discontinued at expiration, notice should be sent to the Managing Editor; otherwise it will be renewed as usual.