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Ogden v. Washington National Bank

Hugh Evander Willis
Indiana University School of Law

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COMMENTS

OGDEN v. WASHINGTON NATIONAL BANK.*

In this case one B had on deposit in defendant bank subject to check, $500. B made arrangements to go to a hospital for a serious surgical operation. Desiring to give to her mother, W, the money above mentioned in case of her death, but apparently immediately, B went to the bank in company with W, just before the operation, told the cashier and the bookkeeper of her desire and they marked her account, "In case of death W to check." The operation occurred and B died three days later. W, then, went to the defendant, drew a check for $500, and that amount was placed to her credit and later checked out by her. Plaintiff was B's administrator, and sued defendant to recover the amount of the deposit, although he had in his hands sufficient assets to pay all claims against the estate.

Was plaintiff entitled to recover, or did defendant rightfully pay the money to W? Did the operative facts create any legal capacities in W and any correlative legal liabilities in the defendant bank? In order to give a correct answer to this question it will be necessary to consider it from the standpoint at least of gifts, bailments, powers of attorney, assignments, declarations of trust, and contracts.

Did the facts create a gift? The trial court of Daviess County held that they did, and the Appellate Court of Indiana held that they created a gift inter vivos.[1] Were these courts right? The earlier Indiana decisions[2] and the weight of authority in other jurisdictions[3] do not seem to have gone so far as the decision in the instant case(but there is some authority in other jurisdictions to support it.[4] The difficulty concerns delivery. Delivery

* *Ogden v. Washington National Bank,* (1924) 82 Indiana Appeals 187, 145 N. E. 514.

1 The Appellate Court did not explain why it regarded the gift as a gift inter vivos rather than as a gift causa mortis. For this reason and for other reasons which will appear perhaps no comment should be made on whether or not the court was right on this point, but it is hard to see how, if there was a gift at all, it was not a gift causa mortis for clearly it was made "in view of death then imminent". *Basket v. Hassell,* (1882) 107 U. S. 602; *Caylor v. Caylor s Estate,* (1899) 22 Ind. App. 666; *Brunson et ux. v. Henry et al.,* (1894) 140 Ind. 455.

2 *Devol et al v. Dye et al,* (1889) 123 Ind. 321; *Gammon Theo. Sem. v. Robbins,* (1891) 128 Ind. 85; *Martin v. McCullough,* 136 Ind. 331 (1893); *Smith v. Moore,* (1922) 77 Ind. App. 455; *Ross v. Watkins,* (1923) 80 Ind. App. 487.

3 *Cockrane v. Moore,* (1890) L. R. 5 Q. B. D. 57.

4 *Castle v. Persons,* (1902) 117 Fed. 835; 54 C. C. A. 133; *Ebel v Piehl,* (1903) 134 Mich. 64; *Dinslage v. Stratman,* (1920) 105 Neb. 274.

is the chief requisite of a gift. It is very difficult to find any delivery in this case. All that B undertook to give W was a debt due her by the bank. There was no physical thing belonging to B in the possession of the bank which was capable of delivery as the object of the gift or as evidence thereof and B gave W nothing as evidence of the gift. Hence there was nothing delivered by anybody, either actually or symbolically, to perfect the gift, and therefore there was no gift in the sense in which that term has generally been used in Anglo-American law. Anglo-American law has gradually relaxed the requirement of delivery for gifts so as to permit symbolical delivery, not only where there is actual delivery of a corporeal chattel as evidence of an incorporeal chattel, but also where the donee is already in possession[5] and where there is a forgiveness of debts,[6] on the theory that there has been all of the delivery of which the subject-matter is capable. But when there is nothing of which any delivery, either actual or symbolical, can be made, is the requirement to be dispensed with? Suppose we admit that on the facts some legal right should be held to be created should it not be found in some other branch of the law than gifts? If the court in the instant case was of the opinion that the plaintiff should not recover because W was the owner of the money should it not have placed its decision on some other ground? To hold that there was a gift under such circumstances not only destroys the law of gifts as it has been developed in Anglo-American law, but it makes that a gift which more nearly resembles a number of other legal transactions. If there were no other theory on which the case could have been decided perhaps the court was justified in further relaxing or stretching the law of gifts, but the case might have been decided upon other theories.

Did the facts create a bailment in favor of W? There could be no such bailment, because for a bailment the law requires the rightful possession of goods by some one not the owner.[7] The bank had no goods of B and was not a bailee of B, and therefore could not by attornment become a bailee of W.

Did the facts give W a power of attorney to collect the debt and keep the proceeds thereafter as a gift? Unquestionably W had this power before B's death.[8] Did she have this power after B's death? Powers should be classified (1) as the powers of an agent, which are for the benefit of the principal and which are

[5] *Tenbrook v. Brown*, (1861) 17 Ind. 410; *Teague v. Abbott*, (1912) 51 Ind. App. 604.

[6] *Gray v. Barton*, (1873) 55 N. Y. 68.

[7] Williston on Contracts, § 1032.

[8] 31 Yale L. J. 283.

held and should be held to terminate with the death of the principal, at least after notice;[9] and (2) proprietary powers, which are for the benefit of the holder—an alter ego not responding to the will of the creator—and which should be held not to terminate with the death of the creator, and which the English cases and many United States cases would hold are not terminated even though there is no assignment nor change of possession of document.[10] However the great weight of authority in the United States, probably due to Marshall's opinion in the case of *Hunt v. Rousmaniere*,[11] is to the effect that proprietary powers, like the powers of an agent, are terminated by death unless coupled with an interest, which term is given a connotation narrower than proprietary.[12] According to the weight of authority the power of attorney of W was terminated by B's death, but upon principle it should not have been, and the Appellate Court might well have so held. Marshall's concepts in *Hunt v. Rousmaniere* were mediaeval. The authorities cited represent outgrown English law. *Hunt v. Rousmaniere* was but a bit of formalism. It has been severely criticised. By repudiating it the Appellate Court of Indiana would not have done violence to the law of gifts but would have repudiated an outgrown theory of powers and established the law of proprietary powers on the new basis on which they should be placed.

Did the facts create a trust? The difficulty with this sort of an explanation is that unless and until the bank had the money set aside there was no trust property.[13] B was not a trustee, because such was not the intent. If B had collected the money before her death and had been compelled by the court to pay over the proceeds to W, it would not have been on the theory of a trust, but because B would have violated her duty to keep her hands off from a donee beneficiary contract.[14]

Did the facts create an assignment? The Appellate Court seems to have rested its decision partly on this ground. But the objections to classifying the transaction as a gift are equally fatal to classifying it as an assignment. In order to have an assignment either a contract or a gift is necessary.[15] For an

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[9] Mechem on Agency, §§ 652-675; *Adams v. Merced Stone Co.* (1917) 176 Cal. 415.

[10] 31 Yale L. J. 298.

[11] (1828) 8 Wheat. 174.

[12] 31 Yale L. J. 283; *Glennon v. Rochester Tr. and S. Co.*, (1913) 209 N. Y. 12; *Farmers Loan and T. Co. v. Wilson*, (1893) 139 N. Y. 284.

[13] *Steel v. Clark*, (1875) 77 Ill. 471.

[14] Clark on Equity, § 258, note 9.

[15] Williston on Contracts, § 430, § 440.

irrevocable gift either delivery or a deed is necessary.[16] For a contract either consideration or a seal is necessary.[17] None of these facts operated in this case. An assignment without one of these facts would create only a power, the effect of which we have already considered.[18]

Did the facts create a contract? There are two possible contract theories according to which a contract obligation could be found.

As between B and W there was neither agreement, nor consideration, nor seal, but there was an oral promise which was intended to be binding. It has been contended that such a promise is all that should be required for a contract;[19] and the Indiana Supreme Court, in the case of *Dawkins v. Sappington*,[20] has so held where there is an offer of reward. Either the case of *Dawkins v. Sappington* was wrongly decided and should be overruled or the doctrine of that case should be extended to all offers, but the court in the instant case did neither. At the time of the decision, of course there was no thought of extending the doctrine, for the Indiana Supreme Court simply followed the earlier English case of *Williams v. Carwardine*,[21] which clearly misapplied the law—evidently out of a mistaken analogy to contracts under seal—and which has been repudiated by the weight of authority in the United States.[22] It may well be urged that a promise in writing, signed and delivered, should be enough to create a contract on the theory that signature is a sufficient substitute for the obsolete requirement of the seal, but it probably would be unwise to give such effect to a mere oral promise.[23]

As between B and the bank it might be held that there was a contract based upon consideration and agreement, made upon the opening of B's account, according to which the bank promised B that it would pay whomever B designated either by drawing a check or otherwise,[24] so that when B asked the bank to pay W W became a donee beneficiary of this contract. Third party beneficiaries of contracts are either payment beneficiaries

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[16] *Cockrane v. Moore, supra.*

[17] 72 U. of Pa. Law Rev. 245, 375.

[18] Notes 9-11 *supra.*

[19] Pound, Introduction to Philosophy of Law, 282.

[20] (1866) 26 Ind. 199.

[21] (1833) 4 Barn. & Adolf. 621.

[22] *Fitch v. Snedaker*, (1863) 38 N. Y. 248; *Williams v. West Chicago etc. Co.*, (1901) 191 Ill. 610; *Taft et al. v. Hyatt et al.*, (1919) 105 Kan. 35.

[23] 72 U. of Pa. Law Rev. 391, 395-6, 398.

[24] 26 Col. Law Rev. 459.

or donee beneficiaries. A large majority of the states of the Union permit donee beneficiaries[25] and almost all of them permit payment beneficiaries[26] to recover on contracts for their benefit; and Indiana permits both to recover.[27] In the instant case, therefore, we simply had another illustration of another donee beneficiary contract, and this would seem to have been a happy solution of the case, but the Appellate Court did not refer to it.

Hence, if it should be agreed that the Indiana Appellate Court reached the right result in the instant case, it would seem that it ought to have done so either under the law of donee beneficiary contracts, or the law of powers, rather than under the law of gifts.[28]

HUGH EVANDER WILLIS

Indiana University School of Law.

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[25] Williston on Contracts, § 368.

[26] Williston on Contracts, § 381.

[27] *Boruff v, Hudson,* (1894) 138 Ind. 280: *Ransdel et al v. Moore et al.,* (1899) 153 Ind. 393, 405.

[28] Of course if in this case B had put her promise in writing, a still further explanation would have been available, that a written promise, signed and delivered, is a contract. *McCrillis v. Sutton et al.,* (1919) 207 Mich. 58; Sutch's Estate, (1902) 201 Pa. 305; *Brickell v. Hendricks,* (1920) 121 Miss. 356; *Thomason et al. v. Bescher et al.,* (1918) 176 N. C. 622; and some cases of gifts with so called symbolical delivery, like In re Cohn's Will, (1919) 176 N. Y. S. 255; *Hawkins v. Union Trust Co.,* (1919) 175 N. Y. S. 694; *Goldworthy v. Johnson,* (Nev. 1922) 204 Pac. 505; *Humphrey v. Ogden,* (1912) 53 Colo. 309, should have been decided on this ground.