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Gifts--Corporate Stock--Delivery

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Once it is shown that the particular occupier has failed to use due care, the contributory negligence of the child may bar recovery in most jurisdictions. The child, of course, must be of such an age as to be capable of being negligent, and the mere fact of trespass is not itself negligence.

Under the facts alleged in the principal case, it seems clear that it was properly decided. The defendant could have anticipated the presence of children, and it was foreseeable that the “damps” involved an unreasonable risk of bodily harm to them. The children could not discover the existence or extent of the risk, and, at a small cost, the defendant could have protected them from it.

While the law requires delivery of the gift to be made and many cases state the rule to be that there must be an absolute transfer of the property from the donor to the donee, several cases modify this rule by holding that it is not to be enforced arbitrarily and it should be the object of the court not to defeat, but rather to carry into effect, the intention of the intestate, if it is able to do so without violation of some controlling


36 The Louterville, N. A. etc. R. Co. v. Lease (1894), 11 Ind. App. 654, 38 N. E. 774.


1 Kratli v. Starke County Trust & Savings Bank, Appellate Court of Indiana, December 23, 1932, 183 N. E. 696.


principle of law. In case of a gift of an article of personal property by the father to his child the change of possession need only be such as the circumstances and the nature of the property will permit. The fact that the decedent retained the right to the dividends and that he retained the key of the safety-deposit box is not of itself sufficient to defeat the gift. Delivery may be either constructive or symbolical, dependent on the subject matter. Knowledge of the transaction by the donee is not necessary, and his acceptance will be presumed if the gift is entirely beneficial to him.

While giving lip service to the rule that an absolute transfer is necessary to have a valid delivery there are cases which, in result, only require that the donor recognize his continued possession as not in conflict with the donee's ownership, and the donor is declared a trustee for the benefit of the donee. These limitations put on the general rule of absolute transfer for a valid delivery show that in practice a literal interpretation is not given to the word "absolute." While this tendency to give effect to the intentions of the parties is commendable, yet it is dangerous if carried too far, as it increases the chances of fraud against decedent's estates.

Under the facts presented to the Appellate Court there was not a valid gift inter vivos in this case as there was no delivery in any sense. Because of the appellee's failure to file a brief it was impossible for the upper court to determine accurately this case on its merits. The statement of the key of the safety-deposit box is not of itself sufficient to defeat the gift, but delivery may be either constructive or symbolical, dependent on the circumstances and the nature of the property will permit. The fact that frequently during the summer of 1928 the claimant accompanied his father to the bank tends to show that there might have been facts which would have constituted a delivery to have completed the gift, but such facts could not be presumed under so broad a statement.

J. D. W.