1890

The Delivery of a Gift

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T h e D e l i v e r y o f a G i f t.

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P r e f a c e .

The object of this thesis is to present to the most important act on the part of the donor in order that he may convey good title to the person property which he wishes the donee to have as his own.

The act referred to is the delivery of the subject of the gift.

Title to personal property, arising from transfer by act of the party, may be acquired by gift and by contract.

A gift is a voluntary transfer of property, but without the consideration which is an essential feature of a contract, and herein lies the distinction between gift and contract. In consequence of this distinction, the delivery of property under gift is regulated by rules applicable to itself alone. Acceptance is, of course, necessary to the completion of every gift, and is entirely optional with the beneficiary. It is supplementary to, but not otherwise connected with delivery. While a gift remains unexecuted, or is not delivered,

it cannot be enforced in any court, because there is no consideration. Delivery without the co-existence of an intention to deliver is insufficient to pass title. The situation, station, and circumstances of the parties, and the subject of the gift, may be taken into consideration in determining the intent to give and the fact of delivery. Mere words of gift are not sufficient, but there must be a delivery, either actual or constructive, in order that title may pass. It is not enough to say"I give you a certain thing" and then withhold it; for a verbal gift without actual delivery transfers no title. Any parol declaration of gift will stand upon the footing of a mere promise to give; and, to complte the transfer, acts and words should harmonize in establishing the intention to give. Words of

future promise do not stand for this purpose. Thus a parol promise to pay a sum of money as a gift does not bind the party making such promise, either in law or in equity, not even to a trustee that he shall have the property which he holds in trust after the death of the cestui que trust. However, on the ground of mutuality voluntary subscriptions for charitable purposes are sometimes enforced against the several subscribers; for though each for himself merely promises to give voluntarily, they are deemed to have signed relying upon the promises of each other. In the case of Watkins vs. Eames, 9 Cushing, 539, the defendant subscribed one hundred dollars for the purpose of erecting a new meeting house for the Congregational Society in the Town of Washington. Fifteen hundred dollars were subscribed

for and the contract was let. The defendant refused to pay his subscription and the plaintiff who was treasurer of the society, brought suit against him, and judgment was recovered on the ground above stated.

Strict construction long prevailed against the rule allowing harmonizing acts to supllement mere words of gift and render them effective. Grangiac vs. Arden, 10 Johnson, 93, perhaps being the introductory case in favor of the new rule. Here a father purchased a lottery ticket and gave it to his eight year old daughter and placed her name on the back of it, put it in his desk, but subsequently was lost and thus never delivered. It drew a prize of five thousand dollars, which money he appropriated to his own use, and when he died, his daughter was allowed to collect the amount of the note

with interest, on the ground that the father had made so many previous expressions of his intentions that it should be or was the childs money. The necessity of harmonizing acts is shown in the case of Carpenter vs. Dodge, 20 Vermont, 563: The defendant conveyed a parcel of land to his daughter and son-in-law, the consideration being four hundred dollars which was paid in a note, and the defendant said that the note should go as a gift to them. But he retained the note in his own possession without assignment or other indication that it was definitely set apart and appropriated for her benefit. The court held that his son-in-law could not compel the estate to give up the note, because there was no delivery.

When the subject of a gift is already in the pos-

session of the donee, it is not necessary to re-deliver the article. Thus if one borrows a book, and the owner afterward says, "I make you a present of it," the borrower may become the new owner without having ever brought the book back.

In the case of Winter vs. Winter, 9 W. R., 947, the owner of a boat, confined to his bed with sickness, told the boatman, who had its charge in custody, that he might have it for his own. Formal delivery was held unnecessary. Conversations and general conduct recognizing the gift here established a change of possession, the law dispensing with all idle and useless formalities.

Corporeal chattels will in general pass by manual delivery, but where the articles to be given are bulky or numerous and not easily taken in hand, it may suf-

fice for the donor to point them out generally and allow the donee to take them. Intention is to be regarded rather than formal procedure, and any clear expression of the donor's willingness that the donee shall take the property for his own will suffice, on his part, when the chattel is present and in suitable condition for the donee to avail himself of his opportunity. Bogan vs. Finlay, La. Ann. 94; Allen vs. Cowan, 23 N. Y. 502; Caldwell vs. Wilson, 2 Spear, 75.

Delivery may be either constructive or symbolical. Real property was also the subject of gift before the feudal system was abolished. The transfer was effected by the symbolical delivery of a portion of the soil, and was known as the process of livery of seisin. When the property, from its peculiar nature or situation,

does not admit of corporeal delivery; as in the case of bulky articles or goods stored away,-- a delivery of a symbol may suffice, if such delivery be otherwise consistent with the owner's intention to give. Thus, the delivery of a key to a wine cellar may amount to delivering possession of the wines, because it is the way of coming at the possession or to make sue of the thing; in other words, such a delivery is tantamount to actual delivery for the purpose of the gift. The delivery of a receptacle, such as a desk, bureau or a trunk, will pass the chattel with all its contents, if such appears to have been the givers intention. In cases simple as a box of jewelry or a purse of money, delivery of the box or purse could hardly fail to carry the contents. Michener vs. Dale, 23 Pa. State, 59. But

the rule is not so readily applied where a symbol and a receptacle are involved in the same gift.

The delivery of the key of a chest, with words showing that the donor designed a constructive delivery of the chest and all it contained, would entitle the donee to money, jewelry, and other effects found inside of the chest. Marsh vs. Fuller, 18 N. H., 360; Allerton vs. Lang, 10 Bosw. 362; Penfield vs. Thayer, 2 E. D. Smith, 305; Cooper vs. Burr, 45 Barb. 9. In the case last cited the plaintiff had taken care of a woman for twenty years, six of which she was confined to her bed, and six weeks before her death, she said to plaintiff, "Mary, here are these keys; I give them to you; they are the keys of my trunk and bureau; take them and keep them, and take good care of them and all my property.

and everything I give to you; you have been a good girl to me and be so still." It was held that the language of the donor accompanied by the delivery of the keys of the trunk and bureau, evinced the intention of the donor, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunk and bureau. And it was further held that the fact that the trunk and bureau, or their contents were not removed, or even handled by the donee, was not a controlling consideration.

The rule appears to be well settled that, when a thing itself might have been readily handed over, there can be no sufficient delivery of another thing solely as its symbol or representative, of a key, for instance,

in the place of an article which it unlocks. 2 Kent's Com. 446; Ward v. Turner, 2 Vesey Sr. 443; Powell vs. Hellicar, 26 Beav. 261. And where the donor was at the time of the gift incapable of inspecting a check or trunk the general rule is that the delivery of a key without other circumstances relative to the gift, or without words explanatory of intention, will not pass title to the chattels contained in the receptacle, partly on account of the fraud which might result in the donor's ignorance of the contents. Transactions of this kind are carefully scrutinized by the courts. In the case Secor vs. Ellis, 23 Mich., Judge Campbell lays down the rule, that where a person does all that he can do under the circumstances to effect a delivery of a gift the title will pass, but this case is criticised

and expressly overruled in Young vs. 30 New York, 443.

Constructive delivery is often necessary to validate a forgiveness of debt. In the case of Darland vs. Taylor, 59 Iowa, 503, the plaintiffs were administrators of the estate of Alsey Darland, who was grandmother of the defendant. This grandson became the owner of a parcel of land conveyed to him for the consideration of sixteen hundred dollars, one thousand of which was allowed for the care of his mother during her life, and four hundred and fifty dollars was paid in cash, the rest by a note which the deceased refused to take, but afterwards did so and destroyed it saying she did not want him to pay them. The court held this to be a valid delivery and cancellation of the debt.

In the case of Strong vs. Bird, Law Rep. 18 Eq.

Cases 315, B's stepmother lived with him and paid two hundred pounds per quarter for board and lodging. B borrowed eleven hundred pounds of her, and it was agreed that the loans should be repaid by quarterly deductions of a hundred pounds from the sum paid for board. Deductions were made accordingly for the first two quarters, after which the step-mother refused to make further deductions, and paid, in full, quarterly for four years, after which she died, leaving D. her executor. It was held that B's debt was released at law by his appointment as executor; also that the intention to give B. nine hundred pounds was completed by her payment of nine installments of a hundred pounds each.

The case of Gray vs. Barton, 55 New York, 68, was an action to recover the balance of an account. The

defendant proved that the plaintiff had received from him one dollar, and balanced the account by an entry, "Gift to balance account," and had given him a receipt for one dollar in full to balance all book accounts. It was held that this transaction though not good as an accord and satisfaction, was good as gift, and that the plaintiff could not recover.

The foregoing rules apply to the delivery of all gifts irrespective of kind, and are the most important of the general rules. However, gifts are divided into two classes, under each of which the delivery of the same article, or class of articles, may be the subject of distinct or special rules. For a full understanding of these rules, exact and distinguishing definitions of the classes are useful.

Gifts inter vivos, or simple gifts are such as one party makes to another without the expectation of approaching death as the moving cause. 2 Kent's Com. 438. And since the mutual intention of the parties to such a gift is properly carries out at once upon delivery and acceptance, or equivalent acts, the transfer will take place absolutely and irrevocably as the executed act of the parties upon the due observance of the requisite formalities. Gifts inter vivos are commonly made when the giver is in his ordinary good health; but this need not be, for however precarious might be the actual chances of prolonged existence, it is only when death appears immenent, and the prospect of losing forever his hold upon his property lead the giver to decide that he will bestow a thing in a particular manner, that the

law deems the gift he makes other than one inter vivos. All gifts gifts are inter vivos except those causa mortis.

Justinian, in his Institutes, describes the danatio mortis causa or gift causa mortis as a wish of the donor that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heirs.

In the case of Nicholas vs. Adams, 2 Wharton, 17, it was held not to be indispensible to a valid gift causa mortis that it should be made in extremis like a nuncupative will. The Chief Justice defined it to be a conditional gift depending on a contingency of expectant death, and that it was defeasible by revocation or deliverance from the peril. The circumstances must be

such as to show that the donor intended the gift to take effect if he should die shortly afterwards, but that if he should recover the thing should be restored to him. If properly made a gift causa mortis is valid, notwithstanding a previous will. Kent's Com. 444.

A gift cannot be both inter vivos and causa mortis. Often persons desire to make gifts which combine the qualities of a gift causa mortis and a gift inter vivos at one and the same time.

The matter of Trough's Estate, 30 Pa. State, 115, illustrates this proposition. Trough effected a life insurance, being solvent. In consideration of one dollar and love and affection for his children, he executed under seal an assignment of the policy to one Hicks, in trust for them, put the policy and assignment into

an envelope and addressed it, "John W. Hicks, Esq. Please send this to him at my death. H. Trough," and placed the envelope in a safe of his own firm. He paid the premiums till his death seven years after the assignment, but never communicated the transaction to Hicks, who never knew of it till after his death. It was held that the assignment was invalid for want of delivery.

The case of Zimmerman vs. Streeper, 57 Pa. State 147 is similar. Streeper who held a bond against Zimmerman, endorsed on it, "I request my executors to give this bod to Anna for her great kindness she has shown to me and her grandmother." This was signed and sealed, after it , was written, "This is not to interfere with what I will to her; this she is to have besides that."

Anna was grand-daughter of the obligee and wife of the obligor. The bond was not delivered to Anna but remained in the obligor's possession with his other securities till his death. It was held that the bond did not pass to Anna. The endorsement indicated a prospective gift, but as there was no delivery, it was without operation. Lacking the requisite statute formalities, such attempted dispositions cannot operate as bequests. They are not valid as gifts inter vivos because to these gifts delivery in praesenti is essential. Neither can they be regarded as gifts causa mortis not being made in immediate expectation of death. And so the owner's intention fails because he has confused the classes of gifts.

In the case of a gift inter vivos if the thing be

not capable of actual delivery, there must be some acts equivalent to it. The donor must part not only with the possession but with the dominion of the property. The case of Young vs. Young, 80 New York, 423, is a leading and illustrative case. In this case a father having two sons desired to give them some bonds which he owned, and to reserve the interest on them during his life. The father owned a safe which he afterward gave to his son, in which he kept all his papers in one part and his son kept his in another part. He told the sons of his gift to them and the son placed them in the safe among his papers, although in the control of the father also, who often tore off the coupons and collected the interest. The court held that this was not a valid delivery, since the father could always get at

them. It was also held that equity would not interfere to perfect an imperfect gift by declaring a trust in favor of the donee.

In New York, a series of just and equitable decisions support a trust for a donee in the case of bank deposits made by way of gift by the donor in the name of the donee. In the case of Martin vs. Funk, 75 New York, 134, is the first to establish the rule. S. deposited in a Savings bank a sum of money belonging to her, declaring at the time that she wanted the account to be in trust for plaintiff. The account was so entered and a pass book given to S. containing an entry, in substance, that the account was with her in trust for plaintiff. A trust was made in the same manner in trust for K. Plaintiff and K. were sisters, and dis-

tant relatives of S. S. retained possession of the pass books, and the money remained in the bank with its accumulated interest, except that she drew out one year's interest, until her death. Plaintiff and K. were ignorant of the deposits until after that event. In an action to obtain possession of the pass books, and to recover the deposits, it was held that the transaction was a valid and sufficient declaration of trust and passed the title to the deposits, S. constituting herslef a trustee; that the retention of the pass books, which were simply the vouchers for the property, must be deemed to have been held as trustee, and was not inconsistent with the completeness of the gift, nor was notice to the cestui que trust necessary. This case is followed in Barker vs. Harbeck, which is a late case re-

ported in the New York State Reporter, 678, where the defendant's testatrix deposited a sum of money in a Savings Bank for Henrietta Barker. Several years thereafter, said testatrix drew it out and applied it to her own use. Held, that testatrix either deposited Henrietta Barker's money, or by such deposit constituted herself a trustee of the fund by a completed gift of the money deposited, and that when she drew it out she held it as trustee, and that the personal representatives of Henrietta Barker were entitled to recover said sum from the estate of testatrix. The same rule was declared in a leter case in the matter of Crawford, reported in 113 New York, 500, which was decided as late as in June, 1889.

In the case of Garuner vs. Merritt, 32 Maryland,

78, a grandmother, from time to time, during a period of five years, deposited various sums of money in the Savings Bank of Baltimore, to the credit of five grand-children, the accounts in the bank being in the name of each, as a minor, and the deposits made subject to her order, or that of her daughter. She also kept an account in the bank in her own name, the deposits being subject to like order. About the time the grandmother began to make these deposits to the credit of her grand-children, she declared that, "she was going to put the money in the bank for the children." Shortly after her death the daughter drew out this money and admin-istered it as a part of the estate of her mother. Upon a bill filed in the name of the grand-children against the daughter to obtain an account of the moneys

so withdrawn by her, it was held, that the moneys deposited by the grandmother were perfected gifts, which she had no design to countermand; and that the donees were entitled to the several amount which stood to their credit in the bank, when withdrawn by the defendant, with interest thereon from the date of the withdrawel.

The rule is meritorious, and will probably become the law in all countries.

If in the case of a gify inter vivos, the thing given be a chose in action, the law requires an assignment or come equivalent instrument, and the transfer must be actually executed. 2 Kent's Com. 439. Thus, it has been held that a certificate of bank stock transferable in terms, at the bank only, person or by attorney, is not fully bestowed as gift when delivered

endorsed in blank by the donor; nor indeed sufficiently to entitle the donee to a transfer of the stock as against the donor's executor. Pennington vs. Gittings, 2 Gill & J. 208. A promise never performed, to execute an assignment, cannot be a gift by assignment. Nor is a gift of privileges to subscribe new stock effectual while the script is neither issued nor the price payable. Egerton vs. Egerton, 17 New Jersey Eq. 419.

And since the debt represented by the note is the principal thing in a mortgage transaction, while the security is only accessory, the delivery of a mortgage deed duly assigned is held to carry no title by way of gift, notwithstanding the giver's intention, unless the note was delivered likewise. Wilson vs. Carpenter, 17 Wisconsin, 512. And from this it would appear that

the promissory note of third person secured by a mortgage, if properly delivered, carries, constructively, the mortgage deed though in the possession of donor at his death. On the other hand, the gift of a note payable to bearer, when suitably endorsed will doubtless be good when the instrument is delivered in that condition; of stock, when the transfer is completed; of incorporeal chattels, which pass by simple delivery, like bank notes and lottery tickets, upon the mere delivery of the thing; of choses requiring an assignment, upon delivery of the assignment; in short, when all has been done which satisfies the lagal requirements of transfer, and the intention of making a gift appears to have been fully executed. And this is true of the donor's own obligation, which is the opinion of Wilde, J., in Grover

vs. Grover, 24 Pick. 261. Vandusen vs. Rawley, 4 Seld. 358; Bedell vs. Carll, 33 New York, 581; Lemon vs. Phoenix Mutual Life Ins. Co., 38 Conn. 294.

But in the case of a gift causa mortis, an apposite rule prevails. Any bond not the donor's own obligation may be the subject of a gift causa mortis by delivery of the instrument with or without assignment in writing, and notwithstanding the non-existence of full formalities. And this is also true of a note. The law was not always thus, and the old cases were expressly overruled in Duffield vs. Lewes, decided by Lord Eldon in 1827. 1 Bigh. (N.S. 497). Upon the principle therein set forth, gifts causa mortis of bills of exchange, promissory notes, certificates of deposit, coupon bonds and negotiable instruments generally, are

now upheld almost universally in England and America, even without an endorsement, provided only that the instrument itself be delivered to the donee or some one in his behalf with the suitable intention of transfer. Ashbrook vs. Ryan, 2 Bush., 228; Bates vs. Kempton, 7 Gray, 382; Westerloo vs. de Witt, 36 New York, 340. As was said by Chief Justice Shaw in Paris vs. Stone, 14 Pickering, 198, "These cases all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of money, by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." But save where the donor means to forgive the donee his debt, such gifts must be confined to obligations of a

third party, and thus the limit is placed to gifts causa mortis of incorporeal chattels that the donor's own promise, whether in the shape of promissory note, unaccepted bill, or contract generally given in the prospect of approaching death and only to take effect at or after his death is not a valid gift causa mortis. For the practical result of sustaining such an executory contract would be to enable a dying man to make informal dispositions of his estate by creating in favor of his friends at pleasure, debts, without a shadow of consideration to uphold them. Flint vs. Patteo, 33 New Hampshire, 520; Paris vs. Stone,14 Pickering, 198; Raymond vs. Sellick, 10 Conn. 480; Starr vs. Starr, 9 Ohio State 74; Harris vs. Clarke, 3 Comstock 93. The last case overrules Wright vs. Wright, Cow. 598.

As to gifts inter vivos, delivery of the subject of the gift to a person as agent of a donor is not good delivery to the donee, and thus questions often arise as to whether the person to whom delivery is made is the agent of the donor or the donee, and as to whether or not the authority to the agent to deliver is revoked at death of donor; or whether the agent's authority is a power coupled with an interest so as to be irrevocable.

The true rule is that if the third party to whom delivery is made is strictly the agent of the donor and does not previously complete the transfer of the gift, it is invalidated by the death of the donor; but the presumption is in favor of the donee. The agency for a donor terminates at his death, because it is not an interest coupled with a trust. The directions, "take

the money and deliver to the donee," constitutes a good delivery because the donor relinquishes all right to the thing delivered to the agent of the donee, and delivery to the agent constitutes a delivery to the donee. The acceptance is always implied where it is for the benefit of the donee. In an agency for the donor the right of revocation remains in the donor until the delivery is completed.

In the case of gifts causa mortis, the presumption is in favor of such third party being agent for the donee becomes a settled fact and beyond question, for the gift being necessarily made in expectation of death, this excludes all inference that the agency was for the donor and to terminate at his death. In other respects, the law of agency is not varied by the nature of the gift.

The writer's attention in the course of his investigation of this subject has been frequently attracted by numerous and interesting decisions on the validity of gifts where the insolvency of a donor enters into the question, or where the parties sustain a confidential relation to each other. But this applies to the effect of a delivery only, and is omitted, since the intention of the writer has been to confine this discourse to the manner of form of the delivery. Also many individual cases which seem of necessity to form a rule of themselves.

In conclusion it is hoped that the writer has conveyed to the learned reader the most important rules relating to the delivery of a gift; to third persons as agents of the donor or the donee, in both inter vivos

and causa mortis. Also as to what amounts to delivery actual or constructive, with the distinguishing features of each.