Volume 32 | Issue 4 Article 3

June 1926

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THE NECESSITY OF DELIVERY IN MAKING GIFTS

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In a recent decision[1] the Supreme Court of Errors of Connecticut has reaffirmed its doctrine as to the necessity of delivery in making gifts which it had laid down in the leading case of *Candee* v. *Connecticut Savings Bank.*[2] It there said:

> "It is not necessary that there should be a manual delivery of the thing given; nor is there any particular form or mode in which the transfer must be made. The gift may be perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied with acts and declarations clearly showing an intention to give and to divest himself of all dominion over the property."

This is certainly a far different doctrine as to gifts from the law as it was set forth by Bracton, namely that there could be no gift without tradition of the subject of the gift.[3] The landmark decision on the point is *Irons* v. *Smallpiece*[4] where a father made an oral gift of two colts to his son. They were left in the father's possession until his death six month's later. He had supplied them with hay up to within four days of his death. His executor and residuary legatee took possession and the son brought suit against him. The court took the position that there had been no delivery and consequently no gift had been made.

After reviewing the early cases on the law of gifts of chattels, Lord Justice Fry in *Cochrane* v. *Moore*[5] says that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery. The authorities supporting the first of these exceptions are too numerous to call for citations.

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[1] Prendergast *v.* Drew, 130 Atl. 75 (Conn. 1925).
[2] 81 Conn. 372, 375, 71 Atl. 551, 552 (1908).
[3] Vol. 1, p. 128.
[4] 2 B. & A. 551 (1819).
[5] L. R. 25 2 B. D. 57 (1890).

A promise under seal to give a chattel was good at law even though delivery of the chattel itself had not been made, and in such cases equity refused to interfere.

The next step in the law of gifts was the statutory abolition of the requirement of seals on private documents. What was the effect of these statutes on gifts by deed? Did they reduce sealed instruments to the level of unsealed instruments and make delivery of possession the only method of completing a gift or did they raise unsealed instruments to a par with sealed instruments and make it possible to effect a gift by an unsealed writing? In the case of releases Professor Williston has pointed out that in some jurisdictions:

> "Statutes have qualified the result (of abolishing seals) by giving an unsealed release in writing the effect which the common law gave to sealed writings only. The courts of a few other States by judicial legislation have given the effect of a sealed release to a written discharge or acknowledgment of receipt in full."[6]

The same result, namely; allowing an unsealed instrument to take the place of a sealed, seems to have been reached in many instances in the case of gifts. Consider the case of *in re Cohn's Will*[7] where a husband delivered to his wife on her birthday a paper containing the following recital:

> "I give this day to my wife, Sara K. Cohn, as a present for her birthday, 500 shares of American Sumatra Tobacco Company common stock. Leopold Cohn."

At the time the husband owned 7,213 shares of this stock in the name of A. Cohn and Company, and deposited in a safe deposit box in New York. The firm of A. Cohn & Company had been dissolved a month before the time of the execution of this writing. The husband promised to hand over the stock when he got possession. The Court held that there was a valid gift *inter vivos* but rested its decision on the ground that handing over the paper was a symbolical delivery.

The same court in *Hawkins* v. *Union Trust Company*[8]

[6] WILLISTON ON CONTRACTS Vol. III §1822.
[7] 176 N. Y. S. 225 (1919).
[8] 187 App. Div. 472, 175 N. Y. S. 694 (1919).

held that there was a valid gift where the donor sent the donee a letter informing him of the gift of a boat which was at the time held in storage. Also in *In re Stalden's Estate*[9] it held a written order delivered by a decedent to a donee, for money and a watch contained in the money belt of the decedent was held sufficient to prove a gift of those chattels.

In Pennsylvania the orphan's court held that where an owner of shares of stock in a bank wrote to the president of the bank expressing her intention of making a present gift of one thousand dollars worth of this stock and ordering him to make out and transfer to the intended donee a certificate for it, there was a good gift. The bank president in this case accepted the order but wrote back to the owner suggesting that a gift of a thousand dollars in money be substituted for the gift of stock. The owner died before anything further was done.[10]

The Nevada case of *Goldworthy* v. *Johnson*[11] is also in point. The decedent owned some Liberty bonds which were held for her by a banking corporation. Three days prior to her death, while she was in expectation of immediate death, she wrote, signed, and delivered an instrument in which she declared it to be her wish that the plaintiff should have the bonds The court found a good gift *causa mortis* but based its decision on the assumption that the written declaration was a symbolical delivery of the bonds.

The Colorado court passed upon the question in the case of *Humphrey* v. *Ogden*.[12] There the defendant's wife delivered to the defendant a bill of sale of all her personal property. She died without having made a manual delivery of the personalty and the wife's administratrix sued the husband. The court held that there had been a valid gift to the husband.

This last case is the only one of those thus far cited that seems to suggest that an unsealed writing is sufficient to pass title to personal property without delivery of the prop-

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[9] 194 N. Y. S. 349 (1922).
[10] Estate of Carter, 35 LANCASTER LAW REV. 89 (Pa. O. C.)
[11] 204 Pac. 505 (Nev. 1922).
[12] 53 Colo. 309, 125 Pac. 110 (1912).

erty itself. In the other cases the courts have rather rested their decisions on the ground that the delivery of the paper was a symbolical delivery of the thing sought to be transferred. It is submitted that they might better have said that statutes doing away with the necessity of seals had raised unsealed instruments to the position formerly held by sealed instruments and that it is now possible to make a gift of a chattel by a writing not under seal.

While this theory will explain many of the recent decisions that over-step the earlier rule that a gift of personal property cannot be effected except by delivery of the chattel or by an instrument under seal purporting to transfer title; there are many cases that it does not explain. It seems worthwhile to review some of these holdings that at first glance seem to have carried the idea of symbolical delivery to the 'nth degree and are doubtless by many regarded as monstrosities in the law of gifts, if not as absolutely wrong.

In the case of *Stephenson's Adm'r* v. *King*[13] the Court of Appeals of Kentucky sustained a gift *causa mortis* where the donor handed the donee a letter from the donor's attorney describing a note and a bond which the attorney held for the donor and which were the object of the gift. There was also a delivery of a key to a desk containing other property. The intention to make a gift was established to the satisfaction of the court. To use its own words:

> "The motive for making it is equally as well established, and the delivery of the key of the desk, and the actual delivery of the letter from King containing a full description of the note and bonds held by the agent, the only evidence the intestate had of his possession for her use, is a sufficient delivery to make the gift complete. No other delivery could have been made, and the arbitrary rule such as formerly existed with reference to the delivery of choses in action, requiring an assignment and delivery of *the indentical thing* in order to make such a gift valid, having long since been abandoned, there is no reason why the intention to give, with the actual delivery of the written evidence of the right to the thing, although in the possession of another, under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift *causa mortis*."

[13] 81 Ky. 425, 50 Am. Rep. 173 (1883).

The federal court in *Castle* v. *Persons*[14] sustained an oral gift of a debt as a gift *causa mortis*. There a father thinking that he was about to die, told his son to pay A's wife, who was present at the time, the amount of the debt owed to the father by the son. One judge held that there was a gift *causa mortis*, another was of the opinion that there was a good assignment of a chose in action and the third judge dissented from the two opinions sustaining the gift. He based his dissent on the proposition that there was nothing capable of delivery.

In *Waite* v. *Grubbe*[15] a father pointed out to his daughter the places on his farm where money was buried and made a positive declaration of gift of the money to her. She did not remove the money from the places where it was buried until after her father's death. The court found that there was a valid gift.

In *Simmond* v. *Simmond's Adm'r*[16] the person who had custody of certain notes refused to surrender them to the payee so that he could make a gift of them to the maker, the defendant in the court below. The custodian later surrendered the notes to the payee's administrator, who brought suit on them. It was held that the gift to the defendant was complete and a good defense. This is quite contrary to the earlier view as set forth in *Pirot* v. *Sanderson*[17] that delivery actual or constructive cannot be made an owner where the property is held by a third party as bailee or custodian, if the third party refuses to deliver over to the donee.

The Indiana case of *Teague* v. *Abbott*[18] is very similar to the Oregon decision in *Waite* v. *Grubbe*. During decedent's last illness his brother's minor step-daughter cared for him. He intrusted her with the combination of his safe in which was certain bank stock. He told her she was to have them as her reward for taking care of him. She did not take possession before his death and the bank stock came into the possession of the decedent's administrator. The court held that the girl's knowledge of the

[14] 117 Fed. 835 (1902).
[15] 43 Ore. 498, 73 Pac. 206 (1903).
[16] 133 Ky. 493, 118 S. W. 304 (1909).
[17] 1 Den. 309 (N. C. 1827).
[18] 51 Ind. App. 604, 100 N. E. 27 (1912).

combination of the safe rendered manual delivery unnecessary and the transaction constituted a constructive delivery of the stock and as such made the girl absolute owner. A case commentator in the Michigan Law Review,[19] in considering this decision, observes that the exceptions, if they keep on growing, will soon constitute the rule.

Whatley v. *Mitchell*[20] presented substantially the same facts as the pioneer case of *Irons* v. *Smallpiece*. A grandfather gave a heifer to a grandchild who lived with him and the Georgia Court upheld a verdict sustaining the gift to the grandchild.

The Nebraska court held that there was a good gift in the case of *Dinslage* v. *Stratman*[21] where a creditor told his debtor to pay the amount of the debt to a third person. The court there quotes with approval from CYC as follows:

> "Where the proof is clear of an intention to make an absolute gift *inter vivos* of a chose in action, arising from a debt not evidenced by a promissory note or other instrument, an unequivocal direction by the donor to the debtor to pay the debt to the donee, instead of to the creditor, is a sufficient delivery of the gift, it being the only delivery of which the chose is susceptible."

One more case in point is that of *Ogden* v. *Washington National Bank*.[22] There the decedent, who was about to undergo an operation, went to the bank with her mother and told the cashier that she wished to give the $500 deposited there to her mother and told them to fix it so that the mother could check it at any time. The cashier took the mother's signature. The same day the decedent handed her mother a box containing among other things, the bank book and told those present that she had given her mother everything. The court held that there was sufficient evidence to establish a gift *inter vivos* of the $500.

An easy way to dispose of these cases would be to say that they are contrary to the law of gifts as established by the great weight of authority and that they are therefore wrong. However, the writer respectfully submits that they

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[19] Vol. II, p. 410.
[20] 24 Ga. App. 174, 100 S. E. 229 (1919).
[21] 105 Neb. 274, 180 N. W. 81 (1920).
[22] 145 N. E. 514 (Ind. 1924).

show the direction that the law on the subject is developing and that it is only a question of time until the courts will sustain gifts at least between the alleged donee and third parties where there is not even a semblance of symbolical delivery but where they are satisfied that the alleged donor intended to make a gift.

To sustain the view that courts are not going to require delivery, either actual or symbolical, as against third parties, one might refer to insurance cases, especially decisions of the English courts, where intent of the maker that the instrument shall be binding has been held sufficient without actual delivery. The classic example, of course, in *Xenos* v. *Wickham*[23] where the court used the following language: "The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding, on him, it is sufficient."

Then too, one might argue in support of this proposition that in all probability the requisite of delivery in the case of gifts was largely evidential. Today since the parties themselves may generally be called as witnesses and many other means of proof are possible that were not formerly the courts if they are fully satisfied that there was a gift, are not going to allow the ancient requirement of delivery to stand in the way of their sustaining the gift.

In conclusion, we might refer to the language of Mr. Justice Holmes as sustaining this position. In considering whether there was a good gift of a trade mark in the case of *Chadwick* v. *Covell*[24] he says:

> "The old rule was 'Everything which is not given by delivery of hands, must be passed by deed'. Noy, Maxims, 62 c. 33. Fairfax, J., in Y. B. 21 Hen. VII, 26 pl. 45. Shep. Touch. 229. But the formalities required by the early common law have been broken in upon a good deal, although more in England than in this State. It may be that later forms of property not admitting of delivery, but unknown to the old law or not then the subject of transfer, are free from the restraint of the an-

[23] L. R. 2 H. L. 296 (1866).
[24] 151 Mass. 190, 23 N. E. 1068 (1890).

cient rule; just as, at Rome, later forms of property could be conveyed without the comparatively archaic ceremonies of mancipation. It may be that even an oral gift of incorporeal personal property would be sustained, although delivery is impossible from the nature of the case. But that question we leave undecided."