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Gifts Inter Vivos and Causa Mortis

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C O R N E L L U N I V E R S I T Y

L A W S C H O O L .

Perhaps there is no subject under the head of personal property which presents as many difficulties to the young student of law as that of gifts. It seems that as far back as Commentators have made mention of it, various opinions have prevailed as to whether a gift was not properly a contract, and to-day even in many cases it is considered a mooted question. It is not my purpose in treating this subject to give the opinions of the various writers on gifts, but will be content by citing authorities whenever circumstances require such. It seems that the subject of gifts did not originate from English customs or laws, but in the days of Roman greatness the custom prevailed, and so it is that dona or gifts were creatures of Roman Law as well as that of Common Law. A gift as defined in Bovier's Law Dictionary consists in a voluntary transfer of a thing without consideration. It is not my purpose to discuss at any length the question whether or not a gift can be properly classed under the head of contracts. While there are authorities such as Toullier and Barbeyrac holding that gifts can properly be classed under certain kinds of contracts, still the doctrine has become quite firmly established among American and English writers of law that a gift is not properly a contract. It is true, however, that when a gift has been made perfect, it partakes

somewhat of the nature of an executed contract. It has, however, been maintained in every period of English Law that delivery was indispensable in making a gift. Hence it is that the following maxim has been accepted by all: "Donatio perficitur possessione accipientis"

Before attempting to make any division of gifts, it might be well to state that certain conditions must be fulfilled before a gift is completed. The party or parties contemplating making a gift must possess sufficient mental capacity. The rules which would be applicable in making a contract would hold in executing a gift. Perhaps it is safe to say that greater care should be exercised, since the giver or donor receives no benefit in return, unless with a view of pleasure. Another important factor which should be considered is whether the maker exercised absolute free dom in making the gift. If a gift has been perfected under undue influence, as, for example, where actual fraud or confidential relations exist, as in case of father and son, physician and patient, and lawyer and client, or the gift has been obtained by the person standing in such relations, is prima facie void, and the burden of proof is thrown on the donee to show that the gift was the unbiassed act of the donor.

Ledell v Starr, 5 C. E. Green (N. J.) 274.
Garvier v Williams, 44 Mo. 465.

Boyd v De La Montaguie, 78 N. Y. 498.
Lake v Ramsey, 33 Barb. 49.
Forman v Smith, 7 Lans. 443.
Ferguson v Lanery, 54 Ala. 510.
Jennings v Mc Connell, 17 Ill. 148.
Matter of Will of Smith, 95 N. Y. 516.
Whitehead v Kennedy, 69 N. Y. 462.
Whipple v Barton, 63 N. H. 612.

The English law seems to go still farther than our own, and places persons who hold confidential relations towards such in a position of not being able to receive benefits unless it can be shown to the satisfaction of the court that the donor had competent and independent advice in acting.

Smith v Key, 7 H. of L. Cas. 772.

Gifts are divided into two classes; gifts inter vivos, and gifts causa mortis. Gifts inter vivos or single gifts are such as one party makes to another without the expectation of death as a moving cause. The person who makes such a gift must be competent to contract and the gift must be perfected. That is, it must go into immediate and absolute effect. It has, however, been held in some cases that where a gift is intended in praesenti, and is accompanied with such delivery as the nature of the property will admit, that it operates at once. But it is far better that all transactions are fully completed, and that nothing essential remains to be done in order to make certain of its validity. It must be remembered that while the donor receives no consideration, it happens that gifts as promises are often tried to be enfore-

ed, as, for example, an agreement to give without consideration or in consideration of love or affection, transfers no title to the property and gives no right to one for damages. Such agreements are considered mere naked agreements.

Carpenter v Dodge, 20 Vt. 595.
Pope v Dobson, 58 Ill. 360.

A promissory note intended purely as a gift by the maker cannot be enforced, nor is an expression of promise to make a gift for a specified benevolent object binding, unless the transfer has been made and the gift completed.

Noble v Smith, 2 Johns. 52.
Fink v Cox, 18 Johns. 145.

This principle should not be confused, however, with voluntary subscriptions for charitable purposes, for the mutual promises of the several subscribers are held sufficient consideration to enforce the promise. This appears to be the settled doctrine, that equity will refuse to interfere in endeavoring to perfect an imperfect gift.

Young v Young, 80 N. Y. 422.

It has become firmly established that delivery is essential to the consummation of a gift, still it need not be simultaneous with the words of donation, but may precede or succeed them. If it precedes no new delivery in necessary; but if it succeeds, it makes perfect that which before was in-

choate. And it should be remembered that after the gift has been made complete by delivery , it is not necessary for the donee to retain possession of the property. The delivery need not be directly to the donee, but may be to a third person for him. If the delivery to the third person is simply for the purpose of delivering it to the donee, as agent or messenger of the donor, the gift is not complete until the subject of the gift actually is delivered to the donee. And until the gift has been completed by delivery to the donee, the donor can revoke the agent's authority and resume possession of the gift.

Scott v Lauman, 104 Pa. St. 593.
Marston v Marston, 21 N. H. 491.
Hill v Stevenson, 63 Me. 364.
People v Johnson, 14 Ill. 342.
Smith v Ferguson, 90 Ind. 229.
Bedell v Earll, 33 N. Y. 581.
Irish v Motting, 47 Barb. 370.

Judge Audson in his opinion in Beaver v Beaver, 117 N. Y., on page 430, said that "a deposit in a savings bank by one person of his own money to the credit of another is consistent with an intent on the part of the depositor to give the money to the other." Perhaps there is no case which throws more light on the question of delivery to third parties than that of Beaver v Beaver. The father, John Beaver, had deposited in the Ulster County Savings Bank $1,000.00 to the credit of his son Aziel. There was no evidence except that John

Beaver said: "I started Aziel in life,--gave him $1,000.00." On the trial defendants, being his mother and sister, claimed that John Beaver had retained the pass-book of the bank up to his death, and claimed that no gift had been made. They acting as administrators demanded the moneys which had been deposited to the credit of Aziel, as it was supposed. Payment was refused by the Bank, and a suit was brought which resulted in the following opinions from the several courts in which it was tried. A judgment was rendered in favor of defendants before Judge Edwards in the Ulster County Circuit, and afterwards judgment was rendered in favor of the plaintiff. 53 Hun 258. The Court of Appeals afterwards reversed the judgment and ordered a new trial. The court said on the trial that the only evidence relied upon to establish an intent on the part of the father to make a gift to Aziel, his son, was the transaction at the Bank on the day of deposit; that there was no proof of any oral statements that had transpired afterwards, and for that reason the court held that in the case there were two essential elements lacking; viz:, an intent to give, and a delivery of the subject of the alleged gift. Judge Edwards in commenting upon the questions as offered by the Court of Appeals said: "Since there had been proof established to show that declarations had been made by the father at the time of the deposit which would necessarily lead me to

think that the money had been deposited as a gift." He held that the admission of one that he had made a gift to another established a consummated gift.

In this case it was claimed by the widow of Beaver that the fact that the Bank book had not been given over to Aziel and still remained in the possession of the Bank, it belonged to her, and should go to the administrator of the deceased. This is a question which is ofttimes the occasion of many legal controversies. For the question is, Is the money deposited in trust or inte nded as a gift. I shall deem it sufficient by giving the rule which seems to govern in such cases. In questions of parol gifts to children it would seem it is not necessary that any solemn act of delivery should be made. The formal ceremonynof delivery is not essential if it appears that the donor intended an actual gift at the time, and evidence of such intention by some act which may be fairly construed as a delivery under such circumstances it is quite evident that the question of trust could not be considered, and a gift is properly established. Where a person holds a bank-book for another for a number of years, it is regarded that it was kept as trustee.

Willis v Smith, 91 N. Y. 31.
Motie v Bailey, 95 N. Y. 206.
Martin v Funk, 75 N. Y. 134.

However, in Howard v Smythe, 40 Vt. 599, it was held that where a depositor took a pass-book and kept it until his death, after which it was found among his effects, it belonged to the niece in whose name it was deposited. This doctrine is also supported in New Hampshire, Maryland, and Connecticut. It was held in Young v Young, supra, that to establish a valid gift although a delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, be shown, yet it is not always necessary that manual delivery should be made; intent to transfer is sufficient.

Gray v Gray, 55 N. Y. 72.
Ross v Draper, 56 N. H. 404.
Hildebrandt v Brewer, 6 Tex. 45.

We have seen, therefore, that the law requires of the donee only that he be able to show that the donor has relinquished dominion over it in his favor. Another kind of delivery which I shall briefly consider is constructive delivery. This is where a gift is perfected by delivery of the means of obtaining it; viz., a key to a trunk or warehouse. But this must be accompanied by words of gift of the contents of the receptacle. The transaction must clearly show that the owner intended to make the gift of the article to which the key or symbol was the means of access. This appears to be equitable and just, as it checks and prevents fraud from being practiced.

A very good illustration of this is given in the case of Cooper v Burr, 45 Barb. 9. A woman confined to her bed delivered to the plaintiff, who had taken care of her for many years, the keys of her trunk and bureau accompanied by the words gift. Held that this was fufficient to constitute a valid gift.

It seems as a rule that property of every kind may be the subject of a valid gift, both corporeal and incorporeal. However, the subject must be certain, and it has been held in 17 N. J. Eq. 419, that no gift was binding unless the property was in esse at the time of the attempted gift. It would be quite impossible for me to give all the kinds of property which are subject to gift , so I shall only endeavor to point out a few. Promissory notes, debts, choses in action, savings bank books, etc., are some of those that are of most frequent occurrence. The first which I shall consider is promissory notes, for these especially are often the subject of much legal discussion. It is quite evident, and I might say that the donee of such a note cannot enforce its payment either in law or in equity. And it seems fair and just that such is the case, as the promise to pay money in the future is without consideration. If such were true it would leave open a broad avenue for fraud. It can be revoked at any time, and can only be said to become a gift when money

has been paid, or when it is in the hands of a bona fide holder for value who has no knowledge of the want of consideration to be lacking in the note. A check received as a gift is incomplete until presented or recognized by the donee, unless some specified request has been made by the drawer to the bank. In the forgiveness of a debt, the general rule which is to guide us is that a receipt or written acknowledgement stating that the donee has been released from further obligations, and that the same is intended as a gift, will forever release the debtor. This does not hold true, however, in cases in which part payment is made. It oftens happens that a person pays part of a debt, and is told by his creditor that he need not pay the remeinder. Such an act on the part of the creditor would in no way bar his right for the balance, unless his intention of cancelling the debt had been fully acted upon.

Bishop on Contracts, Sec. 50/
Gray v Barton, 55 N. Y. 68.
Ellsworth vFogg, 35 Vt. 355.
Draper v Hitt, 43 Vt. 439.
Larkin v Hardenbrook, 90 N. Y. 333.

But not the balancing of the book alone, as there would be no delivery to complete and perfect the gift. I shall not attempt to discuss or even distinguish between the uses of gifts and trusts, but shall simply show what seems to be the method of ascertaining how a trust is created. No

particular form of words is requisite. The intent is what the courts seek.

Fisher v Fields, 10 Johns. 496, 505.
Perry on Trusts, Sec. 89.

In reference to savings Bank books or deposits, it would be difficult to give any definite rule until the facts of each case are known. The following references will serve to give full authority in the matter.

Smith v Bank, 64 N. H. 400.
Davis v Noy, 125 Mass. 590.
Martin v Funk, 75 N. Y. 137.
Gilman v Mc Ardle, 99 N. Y. 458.

Another essential element in the consideration of gifts is acceptance. While it is a general rule that in all contracts acceptance is necessary, it is also true in the case of gifts. Yet evidence of only a slight acceptance is necessary. But when gifts are entirely beneficial to the donee, his acceptance is presumed. And the same principle has been wisely established in the case of infants. For since they are unable to make a complete contract, it would be difficult to say that they were capable of receiving gifts unless some provision had been made. It is held, though, in some cases, that unless the donee knew of the gift during the life of the donor, acceptance will not be presumed.

Clark v Clark, 108 Mass. 522.
Scott v Berkshire Savings Bank, 140 Mass. 157.
Pope v Burlington Savings Bank, 56 Vt. 254.

It is not my purpose to cite but one of the many cases in which gifts may be made, and that is between parent and child. Where a parent delivers property to a child and allows him to use it, the presumption is that it was intended as a gift. This rule is more particularly true if the gift was made at the time the child marries, but since the father is looked upon as the head of the family, a gift made before the parental authority ceases is considered invalid. However, it may be shown that such gift is valid. Where a father said to his son that he might havea certain colt if he would raise it, and there was no other evidence tending to show that the father intended the son to have the colt, and there was no evidence of delivery, it was held that the title to the colt did not pass.

Matlock v Powell, 96 N. C. 499.

But in Fletcher v Fletcher, 55 Vt. 325, it was held that where a father in the presence of his family presented to his son a carriage in the carriage-house, it was sufficient to vest the title in the son. Numerous examples might be cited, but the few which I have mentioned will serve to show quite clearly the general rule that applies between parents and children.

There is one more important question which can be properly classed under this head, and that is where property

has been given to friends or even strangers with an intent to defraud creditors . It appears to be firmly established that any gift made under any such circumstances is void. All the doctrines of the courts of law and equity hold that any gift which seems to be tainted in any way with fraud is void. In the old English case of Reade v Livingston, supra, the rule was laid down that any voluntary transfer of real estate or chattels with a view to defraud creditors was void. It is indeed true that such is the universal rule. For it certainly would be embarassing if not dangerous to the rights of creditors, and would open up an avenue to fraud. This statute was enacted during the reign of Elizabeth, and has ever since been the law of this country.

The nature of proof required to establish a gift is similar to any other question of fact, being a question for the jury. The mere delivery is not sufficient. The intention of the parties and their acts are things which must be passed upon by a jury. Anything which tends to show that the donee had done acts in favor of the donor, or great affection existing between them, would have a tendency to sustain a gift. However, these are only circumstances that may arise. I have endeavored to point out a few of the rules in cases which are to be found under the head of gifts inter vivos, and shall now consider the second class of gifts, causa mortis.

A gift causa mortis is defined as a gift made in apprehension of death by delivering or causing to be delivered the possession of any personal goods to another. These gifts were the subject of frequent discussion in the English courts. Justinian, apprehensive of fraud in these gifts, required them to be executed in the presence of five witnesses. A gift causa mortis differs from a gift inter vivos in tnat it is revocable by the donor, and the mental capacity must be the same as in making a will. They were always looked upon with suspicion, since they did away virtually with certain amount of property described in the will. The gift is not complete until the death of the donor. And it must be made in apprehension of death, and delivered. Great strictness and clear proof are therefore required to establish such gifts; and they can only be upheld when the intention of the donor is clear and definite, and such intent is fully carried out by execution.

Gains v Fish, 43 O. St. 462.
Delmotte v Taylor, 1 Redf. 417.
Hatch v Atkinson, 56 Me. 324.
Marshall v Berry, 13 Allen 43, note.

It would appear by the definition above quoted that only personal property can be given in this manner. It has also been held in Vermont and South Carolina that real estate cannot be included in a gift causa mortis.

Meach v Meach, 24 Vt. 591.
Gilmore v Whitesides, Dudley (S. C.) 13.

In Curtis v Barous, 35 Hun 165, a delivery of a deed of real estate was sustained as such a gift. The question whether land was a proper subject of a gift was not raised. At the present time all kinds of personal property with few exceptions may be the subject of a valid gift causa mortis, whether the property be corporeal or incorporeal. It is not settled generally in this country whether the delivery of a certificate of stock, without some assignment of the shares, is a good gift causa mortis. It is not a valid gift in England or New Jersey.

Moore v Moore, L. R. 18 Eq. 474.
Edgerton v Edgerton, 17 N. J. Eq. 419.

In New York it appears that a delivery of a certificate of stock is good as a gift causa mortis without an assignment, or even without a complete transfer of legal title.

Walsh v Sexton, 55 Barb. 251.

In this case the donor was the owner of sixty shares of stock in a corporation, and executed an assignment of twenty shares which he delivered to his wife to be delivered to the plaintiff. It was held sufficient, and the administrator was ordered to make legal transfer. Peckham, J., in delivering the opinion, said: "I concur in the views expressed by

the courts which have not sustained such a gift, both in principle and in policy. But the authorities are the other way. In my judgment this doctrine is fraught with the greatest danger. It leads into temptation from which we all pray to be delivered, and it greatly facilitates fraud. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it." There is also a diversity of opinion as to whether or not a person can transfer the whole of his property as a donatio causa mortis. In Vermont it has been held that the donor may dispose of all his property by such a gift. In Pennsylvania it has been decided in one case that the principal part may be given, while in another case the court said:that all could not be disposed of in such manner, as partaking of a testamentary character, and contrary to the spirit of the law of wills. In Marshall v Berry, supra, a Massachusetts case, there is a dictum agreeing with the Pennsylvania view that such a gift can only apply to certain specific articles, and not to a disposition of the donor's estate.

Meach v Meach, 24 Vt. 591.
Michener v Dule, 23 Pa. St. 58.
Headley v Kirby, 18 Pa. St. 326.

As to the donor's promissory note, it cannot be the subject of a gift causa mortis, the mere promise of the maker being a nudum pactum; but the note of a third party may be

given, the law being the same as in gifts inter vivos. Bonds, bills, promissory notes, and other evidences of debt, although payable to order, may be given, even if not endorsed. Where a note or bond secured by a mortgage is given, the mortgage goes with the note or bond, although the mortgage is not mentioned in the transfer, and is kept in the donor's possession.

Wright v Wright, 1 Cowen 598.
Sessions v Mosely, 4 Cush. 87.
Druke v Heiken, 61 Cal. 346.

The donor's own check may be given, but until payment or acceptance by the bank the gift is incomplete, and the death of the donor before the check is paid or acceptance acts as a revocation of the gift, providing the donee has not transferred it to a bona fide holder for value without notice before the death of the donor.

Matter of Smither, 30 Hun 632.
National Bank v Williams, 13 Mich. 282.

It has also been held in Pennsylvania that a life insurance policy, payable to the legal representative of the assured, can be given causa mortis by delivery of the policy without an agreement. It is requisite to the validity of a gift causa mortis that it be made in contemplation of death of the donor. This gift can only be made by a person who thinks his death near at hand, and who makes his gift in view of and on account of his approaching death. In New York it is

not necessary that the apprehension of death shall come from illness. The courts hold that it may arise from infirmity or old age, or from external or anticipated danger. It must be founded upon more than some indefinite or unsettled apprehension. The donor must be in a condition to fear approaching death from the proximate or impending peril, or from illness which precedes dissolution. In Tennessee it has been held that the anticipation of death to a soldier enlisting in the army was sufficient foundation for a gift; but in Irish v Hutting, supra, a New York case, it has been decided to the contrary. Where a gift is made during the last illness of the donor and a short time before his death, it is presumed to be a gift causa mortis and not inter vivos, and revocable by the recovery of the donor. The burden of proof would be on the donee to show that it was a gift inter vivos, and therefore absolute and irrevocable.

Emery v Clough, 63 N. H. 553.
Rhodes v Child, 64 Pa. St. 18.
Allen v Polseczky, 31 Me. 338.
Thompson v Thompson, 12 Tex. 327.

The subject of a gift causa mortis must be delivered or the gift is not complete or valid. The law as to the kind of delivery required is substantially the same as in gifts inter vivos. As a rule the best delivery of which the article is capable is required. A delivery by symbol when the

thing itself can be readily or easily handed over, as by giving a key to a box or a jewel case as a symbol, when the receptacle or its contents might easily have passed from hand to hand, is generally held to be insufficient. There must be something done in order to change the possession from the donor to the donee. So necessary is delivery to the validity of a gift of this kind, as was stated in Cutting v Gilman, 41 N. H. 147, that even if the property was in the donee's possession or in the hands of a third party, there would be no gift for want of needed delivery to complete it. If it is delivered to the donee and again comes into possession of the donor, it raises the presumption that it is revoked. Schouler on Personal Property, Sec. 163, says: "The real question is whether the donor has by such transfer intentionally and practically parted with his dominion of the property; and we must view his facts accordingly." It is settled that delivery to a third person for a donee is as effective delivery as to the donee, even if the donor dies before the property reaches the hands of the donee. But delivery to an agent as agent for the giver to perform the act or make the delivery only after the death of the donor would amount to nothing. Like other gifts there must be an acceptance to complete the gift. This acceptance may be by the donee after the death of the donor, especially where the delivery is to a third person for the

benefit of the donee.

A gift causa mortis is not valid against the claims of creditors. The only property which a man can legally dispose of without consideration is the balance remaining after paying his debts; that is, a man must be just before he is generous. If it is needed to pay the debts and taken by the administrator for that purpose, the surplus if any remaining will go to the donee in preference to the intestate's estate.

Kiff v Weaver, 94 N. C. 274.

There may be conditions annexed to this kind of a gift. A very common one is that the donee shall pay the expenses of the funeral.

We have noticed thus far that an ordinary gift or gifts inter vivos when completed, except where they are procured by fraud or force, are absolute and irrevocable. But it is not so with a gift causa mortis. They are specially revocable in three instances; viz: (1) The donor's recovery from a particular peril; (2) By the death of the donee before the donor; (3) By his own act revoking the gift. And in an early case in New York it has been held that where a local statute causes the revocation of one's will by the subsequent birth of a child, the same consequences would follow a gift causa mortis.

The evidence tending to establish such a gift must

be clear and convincing. The burden of proof is necessarily on the donee, as, in the first place, so many opportunities and such strong temptations present themselves to unscrupulous persons to pretend death-bed donations, that there is always danger of having an entirely fabricated case set up; and, secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in a mortal illness, and by a slight change of words to convert the expressions of intended benefit into an actual gift of the property; and no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character.