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THE CONTINUING QUESTION OF DELIVERY IN THE LAW OF GIFTS

PATRICK J. ROHAN†

In recent years the pace of change in private law subjects has been barely perceptible when compared with the progression of rapid advance, consolidation and branching off in new directions in evidence in the public law sphere. To some this may be an indication that the common law, at least in many of its splintered components or categories of substantive law, has matured beyond a growing stage and reached a plateau of reasonably satisfactory development, with concomitant loss of momentum in the direction of change. However, most observers would probably adopt the view that the press of problems directly concerned with the community at large necessitates a concentration on public law measures, with a moratorium on private law revision coming as an unintended aftermath. This phenomenon in the legislatures is paralleled in the courts, where, with the possible exception of negligence litigation, a large portion of the docket is taken up with disputes governed wholly or partially by public law, whether the measure be a tax statute, rent control, zoning or some other form or regulation. When there is legislative or judicial alteration of outmoded concepts in the private law area, it is likely to concern those aspects that affect so large a segment of the populace as to assume a public law character.1 A ready illustration is found in commercial law, where outdated rules are currently being supplanted by the progressive provisions of the Uniform Commercial Code. In short, one might hazard the generalization that the likelihood of change or development in any given area of law varies directly with the number

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1. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 150-51 (1921):
I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent.
of persons affected by the particular norm under consideration. To this may be added the corrective factor of the ability or inability of those so affected to exert a collective influence on the law making body; if the group is large but has no ready avenue of communication or vehicle for banding together in concerted action, the factor of mere size diminishes in importance.

That the foregoing observations are peculiarly applicable to the property field may be seen in the fact that many of its present day principles have gone unexamined and unchanged for decades, and in some cases centuries. The landlord and tenant relation alone could supply countless examples ranging from archaic rules governing reletting after the lessee's abandonment, to outmoded thinking on the effect of a consent to an initial assignment of a lease and the unrealistic approach to the holdover tenant situation. The norms applied today in each of these cases bear marked resemblance to those in force two and three centuries ago and must be taken as an indication that these rules are deemed satisfactory, or that the necessary pressure in the direction of improvement has been lacking, or perhaps that the judiciary has felt itself bound by these principles solely because of their longevity and the assumption that change must await legislative action. It is the object of this comment to examine one such neglected principle, that of delivery in the law of gifts, to determine whether the concept is still serviceable and, in so doing, to indicate that the judiciary has a particular responsibility for periodic evaluation of common law concepts which are unlikely to be drawn into the legislative grist mill for refurbishing. It is felt that this responsibility weighs particularly heavy in areas where, as in landlord and tenant and the law of gifts, the substantive law has been largely, if not exclusively, shaped by decisional law.

THE PROBLEMATICAL DELIVERY

Although it would be a rare lawyer or law student indeed who could not readily supply, on a moment's notice, the essentials for a valid gift—the familiar donative intent, delivery and acceptance—the difficulty experienced in applying the formula seems to bear no relation to the ease with which it may be stated. Situations involving shares of stock, bank accounts, the contents of safe deposit boxes and other common gifts continue to find their way onto the dockets of the courts, including the courts of last resort.² Perhaps no other area of private law reflects so

large a number of defective transactions, split decisions and disappointing results, both in isolated, individual cases and in certain recurring categories or factual patterns. In possibly no other field is such a basic and natural transaction governed almost entirely by abstract theory, having remote, if any, connection with the desires or expectations of the participants. The uncertainty remaining, despite centuries of judicial experience with the law of gifts, is directly traceable to the troublesome element of delivery, and reflects in large measure the fact that normal growth of the traditionally flexible decisional law has been seriously hampered by inertia, an undue concentration on formal requirements and an inordinate fear of fraudulent claims. The comfortable, and usually irrefutable, ratio decidendi provided by the donor's failure to literally comply with the letter of the law has sapped the vigor from the approach at both the trial and appellate levels. Largely neglected and unnoticed have been the normally paramount considerations of enforcement of intention and the sanctioning of a decedent's plan for distribution of his property. In the pages which follow, an attempt will be made to evaluate the delivery concept through an examination of worthwhile theories previously advanced and an analysis of the social and other values involved.

At the outset one might question the need for a further discourse on delivery in view of the economic unimportance of gifts and the availability of Professor Mechem's definitive articles on the subject. By way of apologia, and in addition to the observations already made, it may be stated that although the writer is in fundamental agreement with the greater portion of what Professor Mechem has said, certain differences in emphasis, if not in opinion, do exist. Moreover, the constant appearance of gift cases in the advance sheets indicates that the subject is quantitatively important, measured by the number of cases arising annually rather than the amounts involved. Similarly, while some have expressed the view that there is little by way of social or economic benefit to be gained in the use of judicial machinery to enforce donative


3. Among the opinions which cut across individual cases and cause difficulty on a continuing basis may be included those giving unsatisfactory treatment of the agency determination in instances where the donor employs a third party intermediary, and poorly conceived expositions relating to the prerequisites for use of the constructive delivery doctrine.

4. Professor Mechem's thesis is found in the trilogy entitled The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments, 21 Ill. L. Rev. 341, 457, 568 (1926) [Hereinafter cited as Mechem]. See also Mechem, Gifts of Corporation Shares, 20 Ill. L. Rev. 9 (1925). Many of the considerations urged in this comment have also been treated by Professor Mechem, with some being endorsed, others rejected.
transactions generally, much less imperfect gifts, it is felt that this is too restricted a viewpoint and that recognized and accepted ends would be subserved by a consistent and well thought out policy in the gift area.

Although several authors have contributed varying analyses of delivery, most can be grouped under the heading of one of two schools of thought. The first in point of time, the historical school, represented by such scholars as Pollock and Maitland, have taken the position that the requirement is but a remnant of a bygone day in which the seisin concept prevented recognition of even the sale of property, whether real or personal, without a change of possession; an era when transfer of rights in an object, as opposed to transfer of the object itself, could not be envisaged.\(^5\) As a corollary of the above it was pointed out that the modern refinements of the constructive delivery doctrine were unthought of in the thirteenth century, with delivery by means of a deed under seal still a novelty in the fifteenth century.\(^6\) Of course an approach which would explain the requirement exclusively in terms of historical accident would not treat delivery as an indispensable element to be insisted upon at all cost.

The second school of thought may be loosely termed the functional school, including within it those who would approach the problem pragmatically. Under this view, delivery is explainable in terms of function, that is, the valuable objectives which it accomplishes.\(^7\) In rejecting the position of the historical school almost in its entirety, the argument is advanced that if delivery's chief justification lies in nothing but history, it would have long ago ceased to be a requirement. Instead, its continued vitality is attributed to several desiderata which are achieved by the prerequisite of delivery, perhaps without the courts being conscious of their existence or of the role of delivery in securing them. Professor Mechem's classical analysis assigns three such ends to the "wrench" of delivery: it makes vivid and concrete to the donor the significance of the act he is doing, it is unequivocal to the witnesses present, if any, and gives the donee at least prima facie evidence in favor of the alleged gift.\(^8\) Gulliver and Tilson, in their extensive treatment of the subject, approach

7. See, e.g., Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941) [Hereinafter cited as Fuller]; Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1 (1941) [Hereinafter cited as Gulliver & Tilson]; Stoljar, *The Delivery of Chattels*, 21 Modern L. Rev. 27 (1958).
delivery in much the same way, encompassing the objectives cited by Mechem under the headings of the "ritual" and "evidentiary" functions, while adding the "protective" or fraud prevention role. Professor Fuller, in discussing the larger question of the need for legal formalities generally, stresses these goals and adds the "channeling function of form," which in the gift context is delivery, in that it offers a convenient channel for the legally effective expression of (here donative) intent.

In explaining delivery in utilitarian terms, these authors experience little difficulty in reading in a dispensing power whenever the cited desiderata are secured in any given factual pattern, despite the absence of a delivery as traditionally defined. Thus, for example, Professor Mechem would require a manual tradition or such facts and circumstances by way of substitute as would secure the objectives outlined in his thesis. He expresses the conviction that the existing case law supports such a view in that many courts are presently implementing it by accepting substitutes for tradition which allegedly bring about a change of possession or dominion and control, but which in reality merely satisfy the stated functions. Gulliver and Tilson similarly insist that "an intended transfer should be sustained if the facts show substantial performance of the ritual and evidentiary functions, whatever may be the particular method of securing that performance." Professor Fuller, after cautioning that legal formalities should be reserved for relatively important transactions, takes the position that:

The need for investing a particular transaction with some legal formality will depend upon the extent to which the guarantees that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises—including in these "forces" the habits and conceptions of the transacting parties.

As an illustration, he cites the relaxation of formal requirements in the case of the donee already in possession of the res at the time the gift is made. There a return of the property to the donor and subsequent re-delivery to the donee are dispensed with, and mere words of present gift suffice, due in large measure to satisfaction of the "cautionary" function by the accompanying sense of present deprivation (which would not be felt if the res were then in the donor's possession).
In analyzing the views set forth above, one finds that the functional and historical schools are in fundamental agreement on the fact that manual tradition and possession should not be made ends in themselves. The two part company, however, on whether the requirement of delivery presently accomplishes any worthwhile purpose. In studying the position taken by the functional school, one finds that all three of the expositions outlined above treat delivery as a meaningful formal, as opposed to substantive, requirement. All agree that a rational basis for retention of, or insistence upon, delivery may be found in the safeguard against enforcement of rash or impulsive promises of gift which it affords, and also in its evidentiary value to the donee, third party witnesses, or both. At this juncture, however, the similarity ends. Gulliver and Tilson are alone in stressing the fraud prevention or prophylactic role as an independent function. Their over-all perspective also differs markedly from the other authors cited in that they would regard the formal requirement as meaningful only insofar as it assisted in securing the primary goal of sanctioning the expressed intention of the property owner. Professor Fuller, on the other hand, is unique in citing the channeling function of form. He also aptly expresses certain substantive deterrents to enforcement of promises—principally the cost of the social effort thereby necessitated and the desirability of preserving an area of "free-remaining relations" wherein preliminary and exploratory promises continue to be unenforceable. Although these substantive deterrents were discussed largely in a contracts-consideration setting, they would also appear to have some relevance in the delivery context, if only as an enlargement upon the "cautionary" function.

14. Gulliver and Tilson make this their central theme, observing that:
One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough, but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it.

If this objective is primary, the requirements of execution, which concern only the form of the transfer—what the transferor or others must do to make it legally effective—seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in these cases. They surely should not be revered as ends in themselves, enthroning formality over frustrated intent.

Gulliver & Tilson 2-3.

Professor Mechem seems to be in disagreement in stating that frustrated intent and individual hardship cases alone should not lead to a relaxation of the delivery requirement. Mechem 350.

THE CONTINUING QUESTION

THE DECISIONAL LAW

The reported decisions in the gift area have not emulated the somewhat abstract and theoretical approach of the functional school. Instead the courts have centered their attention on the fact that delivery is a \textit{sine qua non} of long standing, with the principal, and often only, inquiry being whether or not the prerequisite has been satisfied in the particular case under consideration. Overcrowded calendars, the elementary nature of the principles involved, the press of more urgent questions and kindred factors may dictate such an approach. However, it appears clear that archaic principles cannot go unexamined indefinitely and that at some point a broader perspective must be employed. While the commentators have stressed the aspects of why delivery is currently required and whether it should be continued as an operative principle, the courts have adopted a one-sided inquiry. Despite this concentration, the acts or group of acts which the courts will recognize as constituting an effective delivery continue to defy systematic classification and analysis. Upon investigation, one finds that the earlier decisions insisted upon a manual tradition of the object, resulting in transfer of possession and dominion and control to the donee. However, special situations perennially arose which led to a tacit relaxation of the norm. Prominent among these were gifts of choses in action, instances where the donee was in joint possession with the donor, gifts from parent to child, as well as donations involving such factors as bulky objects, property located at a distant place, and transfer of a key to a receptacle. An examination of these cases reveals that the delivery requirement is not the unitary, static norm that it is usually held out to be and that it cannot be equated with manual tradition. As one author has observed:

The simple truth, then, is that the law is split into divergent and disconnected rules. They are nominally kept together by some-

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thing called "delivery," though delivery which can be actual delivery, semi-manual delivery, constructive delivery or no delivery at all. Is it not astonishing how unaxiomatic a legal axiom can be?²¹⁷

It has been demonstrated fairly conclusively that the various factual patterns which currently satisfy the delivery standard in truth represent multiple policy decisions. It has also been shown that the constructive delivery cases do violence to any consistent theory based on transfer of possession, and hence either must be regarded as exceptions to the requirement or the latter must be re-defined in other terms.²⁸ If one seeks to accentuate dominion and control in the donee as the real nub of delivery, greater consistency is achieved but many problems yet remain. If, for example, delivery of a safe deposit box key or bank book is regarded as sufficient, the inability of the donee to gain access to the res without judicial assistance, and the continuing ability of the donor to reach the res without the key or bank book, are ignored. Similarly, dominion and control would not appear to shift in other common situations, such as the informal writing or letter of gift cases, recognized as effectual in many jurisdictions.

If the search for a workable lowest common denominator for delineating the legally effectual gift is carried below the criterions of transfer of possession and transfer of dominion and control, two approaches suggest themselves. On the one hand, one may accept the possession or dominion theory and append to it as many specific exceptions as might be deemed worthwhile to recognize. This may be characterized as the route currently being taken by most courts. On the other hand, one might pursue the approach of the functional school in doing away with the necessity for a delivery, or finding the necessary delivery to be present, in any case where certain desiderata are achieved without manual tradition. The principal problems inherent in either of these approaches, much more significant in the latter than in the former, are twofold: to what extent would such a test bring about the enforceability of executory promises of gift and to what extent would such a rule prove a workable universal?

In the eyes of some, a principal function of delivery is to separate the unenforceable, executory promise of gift from a legally recognized
donation. If delivery were to be downgraded or eliminated, what would mark off the unenforceable promise, or more important, would all executory promises then become enforceable? The discussions attendant abolition of the seal and suggestions relating to the elimination of consideration from the law of contracts have brought forth strongly held viewpoints on the advisability of enforcing all promises indiscriminately. However, resolution of the question of enforcement of gratuitous promises would not be a necessary corollary to a less stringent concept of delivery. In the past delivery has been found where no delivery, as currently defined, was present; the departure from the norm has been clothed with respectability, and made more difficult to detect, by the use of the constructive and/or symbolic labels. These inroads on delivery have not brought about the wholesale enforcement of executory promises of gift. And as long as a delivery standard required that an overt act (such as writing) be shown, signifying the donor's intention that the gift become presently effective, the factual pattern consisting of a mere promise of gift would remain inchoate and nugatory.

At first blush, a more imposing objection to relaxation of the delivery hurdle is presented by the argument that any norm based on an ad hoc inquiry as to whether certain objectives have been realized or satisfied would, of necessity, require litigation in each and every case in order to operate. With respect to the prognosis of litigation, however,

19. See Fuller 815; Stone, Delivery in Gifts of Personal Property, 20 Colum. L. Rev. 196 (1920); Comment, Relaxation of the Requirement of Delivery in Gifts of Personal Property, 6 Fordham L. Rev. 106 (1937).
20. See, e.g., Pound, Introduction to the Philosophy of Law 271-84 (1922); 1941 N.Y. Leg. Doc. No. 65M, Recommendations of the Law Revision Commission to the Legislature Relating to the Enforcement of Certain Written Contracts 337; Corbin, Recent Developments in the Law of Contracts, 50 Harv. L. Rev. 449 (1937); Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704 (1931); Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale L.J. 621 (1919); Wright, Ought the Doctrine of Consideration to be Abolished from the Common Law?, 49 Harvard L. Rev. 1225 (1936). With respect to the effect of legislation abolishing the distinction between sealed and unsealed instruments on the question of whether a gift can be effectuated by means of an informal writing, see Brown, Personal Property § 46 (2d ed. 1955); Mechem 576-86.
21. The New York Court of Appeals adopted a somewhat similar approach in constructing the “Totten Trust” doctrine, specifically in indicating that the tentative trust could be made irrevocable by some unequivocal, overt act of the depositor. Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). It may be argued that the bank account problem of the Totten case is sui generis or sufficiently confined to admit of the approach there employed. However, there does not seem to be any reason why a similar view may not be taken in any gift situation where an overt manifestation of intention to make a present gift is proven.
22. It is not clear whether the approach of the functional writers previously discussed would be applied on a case by case basis, and thereby become subject to this criticism, or whether the value judgment advocated would be made in advance and only in the key fact patterns which recur over and over again. It is probable that the latter interpretation is more in accord with the functional school's thinking on the matter and
it should be noted that the existing confusion and uneven approach in the gift area promote litigation, which, although successfully defended, may drain the economic benefit from the gift. The uncertain and elusive demands of delivery make litigation by anyone with standing to contest a worthwhile gamble, as does the fact that the suspicions of the court, with respect to possible fraud and undue influence, are set in motion and to a degree confirmed by the very fact that a suit is commenced. Relaxation and clarification of the delivery requirement would tend in some degree to reduce litigation based on nothing more than a possibility of success or eventual compromise. In addition, a reasonable degree of stability would be achieved as soon as opinions were handed down endorsing the transition here contended for and extending to the gift area the philosophy or approach prevailing in surrogate's matters generally.

NEGLECTED DESIDERATA

Although the reported opinions frequently declare that the law is neutral and will not presume a gift or no gift, it does not take much reading between the lines to appreciate that the courts generally look upon gifts with disfavor, especially death-bed donations. Much the same is true of the expositions on the subject found in legal periodicals. Perhaps the lack of a brief on the side of an even-handed approach to gifts is partly responsible for their current posture. Initially, one might query why one of the cardinal principles of the common law, the almost reverential enforcement of intention, has not been made use of in the gift area, not to enforce executory promises, but to weight the case wherein the question of delivery hangs on nice distinctions. The prevailing influence of this principle is seen in the widely accepted practice hence this criticism is largely inapplicable to its adherents.

In response to the criticism in question, it should be noted that relatively few, if any, legal concepts are so clear as to predetermine litigation by a mere inspection of their requirements or phraseology. As Chief Justice Hughes noted in another connection:

It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in "contemplation of death," as there can be none in relation to fraud, undue influence, due process of law, or other familiar concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition.


23. This is perhaps nowhere more quaintly stated than in Walsh v. Sexton, 55 Barb. 251 (N. Y. Sup. Ct. 1869), wherein Judge Peckham stated (of gifts causa mortis effectuated by means of delivery of stock certificates alone): "In my judgment, this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong." Id. at 256.

24. See note 14 supra.
of construing a will wherever possible so as to avoid an illegal construction, thereby saving the testator's plan of distribution. A related phenomenon is operative in so construing a will as to avoid even partial intestacy. By contrast, the courts receive the donor's intent, expressed in the form of a gift as opposed to a devise or bequest, with less than lukewarm enthusiasm, if not open hostility. The conclusion seems inescapable that such decisions rest on the belief that a thwarted gift involves at best a cure-all for fraud and at worst a return of the property to the donor. However, such an assumption frequently includes within it an oversimplification, since impending death usually supplies the occasion, as well as the motivation, for the donation.

Thus viewed, defeat of the transaction represents both rejection of the donor's intention and a serious dislocation of his plan of devolution, whether that plan took the form of a will or statutory distribution in intestacy. In all probability the donor had taken the purported gift into consideration in determining what further dispositions would be made on his death. Failure of the gift may accordingly result in a two hundred percent payment to one beneficiary at the expense of the donee-beneficiary receiving nothing; the likelihood of such an occurrence is great where the latter is not a statutory distributee. The position of the donee seems anomalous when one considers that the donor made a direct overture to him while still alive, and is further illuminated by a comparison with the steps the law takes to secure equalization of shares, both under the doctrine of advancements and under statutes aimed at deprivation through oversight, namely the enactments which give a prescribed share to children born after the making of the will who are not otherwise provided for. The disparity is further aggravated in the not unusual situation where the donation is intended to satisfy an obligation owing, in justice if not in law, to the donee.25 These few observations alone indicate that a defeated gift may engender an irreparable imbalance in one's testamentary scheme, with attendant family disharmony. They would also appear to require a re-examination of the admitted judicial disdain of gifts and the resultant stress upon formal delivery requirements.

If the foregoing observations are valid, why, one might ask, has insistence upon a literal delivery survived for centuries. One reason may be found in the fact that there is no continuing group interested enough, either as attorneys or as donees, to associate themselves with the

25. The donee appears to be the stepchild or forgotten man in the litigated gift cases. By contrast, the Restatement of Torts has deemed the donee's expectancy, as ephemeral as it is, worthy of protection, at least to the point of making unwarranted interference with the expectancy actionable. Restatement, Torts §§ 870(b), illus. 2, and 912(f) (1934).
law of gifts to seek its refinement. Once a particular controversy has been decided, the individual client goes his way, perhaps with misgivings with respect to the law as applied to his case but with no burning desire to rearrange things for the benefit of others yet to come. Of equal importance, however, is the courts' oft recited fear of fraud, which is usually coupled with analogies which liken the requirement of delivery to the mandate of the statute of wills or statute of frauds. Finally, there is the seldom expressed but widespread assumption that the lay-

26. The lack of flexibility often exhibited by the courts in interpreting and applying the delivery requirement is traceable in large measure to the fraud prevention concern. The interaction of these two factors can be seen in the passages quoted below which were directed to the gift causa mortis but are representative of the current thinking on all death-bed gifts. The following comment of Judge Dixon, from his opinion in Keepers v. Fidelity Title & Deposit Co., 56 N.J.L. 302, 28 Atl. 585 (E. & A. 1894), is typical:

We agree with the sentiment expressed in Ridden v. Thrall, 125 N.Y. 572, 26 N.E. 627 [11 L.R.A. 684], that "public policy requires that the laws regulating gifts causa mortis should not be extended, and that the range of such gifts should not be enlarged." When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars' worth of property is locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key, and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault,—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury; around this mode, the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily-proven devices.

Id. at 308, 28 Atl. at 587. A plea for an ad hoc approach to these cases is also indicative of the phenomenon under discussion:

Expressions are sometimes found in the books to the effect that gifts causa mortis are not favored in law because of the opportunity which they afford for the perpetration of frauds upon the estates of deceased persons by means of perjury and false swearing; but gifts of the character of those in question are not to be held contrary to public policy, nor do they rest under the disfavor of the law, when the facts are clearly and satisfactorily shown which make it appear that they were freely and intelligently made. Ellis v. Secor, 31 Mich. 185. While every case must be brought within the general rule upon the points essential to such a gift, yet as the circumstances under which donations mortis causa are made must of necessity be infinite in variety, each case must be determined upon its own peculiar facts and circumstances. Dickeschild v. [Exchange] Bank, 28 W. Va. [340], 341; Kiff v. Weaver, 94 N.C. 274. The rule requiring delivery, either actual or symbolical must be maintained, but its application is to be mitigated and applied according to the relative importance of the subject of the gift and the condition of the donor. The intention of a donor in peril of death, when clearly ascertained and fairly consummated within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery. The rule which requires delivery of the subject of the gift is not to be enforced arbitrarily.


27. See the exhaustive citation of authorities in Chief Justice Vanderbilt's opinion in Foster v. Reiss, 18 N.J. 41, 112 A.2d 553 (1955).
man must strive to comply with the law at his peril; the law will not, or at least should not, bend to meet the practices of the layman. Taking each of these judicial objections in order, attention will first be directed to the most frequently voiced, the possibility of fraudulent claims of gift.

While most commentators assign several functions to delivery, the reported decisions evidence a singular preoccupation with a fear of fraud in any case where a recognized delivery is not had. It may be seriously questioned whether this emphasis is properly placed. If some of the instances in which the majority of courts find a delivery are examined, one notes that the holdings provide no barrier at all to fraud, and some might even venture to state that they facilitate fraud. Among the chief offenders, of course, would be the situation wherein the alleged donee was previously in sole or joint possession of the res and the delivery effectuated by means of a key. Perhaps more to the point is the realization that these same courts will not uphold a gift in a case wherein fraud is ruled out but no traditional delivery has taken place. This points up what is perhaps the tenor of judicial thought on the subject at the present time, that is, delivery is a requirement which serves as a guarantee against fraud, which must nevertheless be present although the absence of fraud is secured by other means.

Where something less than a traditional delivery is had, but fraud is not in issue, the courts often express sympathy for the donee while alluding to the inexorable demands of the law. Would it not be more advisable to fashion a concept of delivery which would not invalidate proven and meritorious transactions unnecessarily, while at the same time shifting the prophylactic function to the evidentiary area which is more suited to the task of fraud prevention? The donee has the burden of proving the alleged gift; if he carries that burden, there should be no further need to question the genuineness of the gift. If the preponderance of the evidence alone is felt to be too low a barrier to spurious claims in the death-bed gift area, a statutory or court made rule excluding or limiting the probative value of the donee's testimony concerning transactions (including conversations) had with the deceased, might be employed. Such an approach would rule out the donee as a key witness in all but the rarest case and at the same time make his burden more

difficult to carry. The fraud consideration might conceivably lead a jurisdiction to thus require disinterested testimony to establish or corroborate the gift. Unlike arbitrary insistence upon a technical delivery, however, such an approach would at least be directed to the source of possible fraud and be further limited to deceased donor situations. Viewed affirmatively from the standpoint of the proof of genuineness which is available to the court, much greater use could be made of such factors as the physical and mental condition of the donor, the relationship of the parties, the naturalness of the gift, the dispositive provisions of the donor's will, the employment of an attorney in the matter, or lack thereof, and similar probative facts and circumstances. A review of the reported decisions rendered to date reveals that such details are seldom mentioned much less employed in the courts' rationale. In summary, it is suggested that fraud can be coped with by other and more adequate means than delivery and that a justification for an overly-strict application of the concept, if one exists, must be found elsewhere.

In a slightly different approach, several commentators and judicial opinions advocating a strict application of the delivery concept have placed reliance upon the statute of wills. The following passage from Professor Mechem is representative:

An examination of the authorities shows that in the very great majority of cases, the litigation occurs after the death of the donor, even though the alleged gift was one technically inter vivos. As far as evidentiary and other practical considerations go, the attempted gift transaction thus becomes one substantially testamentary in nature. And it is to be observed that of all statutory provisions controlling dispositions of property, statutes of wills have been those least riddled by exceptions, and those least the subject of hostile criticism.

Although the surrounding setting for the gift and the will are often

29. Another possibility, the employment of the "clear and convincing evidence" test, or some variant thereof, although utilized in some states in deceased donor situations, has been vigorously criticized by several commentators in the field of evidence. See, e.g., McCormack, Evidence § 320 (1954); Morgan, Basic Problems of Evidence 23 (1954); 9 Wigmore, Evidence § 2498 (3d ed. 1940); McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944). Needless to say, a jurisdiction making concurrent use of both the dead man's statute and the clear and convincing standard would have little justification for applying an overly-strict view of delivery as a fraud preventive.

30. Mechem 350. However, Professor Mechem seems to alter his stand somewhat at another point in his article wherein he states: "We have gifts causa mortis, for better or for worse. If undesirable, the attempt should be to abolish them or set logical restrictions on their operation, and not to 'bore from within,' to use the current expression, by arbitrary and carping exceptions." Id. at 574.
similar, if not identical, this fact in and of itself provides no basis for borrowing legal principles peculiar to the latter area. Attempts in this direction are founded on the application by analogy of a statute which clearly does not apply to the gift inter vivos and to which the gift causa mortis constitutes an established exception. In jurisdictions in which the theory of gifts causa mortis is that no interest passes to the donee until the donor’s death, the donation is for all intents and purposes testamentary, whether delivery has taken place or not. In jurisdictions in which a present interest passes subject to a right of revocation, the transaction is more akin to an inter vivos gift, but again basically testamentary in operation. Thus the causa mortis gift, viewed in relation to the statute of wills, stands or falls as an exception—its very definition bespeaks the fact that an exception has been made. Accordingly, one stressing the testamentary nature of such a gift is not raising a telling defect but arguing against the advisability of making the exception.\(^{31}\)

The case for applying the statute of frauds is even more specious, since there is no statutory mandate of general application requiring a written instrument of gift. Moreover, the statute’s purview is limited to executory transactions while the question at issue is whether the particular gift was executed. The simple fact is that both inter vivos and causa mortis transactions fall without the aforementioned statutes and cannot be brought within their purview by any recognized rule of statutory interpretation, including the use of analogy. It would appear that, as in the fraud prevention rationale, the comparisons employed offer only a superficial justification for eroding the gift area from within under the guise of strict construction of the delivery requirement.

A somewhat related question which must be answered in any discussion of relaxation of the delivery requirement is whether the law should be modified to reflect the conceptions and practices of the layman or whether the layman should be held to know the law, at least to the extent of having his transactions rendered nugatory in any case where previously established legal criteria have not been met. Typically those advancing the latter position, in the context of the delivery question, point out that as solemn an instrument as the decedent’s last will and testament falls where inadvertently, improperly executed. However, this may well be a deceptive precedent to cite for several reasons. Of primary importance is the more or less prevalent understanding among laymen that a will is a legalistic transaction of such intricacy as to require a lawyer’s services. Although this generalization may be difficult

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31. See the extensive exploration of this position in Costigan, Constructive Trusts, 28 Harv. L. Rev. 237 (1915).
to prove, the point to be noted is that, by contrast, except for instances of tax-motivated giving, the layman would not even consider the thought of hiring a lawyer to assist in making a gift. It is safe to say that the public is aware of the fact that there are certain legal requirements for a valid will, even if the specific prerequisites themselves are unknown or misinterpreted, while it would be a truly rare individual who would be equipped with the knowledge that there are case-law standards relating to the making of a gift. Hence it would appear that the wills area carries its own built-in safety device in that the common understanding flags the necessity for a trained attorney, while in the gift area the common understanding is to the contrary. Similarly, the layman realizes that he is exercising a dead hand insofar as his post-death directions are to be carried out via a will and executor, whereas the gift situation has all the surface earmarks of an inter vivos transaction. Even the individual who sets a gift causa mortis in motion in all likelihood does so in complete ignorance of the name and attributes of the legal device he is employing, regarding ownership of the object as having passed immediately to the donee, and relying solely on the honesty of the recipient or on his own ability to retrieve the object, in the event of a recovery from the illness at hand. The conditioning of complication-free seasonal giving and the appearance of a fully executed transaction also serve to lull the layman into a false sense of security, preventing realization of the fact that there may be outstanding legal requirements with which he must comply. Another differentiating factor seldom noted is that the testator can in a single stroke transmit real and personal property of every kind and description, wherever located, by means of a single document, with no requirement that the assets be assembled and transmitted. A gift of the very same assets, however, requires their collection and manual tradition, or a recognized substitute for tradition. Thus the will is, in a very real sense, a less complicated method of effectuating transfer than is the gift.

In refutation of the above lines of reasoning, some have espoused the view that the delivery concept does fit in with the layman's pattern of action in that one naturally feels that a gift has not taken place until the object is handed over to the donee. This position has often been

32. Mechem, Gifts of Corporation Shares, 20 Ill. L. Rev. 9, 9 (1925):
That the rule [of Irons v. Smallpiece] is psychologically unsound, if such expression be permissible, is suggested by the persistence with which litigants, and even courts, have attempted to evade it. Judges have found themselves between Scylla of enforcing patently fraudulent claims, and the Charybdis of doing intolerable hardship by refusing to enforce attempts at gift, made in obvious good faith, but lacking, by reason of the donor's natural ignorance of the law, the technical requisite of a delivery.
urged in opposition to the historical school's contention that delivery is but a remnant of a primitive period in our jurisprudence. Supporters of the functional approach contend that as far back as Bracton it has been recognized that delivery is the natural mode of making a gift. However, the validity of such a view is disputed by the very fact that so many gifts flounder on the delivery requirement. Assuming arguendo that an overt act of giving is a natural or "normal" method of making a gift, it does not necessarily follow that a layman would be led intuitively to the intricacies and nuances of delivery as presently defined and applied. The need for some overt act manifesting the donor's intent to then and there make a gift probably approximates the layman's understanding, more so than does the assumption that he is attuned to the existing complexities in this area. The fact that the various states differ in their interpretation of delivery and the further fact that within any particular jurisdiction the concept will be applied in an uneven, splintered fashion also militates against acceptance of such a view.

Approaching the "law for the layman" versus "everyone is presumed to know the law" dichotomy from another vantage point, consideration should be given to the fact that the social and legal device known as the gift is here to stay, being too deeply rooted to be legislated out of existence. The utterance of this truism might appear ludicrous; no one has advanced the notion of abolishing gifts as such. However, the observation takes on meaning when one recalls that proposals have frequently been made relating to the demise of the gift causa mortis or death-bed gifts generally. And, as previously noted, impending death has supplied, and in all likelihood will continue to supply, both the principal motive and occasion for donations. Would legislation aimed at elimination of such transfers be advisable as a policy matter, if, as indicated, it would go contrary to custom, human nature or both? Assuming that a negative answer is forthcoming, one is led to the further question of whether existing delivery standards should be perpetuated when they appear to needlessly defeat such transactions, while serving no worthwhile purpose which cannot be achieved more economically by other means. The demonstrated ability of evidentiary norms to sift out fraudulent claims in all other civil cases, and the valuable ends subserved by upholding transfers of this nature, would appear to dictate that seeds of destruction should not be sown into the very definition of a gift if it is to be continued as a sanctioned method of effectuating succession. In the language of Gulliver and Tilson, "any requirement of transfer should

33. See, e.g., Cochrane v. Moore (1890) 25 Q.B.D. 57; Mechem 345-48 (contrast the cited material with the passage quoted in the previous footnote).
have a clearly demonstrable affirmative value since it always presents the possibility of invalidating perfectly genuine and equitable transfers that fail to comply with it. 4

Nor do the functional aspects of delivery present obstacles to the transition sought. It has yet to be clearly demonstrated that the cautionary function has any real significance in the gift area. 3

Although there is much to be said for freedom of exploratory negotiations in contractual bargaining, the courts and commentators agree that the donor typically does not part with his worldly goods until the last breath is drawing near. It would appear that this fact would, without more, insure that caution and solemnity abound. A realistic view of the situation would appear to require a conclusion that the donor is not so much in need of protection from himself as he is in need of judicial assistance in securing his expressed desires regarding his property. Another indication that the incautious donor problem may be more imaginary than real may be found in the fact that, even in the inter vivos area, remarkably few of the cases involve recalcitrant donors brought into court by disappointed donees. The very human factors which prompt a gift will usually support an amicable retraction. Lastly, the cautionary barrier, whatever its utility or lack thereof, would still be present if, as suggested, an overt act was required to accompany the expression of donative intent. The availability of the causa mortis vehicle, and its frequent employment, would appear to supply an additional safety valve against premature divestment of one’s assets.

With respect to the evidentiary function, it may be noted that many of the observations made in connection with the fraud prevention role may be applied to the evidentiary function with equal validity. There is no inherent relationship between fraud and manual tradition or its substitutes which would indicate that the two cannot co-exist or that a genuine gift cannot be had without a delivery. 8 Proponents of the evidentiary function indicate that delivery may be dispensed with in situations where-

34. Gulliver & Tilson 9.
35. See Williston, Gifts of Rights Under Contracts in Writing By Delivery of the Writing, 40 YALE L.J. 1, 9-14 (1930), wherein Professor Williston champions dominion and control as the key inquiry, while downgrading the cautionary function.
36. Presumably the legislature of any given state could draft a statute setting down requirements for a valid gift without, of necessity, having to include delivery. It is interesting to note that a controversy has flared up from time to time as to whether delivery is an operative fact in the inter vivos gift area but a mere evidentiary fact in the causa mortis area (making possible a relaxation of the strict application of delivery in the latter area but not in the former). See Barlow, Gift Inter Vivos of Chose in Possession by Delivery of a Key, 19 MODERN L. REV. 394 (1956); Murray, Gifts—Donatio Mortis Causa, 31 CAN. B. REV. 935 (1953); Pound, Juristic Science and Law, 31 HARV. L. REV. 1047 (1918); Comment, The Theory of Delivery in Gifts Causa Mortis, 39 KY. L.J. 215 (1951); Note, 59 U. PA. L. REV. 95 (1910).
THE CONTINUING QUESTION

in caution and genuineness are secured by other means. Hence it would
appear that the evidentiary value of delivery cannot be equated with the
stand that it is for some unexplained reason essential or part and parcel
of the very structure of a gift. The farthest most advocates of the
evidentiary function have gone is to state that delivery is of unique qual-
itative value as evidence in that it indicates the presence of the desired
high degree of reflection and volition on the part of the donor. However,
this approach would seem to resolve itself into the cautionary
function previously discussed.

Even if it is assumed that this position represents a consideration
separate and apart from the cautionary concern, it may well be ques-
tioned whether delivery is of unique value as evidence. At one time
manual tradition and/or possession of the object by the alleged donee
after the death of the owner might have been highly probative, if not the
best evidence that a gift had been made. However, several developments
have combined to lessen the significance of the foregoing factors so that
a presumed delivery currently offers only one of many plausible ex-
planations for these facts. Modern mobility of both persons and prop-
erty, ownership of dispersed assets, and the widespread practice of en-
trusting others with choses in action, documents, registrations, and per-
sonal property of appreciable value, for purposes wholly unconnected with
a gift, must be considered. Perhaps the best example of this phenome-
on is the practice of many individuals of permitting acquaintances to
utilize their automobiles almost at will. When such bailments are fre-
quently or for an extended period, such as for use on a trip or vacation, it
is not uncommon to entrust the registration to the bailee as well. Faced
with this fact of life, the courts have exhibited an understandable re-
luctance to find that a gift has taken place even where the alleged donee
is in possession of the vehicle itself, the keys to the auto and garage, the
registration, or some combination of these elements. Ironically enough,
it may well be that in any given instance preoccupation with the fact
that a manual tradition has taken place, or with the fact that the alleged
donee is in possession of the object after the death of the owner, may
lead to a relaxation of vigilance with respect to possible fraud. The
stress placed upon the evidentiary function by the authors cited earlier

37. See, note 19 supra. Most decisions, however, at least since Irons v. Smallpiece,
Rev. 427 (1949); In re Spingarn's Estate, 111 N.Y.S.2d 172 (Surr. Ct. N.Y. Co. 1952)
(not otherwise reported); Matter of Calen, 142 Misc. 363, 255 N. Y. Supp. 383 (Surr.
Ct. Oneida Co. 1932). See also Comment, Statutory Treatment of the Requirement
may also be discounted to the extent that they presume ideal conditions, such as the presence of disinterested third party witnesses at the moment of transfer. The simple fact is that many of the litigated gift transactions take place under less than ideal conditions, and if proof of genuineness becomes the focal point, would not the witnesses themselves provide that, with or without a delivery having taken place. In light of the foregoing, it would appear that adequate proof of a gift can be supplied, with no appreciable loss in efficiency, by shifting to the less stringent demand for proof of an overt act of giving.

Finally, whether delivery may be justified on the ground that it provides a channel for the legally effective expression of donative intent may well be doubted in view of the fact that, more often than not, it appears to represent an obstacle to, rather than a well worn groove for, the accomplishment of the donor's manifest objectives. Can the formal requirement of delivery serve a channeling function if the user is by and large unaware of the fact that it is the only channel to the desired end and presumes that any overt manifestation will suffice? If this function is to be accomplished, it would appear that knowledge of its essential nature and what is required to constitute an effective delivery would have to be much more widespread than it is at present. Presumptions relating to knowledge of the law can have no application in refutation of this criticism, unless one is to take the position that the channeling function is limited to providing assistance for those who are sufficiently versed in the law as to have no real need for a channel, namely the lawyer and the judge.

It is also doubtful whether the norms of manual tradition of the object or possession in the donee are sufficiently flexible to cover today's needs. In the past century the chose in action has surpassed the chose in possession as the chief source of wealth and, as a consequence, the concept of ownership has moved farther and farther away from the connotation of physical control over, or possession of, the corporeal asset. The rules relating to change of ownership, including gifts, of choses in action have been merging with those governing tangible assets, largely due to the commercial practice of personifying or identifying the chose with the document representing it, as for example the bank book or

39. Williston, supra note 35, at 12:
Choses in action now constitute by far the greatest part of the property of most persons of means. Not only is property intangible in its origin included within the category, but a large part of the tangible property in the country is now subjected to the law governing choses in action by the use of mortgages and corporate shares of stock. Gifts of choses in action therefore involve far more serious questions than gifts of chattels.
stock certificate. As these developments continue, methods of transferring the chose multiply and diversify. The same can be said for corporeal assets, such as the automobile, which can now be transferred through bills of sale, transfer of registrations, etc., separate and apart from any tradition of the asset itself. The varied factual situations which may give rise to the gift and the multiplication of indicia of ownership indicate that the day is past when the notion of a singular method of transfer will suffice.\footnote{At least one commentator has raised the possibility of eventual abolition of both actual and constructive delivery requirements. See Roberts, \textit{The Necessity of Delivery in Making Gifts}, 32 W. Va. L. Rev. 313 (1926).} The relaxation of the delivery norm here sought would also have the virtue of encompassing within it the presently accepted method of effectuating a gift—manual tradition—thereby providing a sure route for those cautious enough to seek out the time tested path.

**CONCLUSION**

It would appear that the litigated gift cases center around the act of the would-be donor in disposing of some or all of his assets on impending death and that the courts therefore have a legitimate and continuing concern with fraud prevention. Nevertheless, where the possibility of fraud has been ruled out by the evidence and the donee's burden carried in all other respects, no justification can be found for an overly-strict interpretation and application of the delivery concept. In the past the courts appear to have relied upon strict interpretation as an aid to evidentiary norms in screening out fraudulent claims, at the cost of needlessly nullifying a number of proven and meritorious transactions. An element of inconsistency has thereby been introduced in that deathbed gifts have been treated as testamentary for purposes of proof, while the canons of construction ordinarily applicable to the interpretation of a decedent's directions have invariably been ignored. It is to be hoped that isolation of the fraud prevention function may some day be had, thereby removing its unconscious influence on interpretation of the legal and factual issues presented.

At one time a case-law rule, once crystallized, was beyond the pale of judicial modification, in the view of most jurists, having passed into the exclusive domain of the legislature. Recent inroads in the area of privity of contract in breach of warranty cases, charitable immunity from tort liability, and other common law propositions encrusted with age, indicate that a broader conception of judicial power, and indeed responsibility, to revise principles of case-law origin is taking root. Hence
it may be that a change in perspective in the gift area, as well as in other areas of private law which stand in need of modernization, may make feasible judicial correction which might not have been possible only a decade ago. Attorneys in several states have recently been extricated from the snares for the unwary contained in the rule against perpetuities by sweeping changes which have liberalized and simplified the pertinent rules. Should not this beneficence be shared with the layman donor in the form of a reprieve from the traps for the unsuspecting contained in the delivery maze?