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GIFTS *CAUSA MORTIS*—THE USE OF A WRITTEN INSTRUMENT IN LIEU OF DELIVERY OF THE THING IN GIFTS *CAUSA MORTIS*

For a gift *causa mortis* to be valid, the donor must make the gift in expectation of impending death, he must die, and he must make some sort of delivery of the subject of his gift.[1] The matter to be discussed here is the attitude of the courts toward a constructive delivery by the use of a written instrument in gifts *causa mortis*. It is a well established rule that only personalty is capable of being transferred by gifts *causa mortis*;[2] and since property which falls into this category is generally subject to actual delivery, it is to be expected that the rules of delivery will be quite strict.

The courts of Massachusetts, Missouri, and North Carolina have said that a written instrument will not satisfy the requirement of delivery for the completion of a gift *causa mortis*.[3] In *McGrath* v. *Reynolds*,[4] the only case which actually presents a holding to this effect, the donor signed a paper written by the donee which said, "I give to Patrick McGrath $5,758, to be divided as follows:" This was followed by a list of certain of the donor's relatives, with a sum of money written beside the name of each relative. The donor then gave this paper, along with two bankbooks for nine hundred dollars each, to McGrath and signed orders for this money to be given to McGrath. He told McGrath that the rest of the money was in the pocket of his trousers, which were hanging in his closet, and that his sister would give it to McGrath later. McGrath presented the bank books and the signed orders to the bank

[1] *In re* Hanson's Estate, 205 Iowa 766, 218 N. W. 308 (1928); Weiss v. Fenwick, 111 N. J. Eq. 325, 162 Atl. 609 (1932); In re Freeman's Estate, 290 N. Y. S. 7, 160 Misc. Rep. 133 (1936).

[2] Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415 (1882); Flint v. Varney, 220 Iowa 1241, 264 N. W. 227 (1936); Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178 (1875); Gass v. Simpson, 4 Cold. 288 (Tenn. 1867); Thomas v. First National Bank of Danville, 166 Va. 497, 186 S. E. 77 (1936); Johnson v. Colley, 101 Va. 414, 44 S. E. 721 (1903).

[3] McGrath v. Reynolds, 116 Mass. 566 (1875); *see* Hamilton v. Clark, 25 Mo. App. 428, 436 (1887); Smith v. Downey, 38 N. C. (3 Ired. Eq.) 209, 215 (1844).

[4] 116 Mass. 566 (1875), cited *supra*, note 3.

before the donor's death, but it was not until after the donor had died that McGrath received the rest of the money. The court treated the delivery of the two bank books as an actual delivery, and did not mention the possibility that this in itself might have been a constructive delivery by use of a written instrument; but it said that since the remainder of the money was not delivered before the donor's death, the entire gift failed, since the written instrument by which the over all gift was made could not satisfy the requirement of delivery.

The courts of the three above mentioned states, in laying down the rule that actual delivery is necessary to complete the gift, make no attempt to give an explanation or rationalization for the position which they take, but simply state that such is the rule. As is pointed out in *Ellis* v. *Secor*,[5] it seems likely that the requirement of actual delivery to establish a gift *causa mortis* arises, not because of the peculiarities of gifts *causa mortis*, but rather because of the tradition that delivery is necessary to pass chattels by gift of any kind. Blackstone indicates the attitude in the early common law toward delivery in making a gift of chattels when he says, "A true and proper gift or grant is always accompanied with delivery of possession and takes effect immediately, as if A gives to B one hundred pounds or a flock of sheep, and puts him in possession of them, it is then a gift executed in the donee . . ."[6] The foregoing cases which adhere to this strict rule of delivery in gifts *causa mortis* are comparatively old, the most recent one being fifty-seven years old, and for reasons which will be presented below, it seems possible, if not highly probable, that if the question were to come up in these states today, the attitude of their courts would be quite different.

The cases which hold that gifts *causa mortis* can be effectuated without delivery of the thing when a written instrument is used are definitely in the majority.[7] In two

[5] 31 Mich. 185, 18 Am. Rep. 178 (1875).

[6] 2 BL. COMM. (11th ed. 1790) 441.

[7] Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178 (1875), cited *supra*, note 5 (where an envelope addressed to donee was found, which contained a paper signed by donor and reading, "I wish you to take possession of all my effects, to do with them as you see fit."); Kennistone v. Sceva, 54 N. H. 24 (1873) (where paper, delivered to donees by donor, was signed and sealed by donor and signed by three witnesses); Meyers v. Meyers, 99 N. J. Eq. 560, 134 Atl. 95 (1926) (where donor signed and acknowledged a deed assigning to

of these cases, the instrument by which the gift was made was a recorded deed,[8] and in one of them the instrument was under seal,[9] while in the others the instrument used was not of a formal nature.

There are many possible circumstances which would indicate that it is satisfactory to allow the use of a written instrument in place of actual delivery of the thing itself. Quite frequently the actual delivery of the subject of the gift is impossible; this would be true if the donor could not reach the donee, or if the thing to be given could not be obtained. The imminence of the donor's death, which is a requisite of the gift *causa mortis*, makes impossibility of delivery more common in this type of gift than it is in gifts *inter vivos*. There are other cases where actual delivery, although possible, would be extremely difficult, as where a man wishes to give to his wife all of the livestock on his farm.[10] In such a case, if the delivery were actually made, it would amount to a mere formality, and would have far less value in indicating the donor's wishes than would a written instrument, signed by the donor, in which he clearly stated his intentions.

The courts which allow this form of constructive delivery are quite liberal in their application of the rule. They do not limit its use to cases where delivery is impossible or difficult, but hold that it is sufficient in all cases. There is some indication that the donor may continue to use the subject of the gift until his death. In one case[11] the donor, during his last illness,

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his son interest in a bond and left the deed of assignment with a lawyer who was instructed to put it on record if anything happened to donor); *In re* Braun's Estate, 200 N. Y. S. 781, 121 Misc. Rep. 18 (1923) (where donor gave donee a paper signed by donor and reading, "To my niece . . . I give as a gift all my personal property, which I have in my possession during my stay in Germany); *In re* Goodwin's Estate, 185 N. Y. S. 461, 114 Misc. Rep. 39 (1920) (where donor signed a paper reading, "To you, Georgia L. Gardner, in the event of my death, I give you the entire contents of my apartment . . ."); Meach v. Meach, 24 Vt. 591 (1852) (where donor executed a deed of all his personal property to his wife, consisting of stock upon his farm, and choses in action, and had the deed recorded).

[8] Meyers v. Meyers. 99 N. J. Eq. 560, 134 Atl. 95 (1926), cited *supra*, note 7; Meach v. Meach, 24 Vt. 591 (1852), cited *supra*, note 7.

[9] Kennistone v. Sceva, 54 N. H. 24 (1873), cited *supra*, note 7.

[10] Meach v. Meach, 24 Vt. 591 (1852), cited *supra*, note 7.

[11] *In re* Goodwin's estate, 185 N. Y. S. 461, 114 Misc. Rep. 39 (1920), cited *supra*, note 7.

wrote to the donee, saying that in the event of his death he gave her the entire contents of his apartment. At the time, the apartment was sublet, furnished, to a third person, and the donor was receiving the rent from it.

The question of the delivery of the written instrument itself by the donor presents an interesting problem. In the case of *Ellis* v. *Secor*,[12] after the donor's death a slate was found in the donor's apartment with instructions written on it to look into her valise. In the valise was found an envelope, addressed to the donor's physician, which contained a paper, signed by the donor and stating that she wished to give all her possessions to the physician. The court held this to be a valid gift *causa mortis* despite the fact that the paper was not delivered. In a case such as this, it seems that there is too great a possibility that the donor was undecided, or that the donor had changed his mind and therefore had not delivered the paper.

It appears that it would be desirable to have some requirement as to the delivery of the written instrument itself. To make the requirement too strict, however, might prevent the carrying out of the donor's desires in many cases. Perhaps the most timely illustration of this would be the case of a serviceman, mortally wounded in battle, who, in his last moments, attempts to indicate the way in which he wants his belongings to be disposed of.[13] There could be many such cases where delivery even to a third person would be impossible. Yet certainly the courts would not want to interfere with the last expressed wishes of such a person. Perhaps the needs of the various situations could be met by a rule which would require such delivery as was possible after the written instrument was executed. That is, if delivery to the donee was possible after the paper was written, that should be required to make the gift complete; if delivery to a third person but not to the donee was possible, then such a delivery should be required; while if no delivery at all was possible, then none should be required.

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[12] 31 Mich. 185, 18 Am. Rep. 178 (1875), cited *supra*, note 7.

[13] Many such cases are provided for in the liberal requirements of the nuncupative will.