Modernising the Law of Gift

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1. INTRODUCTION

English commercial law has a number of features which are obsolete. This material should be abolished or repealed. What remains should be modernized and placed in statutory form so that it reflects the world we live in today and not that of Victorian - or even earlier - times.1 One such area of law that needs modernization is the law of gift. Although, like the concept of ‘pledge’, 2 this concept is very old, there seem to have been virtually no English specialist texts on it,3 apart from a (dated) one on tax aspects.4 Further, the caselaw is modest. Thus, it would be relatively easy to place the law on gift in legislation. This article considers the same. It also highlights a number of discrepancies and issues which should be resolved, to simplify this area of law in order to make it more intelligible to ordinary people (as well as to lawyers). These issues include the following:

- **Deed or Other Instrument.** At present, a gift can be made, among other ways, by a ‘deed or other instrument’. A prior article has asserted that deeds (and specialties) should be abolished, since their purposive element has ended.5 As to this:
  - **Livery of Seisin.** In Anglo-Saxon and medieval times, land and chattels could only be transferred by ‘livery of seisin’. That is, a party symbolically handing over possession of the land (in the form of a sod of earth or a twig) to another - or physically handing over a chattel - accompanied by words of gift;
  - **Deed replacing Seisin.** From the 14th century, the law held - in the case of land - that a deed could replace the sod of earth (or twig). And, that it could replace the physical delivery of a chattel.6 Since it was a prerequisite of a deed, *inter alia*, that it be: (a) in writing; (b) sealed; and (c) delivered,7 delivery of the deed replaced delivery of the sod of earth or chattel;
  - **Abolition of Livery of Seisin.** The Real Property Act 1845 abolished livery of seisin and land became transferred by means of a deed of *grant*. Thus, the ‘delivery’ component of the deed (replicating delivery of

2 See n 1(d).
5 See n 1(f).
6 See for example, *Pynchoun v Geldeford* (1385), see n 182 (deed of a chattel).
7 Physical delivery soon became nominal. By the time Coke’s *Institutes of the Law of England* was published (1628-41), touching the deed or pointing to (or at) it - once executed - was deemed sufficient delivery. The logic is understandable, since touching the land (being on it) or pointing to it (i.e. in view of the land) was sufficient for livery of seisin.
the land or chattel) became obsolete. However, delivery was still retained as a technical pre-requisite as was another - (d) a deed had to be on paper or parchment (this was abolished in 1989). Today, legislation still requires a deed for the transfer of a legal estate in land as well as of shares in certain companies. In other cases, writing is usually sufficient. It is asserted that these special cases which reflect the older law on livery of seisin should be abolished. Thus, a gift - of any sort - should only require writing and not a deed;

- **Oral Gift of Chattel - Delivery Required.** In Anglo-Saxon and medieval times, a promise to give a chattel was invalid if there was no delivery of the chattel (cf. if the gift was by way of deed, see above). This reflected the paramouncty of 'livery of seisin.' Even the king could not make a valid gift of a chattel by orally promising to do so; physical delivery was essential. This is still the law, although the caselaw shows there was uncertainty, at times, in the past. Legislation should clarify that an oral gift of a chattel requires delivery;

- **Gift - Formality.** A gift can also arise by way of a declaration of trust, which may be oral in the case of chattels. Thus, legislation should clarify that a gift can be made: (a) in writing; (b) orally, in the case of:
  
  (i) a declaration of trust; or
  
  (ii) a movable, if accompanied by delivery;
  
  (iii) a chose in action where title passes by delivery, if accompanied by delivery.

- **Gift - Definition.** Under Roman law and early English law, the hallmark of a gift was that it was gratuitous. A 'disposition arising from pure liberality and without legal compulsion', as Bracton put it. However, in Berry v Warnett (1980), Buckley LJ proposed that the 'ordinary primary meaning' of a gift was:

  a voluntary [i.e. gratuitous] transfer of property made without consideration.

  This is less felicitous since a gift can still be such even if there is consideration. Thus, a transaction may be 'coloured' to represent a contract when, in fact, it is a gift. Similarly, nominal consideration does not stop a gift being such.

  Thus, legislation should define a gift as arising when a person has no legal obligation to give. That is, when it is gratuitous;

- **Gift – Presumed Acceptance.** In early times - for a gift to be valid - the donor had to intend to make a gift and the donee had to accept it as such. As Bracton put it, there had to be 'consensus.' Acceptance (or rejection) by the donee was evident since the donee formally accepted possession of the land (or chattel) in the presence of witnesses. However, when delivery and acceptance were no longer contemporaneous there arose uncertainly as to if - and when - acceptance by the donee should occur.

  - In due course, the law provided that a donee did not require notice of - or have to accept (i.e. consent to) - a gift prior to its becoming legally effective (vesting). The gift vested - subject to the right of a donee to later disclaim;

  - This was based on a rationale that the law might (reasonably) presume that a person would accept something for their benefit. However, this conflicted with another rationale. That the law would not force a

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8. By 1867, the courts were prepared to hold that a deed was 'delivered' as soon as there was any act, or word, sufficient to evidence that a person intended it to bind him, see n 316. Thus, executing the deed was, in practice, sufficient.

9. The pre-requisite the deed be on 'parchment or paper' was only a 16th requirement. See McBain, n 1(f), fn 218. When this pre-requisite was abolished by the Law of Property (Miscellaneous Provisions) Act 1989, deeds became identical, in law, to any other writing. Thereafter, the distinction was only preserved by the Act requiring a deed to: (a) state it was such; (b) be attested. However, these requirements are makeweights since - regardless of what the parties call a document - a court can conclude otherwise. Also, other writings can be attested. See also W West, Symboleography (last ed, 1647 ed, rep Garland Pub. Inc), pt 1, book 1, s 45 'before the invention of paper or parchment, men used to write sometimes upon boards rubbed over with ware [wear], sometimes upon stones, sometimes upon metal, and sometimes upon the inner rinds of the barks of trees: and sometimes at this day upon tables, stones or tallies.'

10. In 1330, Edward III (1327-77) sought to give away wine and jewels orally without handing them over, see n 185. The Barons of the Exchequer refused to treat them as valid gifts, since there was no livery of seisin (delivery).


12. In James v Lock (1865), Cranworth LC had expressed his concern about such oral gifts, see n 338.

13. In the case of land, any declaration of trust must be in writing. Law of Property Act 1925, s 53(1)(c). Writing would include electronic writing.


15. e.g. a gift structured as a sale for tax purposes or otherwise; Howard v Earl of Shrewsbury (1867), see 10(b).

16. Indeed, a bond can be given as a gift even though, being a specialty, consideration is presumed. See ns 276 & 592.
gift on a person. The logic of the former rationale also became strained when the law presumed a person would accept an onerous trust;

Today, these rationales should be dispensed with - legislation stipulating when a gift vests;

- **Gift - Acceptance Otherwise by Donee.** There is uncertainly as to the legal position where the donor intends a gift but the ‘donee’ accepts it otherwise, for example, as a loan. Legislation should clarify that this is not a gift since the donee has rejected it as such;

- **Gift - Mortis Causa.** From Anglo-Saxon times, it has been possible for a person to make a gift in contemplation of death. Over time, unnecessary discrepancies between gifts inter vivos and mortis causa have arisen, especially in relation to choses in action and the delivery of chattels. Legislation would remove these.

In conclusion, the law on gift should be simple and intelligible for ordinary people. Not, a via crucis. Such can be achieved if it is placed in legislation. Since many of the problems relating to the law on gift have arisen as a result of history, it is useful to review the historical development of gift.

2. ANGLO-SAXON LAW

(a) General

In Anglo-Saxon times, the law was relatively simple. It had to be for a variety of reasons:

- **Population.** The population was small. When the Anglo-Saxons first arrived in the 5th century AD, there was (likely) a great decline in the local population as a result of war and plague (the same occurred in Europe). This was exacerbated with the arrival of Danish armies (the Vikings) from AD 866. Even by the time of the Norman Conquest in 1066, the population of England would (likely) have been no more than 2 million people and widely scattered at that. Also, few people in Anglo-Saxon times were able to read, write or were numerate;

- **Different Cultures & Languages.** Anglo-Saxon England comprised a mixture of cultures with different languages and three legal systems;

- **Troubled Times.** England was, frequently, convulsed with disease, violence and war. London - and the few other major towns which existed - were, often, sacked.

Anglo-Saxon England was also, mainly, agricultural. There was relatively little by way of trade - including foreign trade - something which only began to change by the 10th century. Further - and this was likely the result of Germanic customs and the influence of the Catholic church as well as the absence of writing - there was a heavy emphasis on custom and on ceremony (ritual) in all spheres of life, including in legal matters. The tendency was to do things as they had been done in the past. Legal and judicial innovation was slow.

Against this background, the law of gift in Anglo-Saxon England is considered.

(b) Law of Gift - Land

As Hudson noted, the position in respect of the transfer of land - whether by sale, exchange or gift - in Anglo-Saxon

17. e.g. Dewar v Dewar [1975] 2 AE 728, see 13.
19. This could have been by as much as 50%, see GS McBain, Modernising the Law: Breaches of the Peace and Justices of the Peace (2015) Journal of Politics and Law, vol 8, no 3, p 166.
20. As from AD 866, Danish armies began to winter in England - as opposed to raiding periodically. They brought with them their Danelaw.
21. RH Britnell, The Commercialisation of English Society 1000-1500 (Manchester UP, 1996), p 5 asserted that ‘There were perhaps fewer than 5m people living in the 13,278 places recorded in Domesday Book.’ Cf. CK Allen, The Queen’s Peace (Hamlyn Lecture, 1953), p 4, who thought that the population of England in 1087 was c. one and a half million people. See also G Davies, A History of Money (University of Wales Press, 2002), p 137 (he estimated, in 1087, the population was between 1.375m - 1.5m).
22. Even as late as the time of Henry I (1100-35), it was stated that ‘English law is ... divided into three parts...one is the law of Wessex, another the law of Mercia, and the third the Danelaw.’ See LJ Downer, Leges Henrici Primi (Oxford, 1972), p 97.
24. The principal item of trade was cattle which, in the absence of coinage, were treated as such, see n 48.
times is problematic due to a lack of information. Further, the modern day distinction between ownership and possession did not exist. The issue - to the Anglo-Saxon mind - was who possessed the land (or chattel) and whether such possession was valid. However, it seems relatively clear there existed certain legal categories in respect of land, viz:

- **Bookland (Bookland).** This comprised a royal gift of land made by charter or will. Bookland was, originally, restricted to religious houses and, later, extended to laymen. What its precise legal nature was, is less clear. That is, whether it transferred ownership in royal land or whether it was more limited in extent, being only a grant of superiority (i.e. of fiscal and judicial rights);

- **Loanland.** This comprised the lease (loan) of land for a limited period. Thus, it prevented inheritance;

- **Folkland.** What this comprised is uncertain. The tendency has been to refer to 3 possible alternatives:
  - It may have been a broad category, taking in most (if not all) land that was not bookland;
  - It may have referred to land that had passed into the hands of an individual but which had, once, been some form of communal land; or
  - It may have referred to land associated with the king, distinct from other land under his more complete personal disposal. That is, it referred to Crown land (i.e. land associated with his kingship, the kingdom and its people), which land was not permanently alienable.

Even though there is uncertainty what these categories stood for, what does seem clear is that any transfer of land in Anglo-Saxon times, including by way of gift - in order to be legally valid - required the delivery (livery) of possession (seisin). Since physical delivery was not possible in the case of land, such delivery was symbolic. Pollock and Maitland stated with reference to the time of Bracton (c. 1240):

> It is absolutely essential - if we leave out of account certain exceptions that are rather apparent than real - that there should be a livery of seisin. The donor and the donee in person or by attorney must come upon the land. There the words of gift will be said or the charter, if there is one, read. It is usual, though perhaps not necessary, that there should be some further ceremony. If the subject of the gift is a house, the donor will put the hasp or ring of the door into the donee’s hand (tradere per haspam vel anulum); if there is no house, a rod will be transferred (tradere per fustem et baculum) or perhaps a glove. Such is the common and the safe practice; but it is not indispensable that the parties should actually stand on the land that is to be given. If that land was within their view when the ceremony was performed, and if the feoffee made an actual entry on it while the feoffor was yet alive, this was sufficient feoffment. But a livery of seisin either on the land or ‘within the view’ was necessary. Until such livery had taken place there was...

25 Hudson, n 18, p 93 ‘the sources from which one can uncover the norms of Anglo-Saxon landholding are both limited and problematic. There is little of relevance in the written laws... a large number of documents are lost... We also lack materials to produce accurate estate histories that might indicate land-holding practices.’ Ibid, p 147 ‘Much remains obscure in the history of late Anglo-Saxon land law, particularly outside the best documented aspects of bookland and loanland.’ P & M, n 18, vol 1, p 57 ‘the [Anglo-Saxon] law of property is customary and unwritten, and no definite statement of it is to be found anywhere.’

26 P & M, n 18, vol 1, p 57 ‘it is hardly correct to say that Anglo-Saxon customs... deal with ownership at all... Possession, not ownership, is the leading conception; it is possession that has to be defended or recovered, and to possess without dispute, or by judicial award after a dispute real or feigned, is the only sure foundation of title and end of strife. A right to possess, distinct from actual possession, must be admitted if there is any rule of judicial redress at all; but it is only through the conception of that specific right that ownership finds any place in pure Germanic law.’

27 Ibid, p 60 ‘bookland... could be disposed of by will.’ See also Hudson, n 18, p 122 et seq. It seems that land other than bookland could also be disposed of by will. Ibid, pp 123-7. Wills could be oral as well as written and both were made in the presence of witnesses. Ibid, p 131. See also TFT Plucknett, A Concise History of the Common Law (Butterworth, 5th ed, 1956), pp 518-20 and Baker, n 18, p 224.

28 Hudson, n 18, p 94 ‘Bookland was the product of a royal grant, and royal bocs, that is charters, survive from the seventh century onwards. The word boedland first appears in ninth-century evidence. It could be used to refer to physical pieces of land or to a category of land. As far as can be told, at first bookland was granted only to religious houses, although Bede’s Letter to Egbert (734) shows laymen setting up dubious monasteries and thereby benefitting from the advantages of bookland. From the late eighth century, bookland grants were also made to laymen.’ P & M, n 18, vol 1, p 60 ‘Our Anglo-Saxon charters or books are mostly grants of considerable portions of land made by kings to bishops and religious houses, or to lay nobles. Land so granted was called book-land, and the land conferred a larger dominion than was known to the popular customary law.’ See also FW Maitland, Domesday Book and Beyond (Collins, 1965), ch 4. Baker, n 18, p 224 ‘Land ‘books’ may have been used at first to make grants in perpetuity to the Church; but by the ninth century they were also used for similar perpetual grants from the king to laymen, who were in return generally liable to military service.’

29 Ibid, n 18, p 95.


31 Hudson, n 18, p 106.

32 Ibid, pp 102-7. See also P & M, n 18, vol 1, pp 61-2. At p 62 ‘Folk-land, then, appears to have been... land held without written title under customary law.’ See also Plucknett, n 27, p 519.
no gift; there was nothing but an imperfect attempt to give.\textsuperscript{33} Pollock and Maitland also noted this (likely) represented the position under ancient German and Anglo-Saxon law.\textsuperscript{34} They described the likely ceremony:\textsuperscript{35}

The two men each with his witnesses appear upon the land. A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife may also be delivered, and it may be kept by the donee as material evidence of the transaction; perhaps its point will be broken off or its blade twisted in order that it may differ from other knives. But before this the donor has taken off from his hand the war glove, gauntlet or thong, which would protect that hand in battle. The donee has assumed it; his hand is vested or invested; it is the vestita manus that will fight in defence of this land against all comers; with that hand he grasps the turf and the twig. All the talk about investiture, about men being vested with land, goes back, so it is said, to this impressive ceremony. Even this is not enough; the donor must solemnly forsake the land. May be, he is expected to leap over the encircling hedge; may be, some queer renunciatory gesture with his fingers (\textit{curvatis digitis}) is demanded of him; may be, he will have to pass or throw to the donee the mysterious rod or \textit{festuca} which, be its origin what it may, has great contractual efficacy.\textsuperscript{36}

There was (likely) a Biblical basis for the presence of witnesses - as well as using an object to symbolize the land - since Anglo-Saxon law was much influenced by the church.

- \textbf{Witnesses.} Abraham bought a field with a cave (in Hebron, Canaan) from Ephron the Hittite in which to bury his dead. The transaction was conducted in the presence of all the Hittites who had come to the gate of the city - the place where legal matters were transacted and attested in Canaan. The Bible states:

  \begin{quote}
  So Ephron’s field in Machpelah near Mamre - both the field and the cave in it, and all the trees within the borders of the field - was legally made over to Abraham as his property in the presence of all the Hittites who had come to the gate of the city;\textsuperscript{37}
  \end{quote}

- \textbf{Sandal to evidence Seisin.} When a kinsman of Elimelech gave Boaz a parcel of land belonging to him, he took off his sandal and give it to Boaz in the name of seisin of the land (after the manner in Israel) in the presence of witnesses.\textsuperscript{38}

Pollock and Maitland noted that at some historical point in Germanic times - this ceremony could be transacted \textit{away from} the land. This was achieved by a symbolical representation of the land - such as a sod of earth - being laid on a shrine or altar.\textsuperscript{39} And:

When, under Roman influence,\textsuperscript{40} the written document comes into use this also can be treated as a symbol; it is delivered in the name of the land; the effectual act is not the signing and sealing, but the delivery of the deed, and the parchment can be regarded as being as good a representative of land as knife and glove would be. Just as of old the

\textsuperscript{33}P & M, n 18, vol 2, pp 83-4. Pollock and Maitland refer to YB 20-1 Edw I, p 256 (1292) where Cave J asked the jurors whether the feoffee was so near to the land that he could see it or point it out with his finger.

\textsuperscript{34}Ibid, p 84 'It seems probable that in this respect our law represents or reproduces very ancient German law, that in the remotest age to which we can profitably recur a transfer of rights involved of necessity a transfer of things, and that a conveyance without livery of seisin was impossible and inconceivable.'

\textsuperscript{35}Ibid. Also 'Of the ancient German conveyance we may draw some such picture as this: - The essence of the transaction may be that one man shall be quit and another take possession of the land with a declared intention that the ownership shall be transferred; but this change of possession and the accompanying declaration must be made in a formal fashion, otherwise it will be unwitnessed and unproveable, which at this early time is as much as to say that it will be null and void. An elaborate drama must be enacted, one which the witnesses will remember. The number and complexity of its scenes may vary from time to time and from tribe to tribe. If we speak of many symbols and ceremonies, we do not imply that all of them were essential in any one age or district.'

\textsuperscript{36}Ibid, p 85.

\textsuperscript{37}Book of Genesis, ch 23, vv 17 & 18. Ephron stated what was, likely, the formulaic language ‘Listen to me; I give you the field, and I give you the field that is in it. I give it to you in the presence of my people. Bury your dead.’ Abraham ‘Listen to me, if you will. I will pay the price of the field. Accept it from me so that I can bury my dead there.’ Ephron then quoted the price (400 shekels of silver) and ‘Abraham agreed to Ephron’s terms and weighed out for him the price he had named in the hearing of the Hittites: four hundred shekels of silver, according to the weight current among merchants.’ See The \textit{Compact NIV Study Bible. New International Version} (Hodder & Stoughton, 1998) (‘Bible’).

\textsuperscript{38}Bible, n 37, Book of Ruth, ch 4, v 7 ‘Now in earlier times in Israel, for the redemption and transfer of property to become final, one party took off his sandal and gave it to the other. This was the method of legalising transactions in Israel.’

\textsuperscript{39}P & M, n 18, vol 2, p 86. For the use of the altar in the 12\textsuperscript{th} century and the use of knives, see MT Clanchy, From \textit{Memory to Written Record} (2005), pp 256, 258.

\textsuperscript{40}Roman classical law had required the handing over of the thing (\textit{traditio rei}) but, later on, ownership of land could be practically transferred by charter. See P & M, n 18, vol 2, p 89. See generally, AM Prichard, \textit{Leage’s Roman Private Law} (3\textsuperscript{rd} ed, 1961), pp 195-200; TC Sanders, The \textit{Institutes of Justinian} (Longmans, 1962), pp lii & 112-3; WW Buckland & AD McNair, \textit{Roman Law and Common Law} (Cambridge UP, 2\textsuperscript{nd} ed, 1952), p 112; WW Buckland, A \textit{Text-Book of Roman Law from Augustus to Justinian} (Cambridge UP, 1921), p 232 and T Wood, A New \textit{Institute of the Imperial or Civil Law} (printed by WB, 1704), pp 110-20.
Finally, a transfer of land could be achieved in the presence of a court. Whether these stages had been achieved by the end of Anglo-Saxon times, Pollock and Maitland were uncertain.

- In the case of bookland, it may have been that - once the land had been booked - delivery of the charter (writing) was treated the same as livery of seisin.
- However, it is clear that livery of seisin continued into Norman times and beyond. This suggests that a charter in Anglo-Saxon times (and there were few) was not dispositive of the investiture of possession of land (or a chattel) but evidential only.

Thus, even if a charter existed, there still had to be - for a valid gift of land or a chattel - the going through a ceremony - when on the land or in view of it - in which a person divested himself of possession (seisin) of that land and gave it to another. How did Anglo-Saxon distinguish between a true ‘gift’ of land - one that was gratuitous - and a sale of land?

- **Seisin.** It would seem such a distinction was not of primary interest to the Anglo-Saxon mind. The central issue was whether seisin (possession) had been given. And, proof of this was whether a person had received possession according to the prescribed ritual, in the presence of witnesses of good fame (reputation). Thus, the words ‘give’ and ‘grant’ were used, virtually, as synonyms;
- **Debt.** To the Anglo-Saxon mind - whether a person had bought the land or had been given it - would have been of secondary interest since seisin had been given to another. And, once seisin had been given, to go back to determine whether money had been paid (or not) would no longer have been relevant to the issue of possession. Whether the seller was unpaid, was another legal issue. That of indebtedness. Given this, one imagines that - where payment for land was made - it was immediate or in circumstances where the seller was confident he would secure the money.

Thus, it would seem clear that a gift of land in Anglo-Saxon times could only be effected by the donor and the donee being physically present on the land in question with the symbolical delivery (livery) of possession (seisin) of that land being given by the donor to the donee, who accepted it.

- In later Anglo-Saxon times it may have been that donor and donee did not have to be physically on the land but in ‘view’ of it, in the presence of witnesses;
- And, later, not even in view of the land but with the ceremony conducted by the donor placing a sod of the land (or knife or other representation of the land) on an altar. Or, the ceremony being conducted before an Anglo-Saxon court. Both these would have been in the presence of witnesses.

However, it is dubious whether - even in the case of bookland - Anglo-Saxon law was prepared to accept the delivery of a charter alone as satisfying livery of seisin. At most, the charter may have stood in for the sod of land.

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41 P & M, n 18, vol 2, p 86.
42 Ibid ‘And lastly there are, as we shall see hereafter, advantages to be gained by a conveyance made before a court of law after some simulated litigation; and one part of the original ceremony can be performed there; the donor or vendor can in court go through the solemnity of surrendering or renouncing the land; the rod or festuca can be passed from hand to hand in witness of this surrender.’
43 Ibid, p 87 ‘It would seem that, when once land had been booked, a delivery of the original deed was sufficient to transfer proprietary rights from one man to another. Occasionally, though but rarely, we hear of a turf being placed upon the altar.’ Hudson, n 18, p 141, in respect of whether bookland could be transferred by charter alone stated ‘Whether some other form of ceremonial livery was needed for a valid grant in addition to, or rather than, a ceremonial transfer of the document is not clear from the evidence.’ Cf. FW Maitland, The Collected Papers of Frederic William Maitland (Cambridge UP, 1911), vol 1, p 383 ‘Should it even be proved that the Anglo-Saxon charter or ‘book’ passed ownership without any transfer of possession, this will indeed be a remarkable fact…’
44 Anglo-Saxon law makes much reference to the ‘fame’ (good reputation) of a man and one can see why. The giving of oaths - and being a witness for others - was very much part of everyday life and judges were dependent (in the absence of written evidence) on this.
45 See P & M, n 18, vol 2, p 87. This may also be explained by the fact that, in Roman law, a gift was not (strictly) treated as a distinct form of transfer but as a good reason (iusta causa) for the same. Thus, delivery was legally required but ‘gift’ was the reason (purpose, motive) for such delivery. Prichard, n 40, p 197 ‘Justinian speaks of gift as a mode of acquisition, but this is not so; it is merely a iusta causa for the traditio which transfers the ownership.’ Wood, n 40, p 110 ‘Gifts are distinct from delivery, because they include that and the cause of it.’ See also Sanders, n 40, p lii.
46 One imagines disclaimer rarely occurred. If the donee did not want the land for whatever reason he did not attend to be invested (vested) with it.
47 Roman law had the same concept, Buckland, n 40, p 228 ‘Traditio longa manu was pointing out the thing to the transferee, and authorising him to take it, in such conditions that it was in his immediate power to do so.’
knife or other object.

(c) Gift - Chattels

Pollock and Maitland stated in respect of chattels:

Movable property, in Anglo-Saxon law, seems for all practical purposes to be synonymous with cattle.48 Not that there was no other valuable property; but arms, jewels, and the like, must with rare exceptions have been in the constant personal custody of the owners or their immediate attendants. Our documents leave us in complete ignorance of whatever rules existed. We may assume that actual delivery was the only mode of transfer between living persons...49

Thus, livery (delivery) of seisin (possession) was required for any transfer of a chattel - including a gift. Further, it is asserted that it would have been easy to distinguish between a gift and a sale of a chattel in Anglo-Saxon times since the latter were conducted in designated markets and the acts performed (in the case of sale, haggling over the price in the presence of witnesses) would have been wholly different. Considering sale first - at least, by the laws of Edward the Elder (AD 899-924) and of Aethelstan I (AD 924-39) - it seems that sales of more valuable goods such as larger livestock (horses, oxen, cattle, slaves etc)50 were restricted to: (a) towns; or (b) when in the presence of the portreeve (an official of the king) or other man of credit.51

- **Control of Markets.** The Crown seeking to control markets is understandable. Anglo-Saxons - like their German forbears 52 - were a violent people and disputes frequently led to bloodshed. Further, any large gathering of persons in a market could lead to social disturbance. Thus, the law (and the king) would want to control such matters.53 The Crown had another incentive. Money. These laws of Edward the Elder and Aethelstan indicate that the Crown was asserting its prerogative over the right to hold markets - a right later franchised, for its financial benefit;

- **Buying & Selling.** As for buying and selling in markets, it would have been oral in the vast majority of cases, with immediate physical delivery of the item or a token (earnest) to evidence later payment and delivery. Further - and very importantly - there had to be witnesses to 'vouch warranty'.54

Indeed, one would suggest that - in Anglo-Saxon markets - buying and selling took much more time than today and that the number of sales conducted were much less55 since - if all that a man had was a horse, a cow and a few pigs - the consequences of making a bad bargain could be starvation. Further, given the absence of coinage in

48 Also, P & M, n 18, vol 1, p 55 'Theft, especially of cattle and horses, appears to have been by far the commonest and most troublesome of offences.' It seems likely Maitland did not fully realise why this - and cattle stealing - was such a large part of Anglo-Saxon law (although he was aware that cattle were treated as coinage. Ibid, p 151). However, after the departure of the Romans in AD 410, it seems that coins ceased being used as a medium of exchange from c. AD 435-630. Further, the re-introduction of coinage even after AD 630 was something of a false dawn since it was not until the Statute of Greatley AD 928 that England was sufficiently united for Anglo-Saxon law to stipulate a single national currency. As a result, cattle (and - to a lesser extent - sheep, pigs and horses) were treated as currency. See Davies, n 21, ch 4. This leads one to also suppose that exchange (barter) was, likely, more extensive than sale in Anglo-Saxon England - at least, prior to the late 7th-8th century. An emphasis on exchange (barter) - and using animals as currency - is, also, to be found in Germanic law. Thus, Tacitus on Britain and Germany (Penguin, 1954), pp 111, 118 noted the Germans used cattle, horses and sheep to pay fines - including fines for homicide. Ibid, p 104 'The peoples of the interior, truer to the plain old ways, employ barter.' Ibid, of their flocks of sheep and cattle 'It is numbers that please, numbers that constitute their only, their darling, form of wealth.'

49 P & M, n 18, vol 1, p 57. See also Hudson, n 18, p 152. Movable could be transferred by will as well as inter vivos. Ibid, p 152.

50 Village sales (or barter) of produce for smaller livestock (sheep, hens), vegetables, trinkets etc. one imagines, were resolved (in the case of dispute) at a local level and the law was not interested in them. Travel, anyway, in Anglo-Saxon England would have been restricted - not least, by the danger, the poor state of roads and the lack of any profit element in it. See also, n 1(i)(The Strange Death of the Law Merchant), s 3.

51 See n 1(i)(The Strange Death of the Law Merchant), s 3. Also, Hudson, n 18, pp 153-4.

52 Tacitus, n 48, pp 112-3: 'The Germans have no taste for peace; renown is easier won among perils, and you cannot maintain a large body of companions except by violence and war...They love indolence but they hate peace.' Ibid, p 113 'You will find it harder to persuade a German to plough the land and await its annual produce with patience than to challenge a foe and earn the prize of wounds. He thinks it spiritless and slack to gain by sweat what he can buy with blood. When not engaged in warfare, they spend some little time in hunting, but more in idling, abandoned to sleep and gluttony.' Ibid, p 120 'Their food is plain - wild fruit, fresh game or curdled milk.' Ibid, p 122 'They plant no orchards, fence off no meadows, water no gardens; the only levy on the earth is the corn crop.'

53 Unlike modern times, one would suggest that the Anglo-Saxon reeve (the shire reeve or sheriff) and his officers were omnipresent in borough (fortified town) markets and that they were armed, to quell any trouble.

54 See n 1(i)(The Strange Death of the Law Merchant), s 3.

55 Also, one may surmise that Anglo-Saxon markets (as in medieval times) were divided up into specific trades - the sale of live animals in one area, meat in another, clothes in another etc.
much of Anglo-Saxon history, barter (exchange) may well have been the norm, at least, until the 10th century when trade developed more. Due to all this one would suggest that it was easy - in practice - to distinguish a gift, from a gift, of goods.

- **Sale.** A sale was in a designated market with witnesses and the king’s reeve (or his officers) in attendance. A gift would not be made in a market.

- **Words of Gift.** The words employed in the making of a gift in Anglo-Saxon times would, likely, have reflected (in Anglo-Saxon) the equivalent of the Roman ‘*dono dare*’ in some manner- ‘*dono*’ signifying the motive was a gift and ‘*dare*’ that possession/title was to pass by delivery.

As for gifts, the Anglo-Saxons - like their Germanic forebears - often exchanged gifts between kings (and popes), chiefs and dignitaries. Gifts were also made on marriage, in contemplation of death (*donatio mortis causa*, hereinafter ‘DMC’) and by will. Writing in all these cases would have rare since, probably, not even 5% of the population could read or write.

- **Gifts in General.** It is unclear whether there was a set ceremony for the gift of a chattel. However, it would seem likely. Further, the context of the ceremony would have involved the physical transfer of possession of the chattel by the donor to the donee. Invariably, the ceremony would have been in public with witnesses. Often, there would have been a mutual exchange of gifts. One imagines a public disclaimer would have been rare. Likely, it was treated as an insult;

- **Marriage - Morning Gift.** Among the Anglo-Saxons, a gift was made by the bridegroom (the husband) to the bride (wife) after the consummation of the marriage - the ‘morning gift’ or *morgengift.* Among wealthy people, this took the form of land. Otherwise, the morning gift was (likely) given in the form of money - although it seems that a woman could not be purchased, as such, for the purposes of marriage. The laws of king Aethelberht (AD 588-616) provided for the return of such a gift on a failure to produce a child and those of Canute (1016-35), on widowhood. After the Norman Conquest, the morning gift seems to have died out - a dowry being given by the husband instead;

56 See n 48. Also, Anglo-Saxon coins were few in number and their authenticity was not guaranteed. Further, like medieval coins, they were often clipped (if silver) or divided up, with the result that it was easy to lose the coin. All this would suggest that a cautious man conducted barter unless he was sure of the integrity of the other party with whom he traded.

57 To avoid confusion, one imagines that gifts were never made in such markets, but elsewhere.

58 Sanders, n 40, p 147 ‘The phrase *dono dare* was appropriated in Roman law to the mode of transferring property by gift; *dare* signifying that the whole property in the thing was passed by delivery, and *dono* expressing the motive from which the delivery was made.’

59 Tacitus, n 48, p 104 mentioned that the Germans (their chiefs and envoys) received gifts. Ibid, p 112 ‘Chiefs are courted by embassies and complimented by gifts…’. Ibid, p 113 ‘It is usual for states to make voluntary and individual contributions of cattle or agricultural produce to the chiefs. These are accepted as a token of honour, but serve also to relieve essential needs. The chiefs take peculiar pleasure in gifts from neighbouring states, such as are sent not only by individuals, but by the community as well - choice horses, splendid arms, metal discs and collars; the practice of accepting money payments they have now learnt - from us [the Romans].’ Ibid, pp 112-3 ‘The companions [of the chiefs] are prodigal in their demands on the generosity of their chiefs. It is always ‘*give me that war-horse*’ or ‘*give me that bloody and victorious spear.*’

60 For example king Canute (1016-35), in his proclamation of 1027, after he had visited Rome stated ‘there was a great assembly of nobles there [in Rome] at the celebration of Easter with my lord the pope John [Pope John XIX, 1024-32] and the emperor Conrad [Conrad II, Holy Roman Emperor, 990-1039], namely, all the princes of the nations from mount Garganus [in northern Apulia] to the sea which is nearest [to us], all of whom received me graciously and honoured me with costly gifts; but chiefly was I honoured by the emperor with various gifts and costly presents, both vessels of gold and silver and mantles and very costly robes.’ See also Robertson, n 14, p 147. Ibid, p 217 (*Laws of Canute*) ‘there shall never be any interference with bargains successfully concluded or with the legal gifts made by a lord.’

61 Tacitus, n 48, p 115 noted, in respect of the Germans, ‘The dowry is brought by husband to wife, not by wife to husband. Parents and kinsmen attend and approve of the gifts, gifts not chosen to please a woman’s whim or gaily deck a young bride, but oxen, horse with reins, shield, spear and sword. For such gifts a man gets his wife, and she in turn brings some present of arms to her husband.’ Cf. W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1st ed, 1765-9, Univ. of Chicago Press, rep 1979), vol 2, p 138. See generally, P & M, n 18, vol 2, ch 7.


63 The Laws of Canute, provided that ‘no woman or maiden shall ever be forced to marry a man whom she dislikes, nor shall she be given for money, except the suitor desires of his own free will to give something.’ See Attenborough, n 18, p 213 and Hudson, n 18, p 238.

64 Robertson, n 18, p 15 ‘If she [the bride] does not bear a child, [her] father’s relatives shall have her goods, and the ‘morning gift.’”

65 Ibid, p 211 ‘Concerning widows, that they remain for a year without a husband. And every widow shall remain twelve months without a husband, and she shall afterwards choose what she herself desires. And if then, within the space of a year, she chooses a husband, she shall lose her morning-gift and all the property which she had from her first husband and his nearest relative shall take the land and the property which she had held.’
Causa Mortis & by Will Gifts in contemplation of death (mortis causa) and by will existed in Anglo-Saxon times viz.:
(a) per novissima verba (gifts made on the deathbed, i.e. mortis causa); and
(b) post obit (made in the lifetime of the grantor, to take effect on his death, i.e. by will)
with Pollock and Maitland believing that these two coalesced - possibly from the 9th century. However, what is important to note for the modern law on gift (see 20) is that an Anglo-Saxon gift made mortis causa was treated as inter vivos and that delivery (livery) of seisin was required.

As for later Anglo-Saxon law, the so-called laws of Edward the Confessor (likely written c. 1140’s) stated nothing on the law of gift.

(d) Conclusion
Anglo-Saxon society was very much one of custom and ceremony, in the presence of witnesses, to evidence legal acts and there are no good grounds for supposing this did not also apply to gifts. Thus, in the case of a gift of a:

- Chattel. The law required formal physical delivery - and acceptance - of the chattel in the presence of witnesses. The place of transfer (not in a market) and the words employed in the ceremony would have been sufficient to distinguish a gift from a sale (or exchange);
- Land. The donor and donee would have been physically located on the land in question. In the presence of witnesses, there would have been a ceremony involving the symbolic transfer (vesting of possession) of that land from the donor to the donee using an object to represent the land (a sod of earth, twig, knife). It is also likely that the donor - at the end of the ceremony - physically departed from the land, to evidence his renunciation of it. Whether Anglo-Saxon law had moved, by the time of the Norman Conquest, to accepting that transfer by charter alone (in the case of bookland) was sufficient, is a moot point. One would suggest not.

In conclusion, Anglo-Saxon law recognized - in the case of the gift of a chattel - only the physical delivery of possession (seisin) of the object from the donor to the donee, in a ceremony in which words of gift were employed. In the case of land, likely, symbolic delivery of possession (seisin) was also, always, required - with any writing (carta) being evidential only and not dispositive.

3. NORMAN CONQUEST (1066) - GLANVILL (c. 1189)
(a) Norman Conquest 1066
Legal ceremony - once established and perfected - takes a long time to change and it is suggested that the requirement of delivering possession (seisin) in the context of a ceremony with set words continued long after the Norman Conquest in the case of land and chattels. Indeed, there is no evidence that the Normans were, generally,
more literate than the Saxons. As it is:

- Reference to gift was not made in the (asserted) Laws of William I while the coronation charter of Henry I (1100-35) referred to the marriage settlement;
- The Laws of Henry I (c.1113) followed the laws of Canute in respect of the marriage gift. They also indicated that gift-giving (likely) took place in the course of formal drinking assemblies.

There was a change, however, in that the legal categories of land the Anglo-Saxons employed disappeared after the Norman Conquest. Instead, in the case of land, there was conveyance by feoffment with livery of seisin. Kiralfy stated:

The primitive mind could conceive of a transfer of property only by some physical delivery: in the case of land by a symbolic form, such as putting the grantee in possession or delivering to him a stick or a ring. From the earliest period of the common law, however, a conveyance of land could be effected either by an act of the parties themselves or by the intervention of the courts, owing to the solemnity and dignity with which judicial ceremonies were invested...

The form of conveyance by act of the parties, which may be regarded as symbolic of the Middle Ages, was feoffment with livery of seisin. It was the normal and regular mode of creating or transferring interests in land held by freehold tenure. The form had two integral parts - namely, (i) livery of seisin, and (ii) the words of donation marking out the interest taken, and the services to be rendered therefor, as the livery was in itself ambiguous on these points.

The word ‘feoffment’ derived from the Anglo-Norman ‘feoffer’, to give a ‘fee’ (alsoreferred to as a ‘fief’ or ‘feud’) which referred to the practice of William I (1066-87) giving out land to a person (and his heirs) in return

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74 Baker, n 18, p 12 ‘The Norman invaders were warlike, uncultured and illiterate.’ This equally applied to the Anglo-Saxons for most of their history.
75 Hudson, n 18, p 376 ‘The most common Latin words used to refer to movables were catallum or its plural catalla and pecunia, both of which can mean goods in general, but can also refer specifically to cattle, whilst pecunia was also used to refer to money.’ Ibid, p 376, n 5 ‘Catallum is related to the Old French chattel.’ See also Baker, n 18, p 380 and P & M, n 18,vol 2, p 32.
76 Hudson, n 18, p 366 noted ‘written bequests of land seem to have been less common than in the late Anglo-Saxon period…’. See generally, Hudson, ch 14 & 15 on the impact of the Normans Conquest. See generally, Hudson, chs 14 & 15 on the impact of the Normans Conquest. 79 They also indicated that gift-giving (likely) took place in the course of formal drinking assemblies.
77 Robertson, n 18, p 235 et seq.
78 Ibid, p 279 ‘if, on the death of her husband, a wife is left and has no children, she shall have her marriage settlement (dotem suam) and dowry (maritationem)... if the wife is left with children, she shall have her marriage settlement and dowry…’ The marriage settlement was the money, or property, settled on her by her husband [the morning gift] and the dowry, the money or property brought by the wife from her own family. Ibid, p 371 ‘Instances of the withdrawal of the marriage-settlement from a widow on her remarriage are fairly frequent in the Middle Ages.’
79 Downer, n 22, p 113 ‘Every widow shall remain without a husband for twelve months; after that she shall choose whom she wishes. If within the space of one year she takes a husband, she shall lose her morning-gift [morgangifan] and all the property which she had from her first husband.’ See also Plucknett, n 27, p 566.
80 Ibid, p 253 ‘In the case of every drinking assembly which has been set up for the making of any gift or purchase or guild meeting or for anything of this kind, the peace of God and of the master of the house is first of all to be established, by a public pronouncement made, among those who have assembled, and the demand is to be made that if anyone brings a charge against another there for whatever reason, if he is agreeable he shall do this publicly, and security shall be given to him for the doing of justice at an appropriate time, as and where it is just.’ (Italics supplied).
81 Hudson, n 18, p 250. Baker, n 18, p 225 ‘No more was heard of bookland and folkland.’
82 The main means of conveying property by means of entry on court records were: (a) the fine (the final settlement, finalis concordia); and (b) the recovery. However, as Kiralfy, n 66, p 291 noted, livery of seisin was still required. ‘In either case the transfer was not complete before the court had made formal livery of seisin of the land, the subject of the litigation, to the plaintiff, until the Statute of Uses [1536] rendered this unnecessary. Both fines and recoveries were abolished by the Fines and Recoveries Act, 1833 [3 & 4 Will 4 c 74].’ See also P & M, n 18, vol 2, p 103 ‘[Seisin] can not be transferred by a written instrument, nor by a compromise however solemn, nor even by the judgment of a court.’ Ibid, pp 104-5. See also Cruise, n 18, vol 5, p 64.
83 Kiralfy, n 66, p 215. See also Cruise, n 18, vol 1, pp 47 & 49.
84 E Coke, Institutes of the Laws of England (W Clarke & Sons, London, last ed, 1824, which is cited), vol 1, 9° ‘Feoffment is derived of the word of art foedum, quia est donatio foedii; [feud, because it is a gift of the fee] for the ancient writers of the law called a feoffment donatio, of the verb do or dedi, which is the aptest word of feoffment.’ Ibid, 271a, note ‘The most comprehensive definition which can be given of a feoffment, seems to be conveyance of corporeal hereditaments, by delivery of the possession upon, or within view of, the hereditaments conveyed.’ See also Baker, n 18, p 225; P & M, n 18, vol 2, p 82 and T Madox, Formulare Anglicanum (London, 1702), p iv (feoffment signified a grant with livery of seisin of a free inheritance). See also Cruise, n 18, vol 4, p 46.
for military and other services.\textsuperscript{85} Such a donation was usually oral and - only in later times - was it set out in a charter \textit{(carta, writing)}.\textsuperscript{86} The words of donation would indicate what interest (estate) in the land was being conferred as well as the services which had to be rendered in return.\textsuperscript{87} However, as under Anglo-Saxon law, \textit{‘livery of seisin’} was all important to convey land in medieval times - including by way of gift.

- \textbf{Charter not Dispositive}. Pollock and Maitland cited an instance in the time of Edward I (1272-1307) when jurors - simple people \textit{‘not cognisant of English laws and customs’} - thought that a charter (writing) was sufficient without the transfer of possession.\textsuperscript{88} They also concluded that, up to the first half of the 13th century, \textit{‘what the king's court demanded was a real delivery of a real possession’}.\textsuperscript{89} Any charter of feoffment, in any case, tended to be short. It was also unilateral (not bilateral).\textsuperscript{90}

It may also be noted that - in the time of Glanvill (c. 1189) and Bracton (c. 1240) - a clear distinction, in legal terms, between land and chattels (immovables and movables) did not exist as it did to a later extent. Mainly because the giving of \textit{seisin} (possession) was common to both.\textsuperscript{91} Further, the word \textit{‘gift’} was more generic in medieval (and Anglo-Saxon) times than today, when it refers to a specific type of legal transaction as opposed to a \textit{genus}. In early times the word \textit{‘gift’} was utilized to cover not only a gift \textit{per se} (i.e. where there was no legal obligation on the donor to give) but also where there was a grant - such as pursuant to an exchange or sale. Indeed, \textit{‘give and grant’} was the common formula, as Pollock and Maitland stated:

in the thirteenth century every sort and kind of alienation (that word being here used in its very largest sense) is a \textit{‘gift’}, and yet it is a gift which always, or nearly always, leaves some rights in the giver. In our eyes the transaction may really be a gift, for a religious house is to hold the land for ever and ever, and the only service to be done to the giver is one which he and his will receive in another world; or it may in substance be a sale or an exchange, since the so-called donee has given money or land in return for the so-called gift; or it may be what we should call an onerous lease for life, the donee taking the land at a heavy rent: - but in all these cases there will be a \textit{‘gift’}, and precisely the same two verbs will be used to describe the transaction; the donor will say [in a charter, when there was one] \textit{‘I have given and granted (sciatis me dedisse et concessisse).’}\textsuperscript{92}

That said, Glanvill - the first text on English law (c. 1189)\textsuperscript{93} - recognized a more precise definition of \textit{‘gift’} since he expressly referred to a transfer by gift as distinguished from an exchange or sale.\textsuperscript{94}

\textbf{b) Glanvill (c. 1189)}

\textsuperscript{85} It is likely this occurred only after the Conquest. Cf. Coke, n 84, vol 1, 272a, note \textit{‘Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees. The original and proper import of the word feoffment is, the grant of a fee...’ To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: that is what the feudists call investiture.... When the king made a feoffment, he issued his writ to the sheriff, or some other person, to deliver seisin: other great men did the same.’ See also Madox, n 84, p ix, para 13. Ibid, xxiv \textit{‘livery of seisin formerly was and still is an essential part of the feoffment.’}

\textsuperscript{86} Kiralfy, n 66, pp 215-6 \textit{‘These charters of witness...were not strictly necessary, and in the early period probably not common: hence great importance was attached to the notoriety of the livery, since from those who witnessed it would be drawn those who would swear to the change in ownership should a lawsuit arise. The charter was not a conveyance in itself but a record of the immediately preceding conveyance.’}

\textsuperscript{87} PR Hyams, \textit{The Charter as a Source for the Early Common Law} (1991) Journal of Legal History, vol 12, no 3, p 176 \textit{‘Very few charters from before about 1150 concern grants to laymen other than the king.’}

\textsuperscript{88} Ibid, p 216 \textit{‘This...requirement of the specification of services...ceased with the Statute of Quia Emptores1290 [18 Edw 1 c 1], at least in the case of grants of fee simple, as all grantees would hold by the same service as the grantor.’}

\textsuperscript{89} P & M, n 18, vol 2, p 89 n 1. Plucknett, n 27, p 611, in the Anglo-Norman age, \textit{‘It is clearly recognised that a deed does not operate as a conveyance, but is simply evidence....a great deal of land was transferred without deed.’} He also noted, Ibid \textit{‘The deed is at first a sort of memorandum in the form of a writ-charter recounting the transaction in the past tense.’} See also Kiralfy, n 66, p 216 and Clanchy, n 39, p 260.

\textsuperscript{90} Ibid, p 90. Ibid, p 83 (charter of feoffment evidentiary, not dispositive). Ibid, p 89 \textit{‘when land is to be given the delivery of no rod, no knife, no charter will do instead of a real delivery of the land.’} Ibid, p 90 \textit{‘Even a royal charter did not by itself confer seisin.’}

\textsuperscript{91} P & M, n 18, vol 2, p 94.

\textsuperscript{92} Ibid, p 2 \textit{‘Glanvill and Bracton...can pass from movables to immovables and then back to movables with an ease which their successors may envy.’} Ibid, p 4, n 2 \textit{‘the lawyers see no great gulf between rights in movables and rights in land.’} Ibid, p 29 \textit{‘Seisin is possession.’}

\textsuperscript{93} Ibid, p 32 \textit{‘At a later date to speak of a person as being seised, or in seisin of, a chattel would have been a gross solecism. But throughout the thirteenth century and in the most technical documents men are seised of chattels and in seisin of them, of a fleece of wool, of a gammon of bacon, of a penny. People were possessed of these things; law had to recognise and protect their possession; it had no other word than \textit{‘seisin’} and therefore used it freely.’} See also Hudson, n 18, ch 6.

\textsuperscript{94} Ibid, pp 12-3. See also Clanchy, n 39, p 260.


\textsuperscript{96} e.g. Ibid, p 37 where a tenant says that a thing is not his but that he \textit{‘has in respect of it a warrantor from whom he got it as a gift, or by sale, or in exchange, or some other way.’} Ibid, p 60 (\textit{re dower}) \textit{‘any married man may give or sell or alienate in whatever way he pleases his wife’s dower during her life...’}
Glanvill considered gift especially in the context of marriage (dower and the marriage portion) and by will (testament). Such gifts tending to be oral rather than written, reflecting the illiteracy of the time. Thus:

- **Husband - Dower.** This was given by the husband to the wife on marriage. Glanvill stated:
  
  The word ‘dos’ has two meanings [marriage portion (also called maritagium or dowry) and dower]. [However] In common English law usage it means that which a free man gives to his wife at the church door at the time of his marriage [i.e. dower]. For every man is bound both by ecclesiastical and by secular law to endow his wife at the time of his marriage. When a man endows his wife he either nominates certain property as dower, or he does not. If he does not nominate dower, the one third of the whole of his free tenement is deemed to be her dower, and the reasonable dower of any woman is one third of the whole of the free tenement of which her husband was seised in demesne at the time of the marriage. If, however, the husband nominates dower and it amounts to more than one third, it cannot stand at such a level, but will be measured up to one third; for a man cannot give less but not more than one third of his tenement in dower;

- **Father - Marriage Portion (Maritagium or Dowry).** This was given by the father to the husband on his daughter’s marriage. Glanvill stated:
  
  In Roman law the word ‘dos’ has a different meaning [marriage portion or dowry]; there ‘dos’ is properly used for that which is given with a woman to her husband, which is commonly called ‘maritagium’, a marriage portion. Every free man who has land can give a certain part of his land with his daughter, or with any other woman, as a marriage portion, whether he has an heir or not, and whether the heir if he has one is willing or not, and even if he is opposed to it and protests. For he can give a certain part of his free tenement to whom he pleases in recompense for his service, or to a religious place as alms. If seisin follows the gift, the land will remain for ever with the donee and his heirs, if it was given to them heritably; however, if no seisin follows such a gift, then after the donor’s death nothing can be claimed in reliance on such a gift against the will of the heir, because, according to the interpretation customary in the realm, it is deemed to be a naked promise rather than a true gift;

- **Will - Land.** Glanvill stated:
  
  although the general rule is that any person is allowed to give freely in his lifetime a reasonable part of his land to whom he pleases, this liberty has not hitherto been extended to those about to die, because there might be an extravagant distribution of the inheritance if it were permitted to one who loses both memory and reason in the turmoil of his present suffering, a common enough happening. Therefore if anyone mortally sick began to distribute his land, which he had not in the least wished to do while he was well, this would be presumed to result rather from turmoil of the spirit than from deliberation of the mind. However, a gift of this kind made to another in a last will can hold good if made and confirmed with the heir’s consent.

95 Glanvill referred to writing in the context of agreements (concords) made in writing in court, in order to resolve disputes. Ibid, p 94 ‘It often happens that cases begun in the lord king’s court are ended by amicable composition and final concord subject to the consent and licence of the lord king or his justices, whether the plea concerns land or something else. Such a concord is generally, by common consent of the parties, written down in a chirograph, and the written terms read over to the lord king’s justices sitting on a bench, in whose presence there is delivered to each of their own part of the chirograph, which is identical with the other part.’ The reference to a ‘chirograph’ was to a parchment which was indented and cut through, the parchment then being given to the parties. The indents could, later, be matched up, to prove that the two pieces (sometimes, three) came from the same original parchment. See also Coke, n 84, vol 1, 229a, note (1); P & M, n 18, vol 2, p 97 and Clanchy, n 39, p 87.

96 In English common law, the distinction between a marriage portion (dowry) brought by the bride and dower (dos) which was the gift of the husband, was preserved. See Coke, n 84, vol 1, 31a. See generally, P & M, n 18, vol 2, chs 7 & 8 and Cruise, n 18, vol 1, tit 6.

97 Glanvill, n 93, p 59. He dealt with dower at some length, pp 59-69 and then went on to discuss marriage portions. See also Baker, n18 , vol 3, pp 1361-79 (Dower of Personality 1250-1430).

98 See also P & M, vol 18, pp 15-6, ch 7; Baker n 18, p 271 and Plucknett, n 27, pp 546-7.

99 For a summary of the position under Roman law, see Wood, n 40, p 117. Also, Hyland, n 4, pp 25-8 who noted, p 25 ‘Gift giving was a central part of late Roman aristocratic life.’ See also H Bracton (trans Thorne), On the Law and Customs of England c.1240 (Cambridge UP, 1968-76), vol 2, pp 266-7 (dos, under English law, referred to dower (given by the husband) and not to the marriage portion (given by the father or others)).

100 Glanvill, n 93, p 69-70.

101 See P & M, n 18, vol 2, p 328, n 2.

102 Glanvill, n 93, p 70. See also Baker, n 18, p 263, n 19. As to chattels, Glanvill, n 93, p 79 ‘Heirs are also bound to observe the testaments of their fathers and other ancestors, and to pay their debts. For every free man of full age who is not burdened with debts may, when seriously ill, make a reasonable division of his chattels...no one is bound by the laws of the realm to leave anything in his testament to any person in
Thus, it seems clear that - what was permitted under Anglo-Saxon law - that is, the ability of a person to give away his
land by will or DMC, was not longer permitted by the time of Glanvill, unless the heir consented. As Pollock and
Maitland indicated, the reason for such a large restriction on the donor was, likely, a policy decision to protect the heir
as well to prevent injudicious giving to the church when in extremis; 105

- **Will - Chattels.** Glanvill indicated that the common law required the division of chattels of the testator into 3 parts:

  - (a) one part to the heirs (or lineal descendants);
  - (b) one part to the wife; and
  - (c) the third part at his own disposal,

  with (a) and (b) being called their ‘reasonable part’. 104 That said, it has been alleged that Glanvill was only referring
to a local custom and not a requirement of the common law - though such an assertion has proved to be contentious,
as Blackstone noted. 105 For their part, Pollock and Maitland thought that - in the 12th and 13th century - the common
law (probably) did impose such restrictions on giving away chattels by will (albeit, there were exceptions). 106

Glanvill also referred to the capacity of the donor. For example, indicating that - in a religious context - there was incapacity without the king’s consent. 107 The influence of Roman law on how Glanvill presented things may be noted since Roman law also:

- permitted gifts in the context of marriage and mortis causa; 108
- treated a gift as gratuitous; 109
- required the consent of the donee - as well as the donor - to a gift; 110
- made provision on the capacity of the donor and the donee. 111

Finally, it may be noted that - by the time of Glanvill - while seisin (possession) still existed as of old, there
emerged a difference between it and the right to property, giving rise to our modern distinction between possession
(jus possessionis) and property (jus proprietatis). 112 This development is understandable since it became apparent
that a transfer of seisin (possession) was inappropriate in the case of incorporeal rights such as franchises,
advozsoms etc., which rights had no physical substance to be transferred. 113

**In conclusion, by the time of Glanvill (c. 1189), the Anglo-Saxon law on gift was little changed. Delivery (livery)
of seisin (possession) was still a requirement for the valid gift of a chattel or land. Where a charter (writing)
exists, it was evidential and not dispositive.**

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103 P & M, n 18, vol 2, pp 326-9. See also Cruise, n 18, vol 6, pp 3-4.
104 Ibid, p 80.
105 Blackstone, n 61, vol 2, pp 492-3.
106 P & M, n 18, vol 2, pp 348-56.
107 Ibid, p 74 ‘neither a bishop nor an abbot can alienate in perpetuity any part of his demesne without the lord king’s consent and confirmation,
because their baronies are a charitable endowment from the lord king and his ancestors.’ See also pp 185-6.
108 See Wood, n 40.
109 Wood, n 40, p 110 ‘when one out of mere liberality bestows any thing upon another, there being no law to force him to it.’ See also A
are several types of gift. When someone makes a gift with the intention that it should immediately become the property of the recipient and will
not revert to himself in any circumstances, and when he does this for no other reason than to practice liberality and generosity, this is a gift in the
proper sense.’ See also Hyland, n 4, p 149.
110 Ibid ‘To the perfection of a gift, the consent of the giver (expressed in writing or without it) and the consent of him to whom the gift is made, is
required, for if he is either unwilling to accept, or ignorant of it, it is no gift.’
111 For example, in respect of the donor, madmen, prodigals, minors criminals etc lacked capacity. See Wood, n 40, pp 112-3 who summarised
the position.
112 See Glanvill, n 93, pp 192-3 (commentary). Also, Maitland, n 43, vol 1, pp 358-407-57, ‘Mystery of Seisin’ and ‘Beatitude of Seisin’. See also JB Ames,
Lectures on Legal History (Harvard UP, 1913), pp 192-209 ‘The Nature of Ownership’. Coke, n 84, vol 1, 266a ‘there is jus
proprietatis, a right of ownership, jus possessionis, a right of seisin or possession…..’ See also the Mirror of Justices (c.1290), pp 73-4‘no…gift
will hold permanently if the donor be not seised at the time of the contract in both rights, the right of possession and the right of property.’
113 As Coke, n 84, vol 1, 9a, was later to state ‘incorporeal (which lie in grant, and cannot pass by livery, but by deed, as advozsoms, commons,
etc. and of some is called haereditas incorporata; and, by the delivery of the deed, the freehold, and inheritance of such inheritance, as does lie
in grant, does pass) comprehended in this word grant. And the deed of incorporeate inheritances does equal the livery of corporeate.’ Also,
49a‘incorporeal, as advozsoms, rents, commons, estovers etc these cannot pass without deed, but without any livery. And the law has provided
the deed in place of a livery.’ See also P & M, n 18, vol 2, p 140 et seq.

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4. BRACTON (c. 1240)

The most extensive analysis of the law of gift in early times was provided by Bracton, in his *On the Laws and Customs of England* (c.1240).\(^{114}\) The position as to livery of seisin (delivery of possession) being required in the case of gifts of land and chattels was unchanged in his time. Furthermore, a charter (if there was one) was evidential, not dispositive. Only in the case of incorporeal hereditaments (advowsons, franchises *etc*.) was a charter dispositive, since such rights could not be physically transferred. As to Bracton:

(a) Gift - Definition & Categories

Bracton noted that the essence of a gift was the absence of any legal obligation to give on the part of the donor. He stated:

> By the civil law dominion is acquired in many ways, namely, by the *causa* of gift, succession, a testamentary *causa*, and many others… A corporeal thing\(^{115}\) is acquired by livery, for it admits of livery, an incorporeal thing, as a right,\(^{116}\) does not… A gift is a disposition arising from pure liberality and without legal compulsion, that is, neither of civil or natural law, payment, duress or force playing no part.\(^{117}\) It proceeds from the full and free disposition of a donor [wishing] to transfer his property to another.\(^{118}\)

Bracton indicated that gifts could be classified as:

- *inter vivos* or *mortis causa*;
- absolute or conditional;\(^{119}\)
- rightful or wrongful;\(^{120}\)
- free or restricted;\(^{121}\)
- complete or incomplete.\(^{122}\)

(b) Gift - Capacity, Object of a Gift, Ascertainment

Bracton analysed those who had the capacity to make a gift.\(^{123}\)

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\(^{114}\) Bracton, n 99. Bracton is now online, see bracton.law.harvard.edu. For a summary of Bracton’s law on gift see J Reeves, *History of the English Law* (2nd ed, 1787, rep Rothman Reprints, 1969). For gift giving in medieval times, see Hyland, n 4, pp 29-33. He noted, p 30 ‘Throughout the early Middle Ages, the sources document a lively exchange of gifts among kings, popes, bishops, and abbots. These gifts were an element of political and diplomatic strategy… The powerful used gifts to recruit retainers, to obtain secret information, and entice others to engage in criminal acts. Retainers, on the other hand, used gifts to obtain favors and appointments from their lords. As with gifts given between rulers, these gifts too were usually exchanged at elaborate feasts, and the feasts themselves were considered a form of gift. ’Gifts among the poor would have been more rare and of little worth, JE Thorold Rogers, *Six Centuries of Work and Wages* (1906), p 67 ‘In the taxing rolls of Edward I [1272-1307], the household furniture [of peasant cottages] is inventoried, and valued at a very few shillings. It consists of a few articles of furniture, generally of home manufacture, some coarse bedding, and a few domestic implements, mostly earthenware. The most valuable articles in use were copper or brass pots…’.

\(^{115}\) Bracton, n 99, vol 2, p 48 ‘Those are corporeal which by their nature can be touched, as land, a man, a robe, gold, silver, and many other things too numerous to mention.’

\(^{116}\) Ibid ‘Incorporeal things are such as are intangible, which exist in contemplation of law, as inheritance, usufruct, advowsons of churches, obligations, actions, and such like.’

\(^{117}\) See also Ibid, p 59, the gift ‘must be complete and absolute, free and uncoerced, extorted neither by fear nor through force. Let money or service play no part, lest it fall into the category of purchase and sale, for if money is involved there will then be a sale, and if service, the remuneration for it.’ See also pp 64-5.

\(^{118}\) Ibid, vol 2, p 49.

\(^{119}\) Ibid, pp 49-50. ‘Some gifts are simple and absolute, where the donor does not wish what he has given or promised to give to revert to himself, whether the gift is made absolutely or to take effect at some future day; others are made *ob causam*, where a *causa* is put into the gift that something be done or not done, into which class fall gifts *causa dotis* and *causa mortis* and the like [It is simple and absolute] unless the gift is made subject to a condition or *modus*, as where one gives with the intention that the thing will become the donee’s only when something further follows, that is, if something is done or not done.’ See also Digest, n 109, title 39.5 (*Gifts*), the Roman law of which Bracton follows.

\(^{120}\) Ibid, p 50 ‘Some gifts are rightful, others wrongful: rightful, if made of one’s own property; if made of another’s it will be wrongful and may be reclaimed by the true lord.’

\(^{121}\) Ibid. Bracton referred to ‘free and absolute’ and to ‘condition’. However, reference to ‘free’ (the word ‘absolute’ Bracton had previously used in a different context, see n 119) and to ‘restriction’ (as opposed to the word ‘condition’) are better translations since Bracton is dealing with where the gift is restricted in some way - to certain heirs or certain other persons *etc*.

\(^{122}\) Ibid, p 50.

\(^{123}\) Bracton, n 99, vol 2, pp 51-6. See also Reeves, n 114, vol 1, pp 289-90.
• **Donor.** A gift by a minor or madman was good if it was confirmed after the minor became of age or if the madman became sane.\footnote{124} Various religious persons could not make gifts.\footnote{125} Nor could bastards, lepers, prisoners, persons charged with felony or a husband to his wife;\footnote{126}

• **Donee.** A gift could be given to a minor (with the consent of his tutor) and to a Jew.\footnote{127}

Bracton also analysed what might be the object of a gift and what not. For example, sacred things, freeman, certain Crown prerogatives *etc* could not be an object of gift.\footnote{128} The object of a gift also had to be ascertained.\footnote{129}

**(c) Gift - Livery of Seisin**

By Bracton’s time, the use of a charter (writing) was becoming more common since there was a greater degree of literacy (such charters were on parchment, since paper had not yet been introduced into England).\footnote{130} Bracton categorized charters into royal and private ones\footnote{131} and he recommended the use of a charter.\footnote{132} He stated:

> It is also necessary that certain words be used, as suitable to a gift as to a stipulation, as where I say ‘Will you give me a hundred?’ and you reply, ‘I will give’, for a question is of no effect unless followed by an answer appropriate to it, that is, ‘I will give.’ From such a question and answer an obligation at once arises.\footnote{133}

This verbal formulation was required to transfer possession (ivery of seisin)\footnote{134} which was essential to make a valid gift and a charter was, *per se*, insufficient to achieve this, save in the case of an incorporeal hereditament.\footnote{135}

Thus, Bracton stated:

> Nor is it sufficient that the charter was made and sealed, unless it is proved that the gift was completed, [that is], that everything necessary for a gift was properly done and that livery followed, for otherwise the thing given can never be transferred to the donee. Homage may have been taken, the charter, genuine and authentic, properly drawn and formally read and heard, but the gift will never be valid until livery has been made.\footnote{136} Thus, the charter may be valid, but [the gift], since without seisin, nude.\footnote{137}

As to the procedure for livery of seisin, Bracton stated:

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\footnote{124} Ibid.
\footnote{125} Ibid.
\footnote{126} Ibid.
\footnote{127} Ibid, pp 54-6. See also Reeves, n 114, pp 290-1.
\footnote{128} Ibid, pp 57-9.
\footnote{129} Ibid, p 62 ‘It is also necessary that a thing certain be comprised in a gift, for if the thing is uncertain there is no gift.’
\footnote{130} Paper making did not arrive in England until the 14\textsuperscript{th} century. See Clanchy, n 39, p 120 (he thought the earliest records on paper in England were in 1307). See also McBain, n 1(f), part 1, p 33, fh 35.
\footnote{131} Bracton, n 99, vol 2, p 108 ‘some charters are royal, others private’. Bracton also noted that the king’s courts were now considering such charters, Ibid, p 109 ‘though it is not usual, the necessity of considering such private agreements is sometimes imposed upon the king’s court, for it is not lawful for the parties [to the agreement] to withdraw from agreements, since if one withdraws the other is aided by an action based on the agreement….’. Cf. Glanvill, n 93, p 132 ‘it is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements.’
\footnote{132} Ibid, p 62 ‘If a charter is made the gift will be more secure, for the gift may be proved more easily and more effectively by a writing and instruments than by witnesses or suit. ’
\footnote{133} Ibid. This form likely derived from Biblical times, see n 37.
\footnote{134} Ibid, p 124 ‘[ivery] is the transfer of a corporeal thing, one’s own or another’s, from one person to a second; a voluntary transference from one’s own hand or another’s…into that of [the donee]. In one sense, livery is nothing other than an induction into possession. Of “a corporeal” thing, it is said, because an incorporeal thing does not admit of livery, as the right itself which adheres in a thing or body, because [rights] cannot be possessed, only quasi-possessed. They therefore do not admit of livery, only of quasi-livery, nor are they acquired or retained except by acquiescence and use. ”Of one’s own property or another’s”, it is said, because it makes [no] difference which makes livery.’ Ibid, p 64 ‘It is also necessary that livery of the thing follow the gift, and do so in the lives of the donor and the donee, otherwise it will be regarded as a nude promise rather than a gift, and an action no more arises out of a nude promise than out of a nude pact. An incomplete gift is of no effect, neither the execution of a charter nor the taking of homage with every ceremony observed, unless seisin and livery follow during the life of the donor…Thus the gift is contracted as though I say ”I give that you do”. The matters dealt with above may be concisely expressed, as may be seen from these verses: By a thing, words, writing, consent, tradition and conjunction pactes take on their vestments.’
\footnote{135} See also ns 113 & 116.
\footnote{136} Ibid, Bracton, n 99, vol 2, p 126 ‘Where a gift has been made and the donee puts himself in seisin without livery, on his own authority, without the donor or his procurator [attorney] or letters and a messenger, such seisin is valueless, [for before livery a donor may change his mind, since the gift is incomplete, and retain possession corpore and animo….’
\footnote{137} Ibid, p 121 ‘Since to give is to make the thing the property of the donee, a gift will never be complete until the donee has full possession or seisin, [by himself alone, with no other who claims a right in a thing], that is, until the thing has been delivered to him, for by liveryes and usucapions possessions and the dominion of things are transferred, for it does not suffice if the right is granted to another unless the donee obtains seisin.’ Ibid, p 64. See also SE Thorne, *Essays in English Legal History* (Hambledon Press, 1985), ch 4 (livery of seisin).
if livery is to be made of a house by itself, or of a messuage for an estate [i.e. the house and the ground set apart for household usages], it ought to be made by the door and its hasp or ring with the intent that the donee possess the whole to its boundaries, with all its rights and appurtenances, and he will thus be in possession of the whole by the will [of the donor], the view, and his own affectus possidenti [disposition to possess].

The donor also had to withdraw from possession. For a gift to be valid there had to be mutual agreement (consensus) between the donor and the donee (and, sometimes, that of a third party). In the case of incorporeal hereditaments, Bracton stated:

Now we must explain how the dominion and possession of incorporeal things, as of rights, are acquired by express consent, by way of gift and by the creation of a servitude. Rights, being incorporeal, cannot be seen or touched, and thus do not admit of livery as corporeal things do. The gift must therefore be effected by the intention of the contracting parties, simply by the intention and will to transfer and accept and the view of the corporeal thing in which these rights inher, and in that way, by means of a legal fiction, they are quasi-possessed.

Bracton also considered, inter alia,

- **Marriage Gifts** These were in the form of the marriage portion (maritagium) and dower. Neither were compulsory. Both could be oral and could include movables. Both could also (being gifts) be refused. The marriage portion (of the father) was different to the dower (of the husband) in that it vested at once while the latter was a gift perfected only when the husband died. Further, dower was given at the church door by the husband on the day of his marriage.

- **Gift Mortis Causa.** This was a form of conditional gift since it was only perfected on the death of the donor;

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138 Ibid, p 125 ‘If there is no house on the land, it is not necessary to circumambulate all the fields or enter everywhere and into every quarter, [but] let [livery] be made in the manner commonly called ‘by staff and rod’, and simple entry with the affectus possidenti and the donor’s consent suffices, though he does not at once take the issues…’.

139 Ibid, p 125 ‘Though an estate is transferred with an intention on the donor’s part to give the whole and on the donee’s part to take the whole, it is not sufficient for the donee to use some part of it…unless the donor and all his people withdraw completely from possession…’ See also p 130 et seq.

140 Ibid, pp 62-3. ‘A gift is of no effect unless there is mutual consent and agreement on the part of both the donor and the donee, that is, that the donor have the animus donandi and the donee the animus recipiens. [A bare statement in an account and a nede pact do not make anyone a debtor] for if I say ‘I give you such a thing’ and have no intention of giving it (and do not begin it by livery) the gift fails, as where I say, ‘I give you that thing’ and do not wish to hand it over, or suffer you to take it with you, or if it is a tree that is given, to cut it down, the gift is without effect, because the donor did not fully consent. There must also be no mistake in the thing given, for if the donor has one thing in mind and the donee another, the gift fails because of the lack of agreement, and that will be so whether the disagreement is in kind, number [or] quantity.’

141 Ibid, pp 63-4 ‘In some gifts it is requisite that the consent of persons other than the donor and donee be secured, as where an archbishop, bishop, abbot or prior, a rector of churches, a syndic or a procurator makes a gift, the consent of all those who have an interest is required, as that of the king and the chapter or convent.’

142 Ibid, p 159.

143 Ibid, pp 76-84. At p 77 ‘land sometimes is given before espousals and because of marriage, by the father or other relative of the woman to the husband with such woman, or, which has the same effect, to them both together, that is, to such a man and his wife and their heirs, or to a woman to facilitate her marriage, or simply and without mention of marriage, a gift such as may be made to anyone. If marriage is mentioned the land so given may be called a maritagium. A gift of this kind is made before marriage, sometimes at the marriage and sometimes after it, there is a gift of another kind made on the marriage day by a husband to his wife at the church door, which is not properly called a donatio but the constitution or nomination of dower. It is land given propter nuptias that is called a maritagium.’ See also, pp 266-7. Also, Reeves, n 114, vol 1, p 297.

144 Ibid, p 265 ‘Dower is that which a free man gives his spouse at the church door [on the marriage day], because of the burden of matrimony and the future rigour, for the maintenance of the wife and the nurture of the children when they are born, should the husband prodecease her. The rightful dower of every woman is the third part [of each tenement] of all the lands and tenements her husband held in his demesne and so in fee that he could endow her on the day he married her.’ Reeves, n 114, vol 1, p 312 ‘Dower is defined by Bracton, not in the words, but upon the ideas of Glanville.’ Bracton also noted that gifts between husband and wife during marriage were invalid, pp 97-9. Ibid, p 97 ‘gifts between husband and wife during marriage ought not to be good, and the reason is lest they be made because of the lust or the excessive poverty of one of the parties.’ However, the better reason was that a wife could not own property separately. See also Plucknett, n 27, pp 566-8.


146 See n 131. See also Baker, n 145, vol 3, p 1371 and, generally, P & M, n 18, vol 2, ch 7.

147 Bracton, n 99, vol 2, p 178 ‘Gifts so made in anticipation of death are confirmed by the testator’s death, and are made on the understanding that if the testator dies he to whom the bequest was made may have it, but if he recovers the testator may retain or retake it, and so [too] if he to whom the bequest is made predeceases him. It is lawful to make a gift mortis causa not only on account of illness, but because of danger and imminent death at the hands of an enemy or robbers, or because of the cruelty or enmity of some powerful man, or because of an impending
in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.'

...donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion; the law allowing, together for that particular purpose; upon which the donor retired from the possession, both party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in return ing to it as lord; and the donee was put into vacant possession, reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbours, who were called the seisin could not remain vacant for the minutest space of time. This is the account of livery given by Bracton, who adds his definition of it:

As in Anglo-Saxon times and in the time of Glanvill - so too, in the time of Bracton - all gifts of land were imperfect until seisin (possession) was given. Gifts required formal delivery (traditio) and a charter was not, per se, sufficient151 (that said, by Bracton’s time, there were a few cases where livery was held not to be necessary).152 In respect of this need for seisin - and the gradual growth of charters to evidence transfers of land, Pollock and Maitland stated:

if there is to be a gift there must be some expression of the donor’s will. It is unnecessary that this expression should take the form of a written document. It is, to say the least, very doubtful whether the Norman barons of the first generation, the companions of the Conqueror, had charters to show for their wide lands, and even in Edward I’s [1272-1307] day men will make feoffments, nay settlements, without charter.153 Later in the fifteenth century Littleton still treats them as capable of occurring in practice. Furthermore, the charter of feoffment, if there be one, will, at all events in the thirteenth century and thenceforward, be upon its face an evidentiary, not a dispositive, document. Its language will not be ‘I hereby give’, but ‘Know ye that I have given.’ The feoffor’s intent then may be expressed by word of mouth; but more than this is necessary.

It is absolutely essential - if we leave out of account certain exceptions that are apparent than real - that there should be a livery of seisin. The donor and the donee in person or by attorney must come upon the land. There the words of gift will be said or the charter, if there is one, read. It is usual, though perhaps not necessary, that there should be some further ceremony. If the subject of the gift is a house, the donor will put the hasp or ring of the door into the donee’s hand (tradere per haspan vel amulum); if there is no house, a rod will be transferred (tradere per fistem et baculum) or perhaps a glove. Such is the common and the safe practice; but is not indispensable that the parties should actually stand on the land that is to be given. If that land was within their view when the ceremony was performed, and if the feefollow made an actual entry on it while the feoffor was yet alive, this was sufficient feoffment. But a livery of seisin either on the land or ‘within the view’ was necessary. Until such livery had taken place there was no gift; there was nothing but an imperfect attempt to give.154 (wording divided for ease of reference).

In conclusion, Bracton summarized the law on gift. A gift of land or chattels required livery of seisin. The donor had to have an intent to give (animus donandi) and the donee an intent to receive (animus recipiendi). Gifts could be inter vivos, mortis causa or by will. In the case of the latter, a written will was becoming more common (land could not be given by will). Gifts inter vivos could be evidenced by a charter (carta), which was dispositive voyage or journey, or if one is about to travel through perilous places. All these indicate immediate danger.' Bracton followed Roman law on DMC. See also Borkowski, n 4, ch 1.

148 Ibid, p 179 ‘It is clear that he may make a will of his movablees…’ Ibid, p 178 ‘Heirs are bound to observe the wills of their parents and of the other ancestors whose heirs they are, and to discharge any debts for which their chattels do not suffice…’

149 Ibid, pp 178-81. Reeves, n 114, vol 1, p 307 ‘The whole law of testaments stated by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author.’ See also Butler & Baker’s Case (1591) 3 Co Rep 25b fn (A).

150 Ibid, p 184 ‘There is another causa for acquiring dominion called succession, which entitles every heir to everything of which his ancestors die seised as of fee, or of which they once were seised as of fee and hereditary right…’

151 Reeves, n 114, vol 1, pp 303-4 ‘The degrees of possession made a subject of very minute distinction and refinement at this time, and is discussed on by Bracton at length. It is sufficient to say, that the completest possession which could be had, was, when the jus and seisinus, the title to the land, and the seisin of it, went together; for the donee had then juris et seisinae conjunctio; the highest of all titles. But this could not be obtained without a formal traditio, or livery; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by the donor giving full and complete seisin thereof, either in person or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbours, who were called together for that particular purpose; upon which the donor retired from the possession, both corpore et animo, without any intention of returning to it as lord; and the donee was put into vacant possession, animo et corpore, with a resolution of retaining possession; in short one party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in seisin; it being a rule of law, that the seisin could not remain vacant for the minutest space of time. This is the account of livery given by Bracton, who adds his definition of it: dere corporali de persona in personam de manu propria vel aliena (that is, of an attorney) in alterius manum gratuatranlatlo. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reason of the juris et seisinae conjunctio.’

152 Ibid, p 304 ‘There were some cases where livery was not necessary, and any expression of the owner’s will, that the property should be changed, had the same effect as livery: thus, where land was let for a term of life, or years, and afterwards the donor sold or gave it wholly to the donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion; the law allowing, in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.’

153 P & M, n 18, vol 2, p 83. They cite YB 20-1 Edw I, p 32 (a case in 1292) and the Statute of Marlborough 1267, c 9.

154 Ibid, p 83. They refer to YB 20-1 Edw I, p 256 (a case in 1292) where Cave J asked the jurors whether the feoffor was so near the land that he could see it or point it out with his finger.
in respect of incorporeal hereditaments only.

5. BRITTON (c. 1290) & FLETA (c. 1290)

(a) Britton

Bruton (c. 1290) added little to Bracton. Inter alia, he stated:

A gift is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For a gift cannot be properly made, if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested. Britton also considered the capacity of the donor and the donee and noted that seisin was required for gifts but not in the case of incorporeal hereditaments. He stated:

There are some purchases which are invalid, unless induction into seisin follows, as of corporeal things; others which are good without the institution of seisin made immediately upon the gift, as of things incorporeal, such as franchises, and easements relating to land, for which this assize lies as well before seisin as after, as to have a way in another's soil, or common for an annual rent. For the act of the mind in the union of wills, and the delivery of the writings from one neighbour to another, are sufficient for seisin...

(b) Fleta

The writer Fleta (c. 1290) closely followed Bracton in respect of the law on gift although his work is useful in that it put matters more succinctly. Fleta stated that a gift was gratuitous. He then considered the capacity of the donor and donee and what might be the object of a gift. As for the mechanics of making a gift, Fleta stated:

a gift is contracted in this way: for example, if I say 'I give to you that you may do [accept].' Six things, indeed, are associated in a gift - a thing, words, writing, consent, delivery, conjunction.

Fleta also noted that a gift inter vivos was confirmed only by livery of seisin for corporeal hereditaments.

6. SUMMARY - LAW OF GIFT BY 1290

The position as to the law of gift by 1290 was relatively simple and it may be summarized as follows:

- **Land: Anglo-Saxons.** The early Anglo-Saxons required any gift (and grant) of land to be by way of livery of seisin. That is, by the donor and donee being present on the land in question and their going through a ceremony (ritual) in which the donor handed over the land to the donee - the land being, symbolically, represented by a sod of earth (or knife or other object) - in the presence of witnesses. Likely, this followed Biblical precedent. On acceptance of the gift of land by the donee, the donor then quit the land. In due course there was some legal innovation with physical presence on the land being replaced by the parties being in sight (view) of it. Also, later,

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155 FM Nichols (trans), Britton (John Byrne & Co, 1901), p 181. See also Mirror of Justices, n 112, p 75 ‘if the gift is really a gift, the donor’s intention is that the thing given shall belong to the purchaser for ever, and that there shall be no hope of a reversion.’

156 Ibid, pp 181-5. Ibid, p 181 ‘some persons have power to give, and others not. For no one can effectually give but he in whose person the possession and the property are vested…’ Britton considered the capacity of the king, churchmen, felons, bastards, children, persons under a mental disability, married women, prisoners etc: In respect of donees, Britton considered churchmen, infants, madmen and others.

157 Ibid, p 185 ‘Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in the case of gifts granted, whereof no seisin follows.’


159 Britton, SS, vol 89.

160 Ibid, p 5 ‘A gift is a disposition which proceeds out of pure generosity and without legal compulsion [ex mera liberalitate, nullo jure cogente], which transfers property from the true possessor to another.’ Ibid ‘Some gifts are simple and absolute which…proceed out of the pure and free generosity of the donor [ex mera gratuiaque liberalitate]…others are subject to a mode or condition…’

161 Ibid, p 12 ‘a right of action, sacred property, property of the Crown, a free man, jurisdiction, peace, the walls and gates of a city may be given by no one so that the gift is valid.’

162 Ibid, p 13 (‘Et ita contrahitur donacio ut si dicam ‘Do tibi ut facias’. Sex enim donacioni concurrent: res, verba, scriptum, consensus, tradicio, iunctura.’). For wording in a charter, see p 28. See also Ibid, p 13 ‘It is necessary that between the donor and the donee there shall be mutual agreement and the same intentions and that there shall be no mistake regarding the thing nor any disagreement regarding number, kind or quantity.’

163 Ibid, p 29 ‘a gift inter vivos is confirmed only by livery.’ Ibid, p 32 ‘Livery is the free transfer of corporeal property…from one’s own person and hand or that of another (for example that of an agent) into the hand of someone else. In one sense livery is nothing else than putting into possession…’.

164 See n 37.
by the venue being a church or court. However, it is doubtful whether Anglo-Saxon law permitted this ceremony to be replaced by the delivery of a charter (writing) - even in the case of bookland (bocland);

- **Land: 1290.** The Normans were, likely, no less illiterate than the Anglo-Saxons and writing was scarce. Up to 1290, the process was similar to that of the Anglo-Saxons for a gift of land. Livery of seisin was required and any charter (or deed) was evidential only. That said, it is likely that the donor and the donee were represented by agents (attornies) to make the livery for them, in an increasing number of cases. 165 Further, from 1189 (the time of Glanvill) onwards, writing would have been more common, to reflect a greater degree of literacy;

- **Chattels.** In Anglo-Saxon times, chattels would have been few (cattle, swords, clothing etc) and any gift of the same would have been by way of livery of seisin. That is, delivery and acceptance of the gift in the presence of witnesses. Often, this would have been at a drinking ceremony or other public event. A gift of chattels would, invariably, have been oral and a similar practice would have prevailed until 1290, with any charter (or deed) being rare and both being evidential only.

Besides, *inter vivos* gifts, in Anglo-Saxon times:

- **Gifts Mortis Causa and by Will.** Both could be made. They would, usually, have been oral and made in the presence of witnesses. The position was unchanged up to 1290 - save that a gift of land by will by the time of Glanvill (c. 1189) was not lawful (a situation remedied by statute in 1540);

- **Marriage.** On the consummation of a marriage, a man gave his wife a ‘morning gift’. This was replaced - after the Norman Conquest in 1066 - by the gift of dower (given by the husband). There was also the gift of dowry (also, called the marriage portion) which was given by the father, or other member, of the wife’s family. Both these forms of gift would (usually) have been given orally. Both could comprise land as well as chattels. Both were voluntary (gratuitous).

**Anglo-Saxon law on gift has survived into modern times in that gifts of chattels are still - mainly - oral with delivery and acceptance (albeit without any formal ceremony). In the case of gifts of land there has been change. Since 1845, livery of seisin (already much encroached on) was abolished and land could only be transferred by deed of grant.** 166 It may also be noted that dower was abolished in 1925167 and that dowry (given by the husband) became rare.

### 7. LAW OF GIFT: 1290 - 1766

The law of gift experienced little change in his period. As in Anglo-Saxon times, gifts of land and of chattels could still be made by way of delivery of seisin in which no writing was required. Further, in the case of land, the gift could be made by the donor and donee standing on the land (*seisin in deed*) or in view of it (*seisin in law*). There was some change, however, in two areas in particular:

- There was a great increase in writing to evidence legal acts - including gifts of land and chattels and, where the writing was sealed and delivered, it began to be referred to as a ‘deed’;

- The only way of transferring land - by livery of seisin (possession) - was circumvented by employing a *use* (trust).

As to these matters:

- **(a) Deeds.**

With increasing literacy, the advent of paper and the proliferation of seals, 168 there was a greater tendency to evidence legal acts in writing. In Anglo-Saxon times, any written document was termed a charter (from the Latin, *carta*, a writing). Gradually, the word ‘charter’ became used to describe a writing executed by the monarch only, 186

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165 See also Thorne, n 137, p 49 (at the time of Bracton) ‘authorizations to give seisin became a recognised part of the normal character offeofiament.’

166 Real Property Act 1845 (8 & 9 Vict c 106). See also Baker, n 18, p 306 and Kiralfy, n 66, p 218. A Underhill, *Changes in the English Law of Real Property during the Nineteenth Century* in Select Essays in Anglo-American Legal History (1909)[‘AALH’], vol 3, p 706 ‘the old common law theory that actual delivery of possession, or the newer theory that a notional delivery by the aid of the Statute of Uses [1536] was necessary to a transfer of land, was swept into the limbo of pedantic rubbish, and a simple deed of grant was made sufficient. This deed of grant is still the common form of conveyance.’

167 Baker, n 18, pp 270-1 ‘the Dower Act 1833…empowered husbands to bar dower by will or by alienation *inter vivos* [3 & 4 Will IV c 105]. In 1925 dower was abolished in respect of persons dying thereafter.’

168 See n 130 (re advent of paper). Clanchy, n 39, p 51 ‘Despite the objections of some lords, seals like charters were probably possessed by the majority of landowners, however small their holdings, by 1300. The possession of any type of seal implied that its owner considered himself to be of sufficient status to use and understand documents, even if this were an aspiration rather than a reality.’ See also Ibid, p 233.D Brewer, *The New Pelican Guide to English Literature* (cited by Clanchy, p 13) suggested that, in England ‘probably more than half the population could read, though not necessarily also write, by 1500.’

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while the word ‘deed’ was applied to a writing executed by a private subject, being his ‘act’. As to this:

- **Glanvill (c. 1189).** He referred to a charter and that it was sealed, although he made no reference to a deed (factum, fact) as such;

- **Bracton (c. 1250).** He distinguished royal, from private, charters. He also mentioned the requirement that the charter be sealed. So did Britton (c. 1290) and Fleta (c. 1290). However, Britton also used the term, ‘deed’ while Fleta (following Bracton) used the term writing (scriptura) or charter (carta).

- **Prerequisite of a Deed.** Over time, the word ‘deed’ was appropriated to refer to a writing that was sealed and delivered. Doubtless, the change related to the delivery of a document - as opposed to a sod of earth or twig (in the case of land) - by the chattel itself. Exactly when the courts defined a ‘deed’, in law, as comprising a document which was sealed and delivered is uncertain. However, counsel were pleading this by 1383 and the court was referring to it by 1430 at the latest.

The upshot of the increase in writing (as well as an increase in the use of personal seals) was that, while - in the case of a gift of chattels - livery of seisin was required in early times by the 14th century - a gift of a chattel

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169 Blackstone, n 61, vol 2, p 295 ‘a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, carta, from it’s materials; but most usually, when applied to transactions of private subjects, it is called a deed, in Latin factum.’ The latter latin word (literally, ‘that which is done’) was, in Anglo-Norman a ‘fait’ or ‘fer’, all of which referred to an act (or fact). And, in a legal context, it referred to a legal act. See generally, McBain, n 1(f), part 1, p 16.

170 Ibid, p 119 ‘Since credence would not be given to a writing of this kind [i.e. a mere charter without a seal] unless some sign appeared that the gift and writing proceeded from the understanding and agreement of the donor, therefore, in testimony and in proof of the transaction let the donor affix such sign, by adding to the charter of gift this clause, ‘That it may be secure (or in testimonio whereof) I have set my seal to this writing.’ Witnesses ought also to be called [and let everything be done in their presence with due ceremony, that they may verify what was done if required to do so.] and their names included in the charter.’

171 Ibid, n 155, p 206 ‘that clothing by writing, which is called charter.’ Ibid, p 211 ‘the charter should be…sealed.’ See also Fleta, n 159 below.

172 Ibid, p 211 ‘let some of the neighbours who are freemen be called as witnesses, in whose presence the charter should be read and sealed, and the names of the witnesses should be written in the charter. It would also be a good precaution to procure the seals of the witnesses to be affixed, together with the seal of the lord of the fee; or in the presence of the parties to have the charter enrolled in a court of record. And although the witnesses be not called, it is sufficient if the deed be afterwards recorded and acknowledged before them.’ Ibid, pp 212, 481, 509.

173 Fleta, n 159, SS, vol 72, p 201 ‘a written instrument [scriptura] will not alone suffice unless it is confirmed by an impression of the stipulator’s seal and by the testimony of trustworthy men then present.’ Ibid, vol 89, p 28 ‘[the grantor’s words] ‘I have by this, my present charter, confirmed’, he implies that he wishes that his intention of transferring the property to the donee, which must be firm, shall be confirmed by his present charter [carta] authenticated by his seal.’ Ibid, n 159, p 169 ‘when the voucher wishes to dispute the warranty and the voucher provers in court a charter on his own behalf and it is excepted against it that it is valid or forged, it will be necessary for the voucher to show that it is valid and true: as where the seal is challenged and thereby the gift is denied, it will be necessary for the voucher to say that the gift was properly made and that the charter [carta] is valid and to put himself therein on the witnesses named in the charter and upon a jury.’

174 P & M, n 18, vol 2, p 221, hypothesised that the technical use of the word ‘deed’ was the outcome of the common plea, non est factum meum (‘I did not execute that document’). Hyams, n 86, p 173 ‘The process by which a man’s deed (‘factum’) became equated with the parchment that recorded it was a gradual one.’ See also McBain, n 1(f), part 1, p 34, ns 42 & 43.

175 In 1316, Beresford CJ in Anon v Priory of Hurley (1316-7), SS, vol 54, p 122. noted that ‘it is the party’s deed, since the party’s seal is pendant to it.’ However, he did not refer to delivery. If a document was not sealed it was treated as an escrow (a mere writing). See also McBain, n 1(f), part 1, p 42, n 202.

176 Charles v Antoigne YB 6 Ric II (1382-3), Ames Foundation (1996), vol 2, p 144. See also McBain, n 1(f), part 1, p 42, n 203.

177 See YB 90 Hen 6, pl 12, fo 37a-38a(1430), Seipp no 1430.059 per Strangeways JCP ‘no deed will be a deed without delivery’ (‘nulla facta sera facta sans lieverie’). See also McBain, n 1(f), part 1, p 42, ns 203 & 204.

178 See n 168.

179 Baker, n 18, p 383 ‘In the case of gift, delivery was at first the only acceptable method of transfer. There is an analogy with the insistence on livery of seisin for the conveyance of freehold; and the consequence was similar. If the person out of possession made a gift of goods, it was no more effective than a transfer of right to land by someone without seisin. This analogy with land was sometimes drawn by medieval lawyers, and between the thirteenth and early fifteenth centuries we find numerous references to seisin of chattels.’ Baker cited YB 6 Hen VII, fo 9, pl 4, per Bryan CJCJP, see also Seipp no 1490.035 (trespass for taking goods). Baker also cited Anon (1492) 10 Hen VII, fo 27, pl 13; Seipp no 1495.063. See also, JH Baker, The Notebook of Sir John Port, Selden Society, vol 102, at p 151n 2 (Baker thought this case was in 1492 and not 1495).
could be made, validly, by the delivery of a deed.\textsuperscript{182} Kiralfy stated:

A deed was sufficient to found an action of covenant, and hence it was perhaps a natural extension to permit a purchaser to bring detinue for a chattel promised him by a deed of gift. Possibly this used the doctrine of estoppel by deed, under which the donor could not disavow the gift.\textsuperscript{183}

However, one would assert that estoppel was not the basis. Rather, delivery of the deed was recognized by the courts as (symbolically) constituting the same as delivery of the chattel (just as the same, later, happened in respect of land).\textsuperscript{184} Finally, it should be noted that the law on the need for delivery to make a gift of a chattel valid, was unchanged. An oral promise to give a chattel, in the absence of delivery, was invalid - even in the case of the sovereign.\textsuperscript{185}

(b) Uses (Ownership in Trust)

The use (trust) was developed to get round various restrictions on law. Thus, it was used to:

- place land beyond the reach of creditors;
- avoid the prohibition on sale of wills;
- free land from a claim for dower;
- avoid paying various feudal revenues.\textsuperscript{186}

Cruise stated:

A use was created in the following manner; the owner of a real estate conveyed it by feoffment, with livery of seisin to some friend, with a secret agreement that the feoffee should be seised of the lands to the use of the feoffor, or of a third person. Thus the legal seisin was ineone, and the use or right to the rent or profits was in another.\textsuperscript{187}

Uses caused confusion in respect of the law on gifts of land (as well as generally), since a use could be transferred orally without 'livery of seisin'.\textsuperscript{188} The Statute of Uses 1536,\textsuperscript{189} sought to remedy this by creating a fictional livery of seisin by the trustee to the beneficiary (cestui que use)\textsuperscript{189} which has been called 'marrying the use to the land'.\textsuperscript{189} However, conveyancers then utilized (among other things) a transfer by lease and release to circumvent this,\textsuperscript{190} leading to the Statute of Frauds 1677 which provided against conveying any land or hereditaments for more
than 3 years - or declaring any use in respect of it - otherwise than by writing. Section 3 stated:

no leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, or to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time… be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law. (italics supplied)

(c) Legal Texts - 16th Century

Since the gift of a chattel could be made by delivery or by way of deed - and since the formality of livery of seisin in respect of land was so well established - legal texts did not devote much space to analyzing the law of gift, because the law was 'clear cut.' Thus, St German, in Doctor and Student (1528), considered more arcane issues such as whether a gift:

• by a donor under the age of 25 was good;194
• to a prelate (in the form of a legacy) might be refused; 195
• with a condition was void, if the sovereign only broke the condition; 196
• to the church, containing a covenant that it should not be alienated, was good. 197

Little was, also, said on gifts in Perkins, Profitable Book - a legal text published from 1528 until 1827. However, one of his statements became open to confusion later on - in that counsel in Cochrane v Moore (1890) thought that Perkins had indicated that an oral gift of chattels without delivery was valid, referring to a statement that Perkins had made in respect of growing corn or a young tree. Perkins stated (see 1642 edition):

all chattels, reals, or personals, may be granted or given without deed, if not that it be in special cases. And therefore if a man give unto me ['done a moy', in Law French i.e. delivers to me] his horse or cow, or a bow; or a lance, or other such like thing, such gift is good by word: [i.e. a gift orally with delivery]

and if a man give unto me by word his corn growing upon the land it is good. And if a man give unto me a tree growing upon his land, it is good without deed. (wording divided for ease of reference)

A similar statement was contained in earlier editions of his work. However, it is asserted that Perkins was not alleging, in his statement, that an oral gift of a chattel was good at common law without there also being delivery. Thus:

• Horse or Cow. It seems clear Perkins intended to mean that a gift of chattels could be: (a) by way of deed (which was pre-requisite of a deed that it be delivered) or (b) orally, with delivery. The

193C St German, Doctor and Student (1528), SS, vol 91.
194 Ibid, p 24 ‘The age of infants to give or sell their lands and goods in the law of England is at 21 years or above so that after that age the gift is good and before that age it is not good by whose assent so ever it be except it be for his meat and drink or apparel or that it he do it as executor in the performance of the will of his testator or in some other like case that need not be rehearsed here and that age must be observed in this realm in law and conscience and not the said age of 25 years.’
195 Ibid, pp 248-50. St Germain also stated ‘if a gift be made to a man that refuses to take it the gift is void: and if it be made to a man that is absent the gift takes no effect in him till he assent…as I suppose an infant may disagree [disclaim] as well as one of full age but if a woman covert disagree to a gift and the husband agree the gift is good.’
199 Cochrane v Moore (1890) 25 QBD 57 at p 58 (Counsel). However, Fry LJ at p 72, clearly, did not think Perkins was suggesting that, at common law, a mere parol (oral) promise without delivery was sufficient, in the absence of a deed. 200 Since the 14th century, a gift of chattels could be by way of deed instead of physical delivery of the chattel, see n 182. See also 7 Edw 4 pl 21 fo 20b (1467), Seipp no 1467.057 (Choke JCP and other Justices: if one make a deed of gift of his goods to me this is good and effectual without delivery (livery) made to me [of the goods] until I disagree to the gift and this (disagreement) ought to be in a court of record). The rationale was that livery of the deed represented livery of the goods. Coke, n 84, vol 1, 36a ‘as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or oblige G o and take up the said writing, it is sufficient for you, or it will serve your turn; or Take it as my deed, or the like words, it is a sufficient turn.’ See also McBain, n 1(f), pt 1, p 52, n 416. See also Cochrane v Moore (1890) 25 QBD 57 per Fry LJ at p 67-9. Ibid, p 69 ‘the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day.’
201 Perkins (1642 ed), s 57. The wording in the last ed (1827) was similar.
202 See, for example, 1559 ed, title Grauntes, fo 13 (in Law French).
reference to a 'horse or cow' may be to a case in 1506 where Rede JKB observed, obiter, 'If I give to a man my cow or my horse, he may take [delivery, prendre] of the one or the other at his election.' The reference to delivery (prendre) in that case precludes that the case (or Perkins) was alleging that an oral gift without delivery was valid;

- **Growing Crops & Unfelled Trees.** As to the statement of Perkins re gifts of growing crops and unfelled trees, he cited an authority in the margin for it. However, the citation is inaccurate and the likely citation refers to a case in 1351 where there was a deed. Thus, Perkin's statement is more dubious, unless he was referring to a gift orally accompanied by delivery of the crops or trees once severed from the land.

As it is, it was confirmed in *Smith v Smith* (1733) that an oral (parol) gift of a chattel (in this case, furniture) without an act of delivery (livery of seisin) would not transfer the property, which is in accordance with earlier law.

(d) **Legal Texts - 17th Century**

Bacon had little to say on the law on gift. So did Coke, in his *Institutes of the Laws of England* (1628-41).

In respect of livery of seisin of land, Coke stated:

Livery of seisin. *Traditio, or deliberatio seisinae*, is a solemnity, that the law requires for the passing of a freehold of lands or tenements by delivery of seisin thereof...And there be two kinds of livery of seisin, viz. a livery in deed, and a livery in law.

A livery in deed is when the feoffor takes the ring of the door, or turf or twig of the land, and delivers the same upon the land to the feoffee in name of seisin of the land...etc. 208, viz. a livery in deed, and a livery in law.

A livery in law is, when the feoffor says to the feoffee, being in view of the house or land (I give you land to you and your heirs, and go enter into the same, and take possession thereof accordingly) and the feoffee does accordingly and your heirs, and go enter into the same, and take possession thereof accordingly) and the feoffee does accordingly and your heirs, and go enter into the same, and take possession thereof accordingly) and the feoffee does accordingly.

This ancient manner of conveyance by feoffment and livery of seisin, does for [in] many respects exceed all other conveyances.

The position with a gift of land was the same. Thus, such livery of seisin was no different to Anglo-Saxon times.

It could be effected by; (a) being on the land; or (b) in view of it. Further, it could only be made orally with the symbolic delivery of the land represented by way of a sod of land (or a twig). The only real development was that - by Coke's time - livery of seisin was, invariably, effected by delivery of a deed as opposed to a sod of land or a gift of land was the same.

Thus, such livery of seisin was no different to Anglo-Saxon times. It could be effected by; (a) being on the land; or (b) in view of it. Further, it could only be made orally with the symbolic delivery of the land represented by way of a sod of land (or a twig). The only real development was that - by Coke's time - livery of seisin was, invariably, effected by delivery of a deed as opposed to a sod of land or a gift of land was the same.

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203 See 21 Hen 7 pl 30 fo 18, Seipp no 1506.030, discussed in *Cochrane v Moore* (1890) 25 QBD 57 per Fry LJ at p 70 (Rede JKB 'Mes si jeo donne a un home ma vache, ou mon cheval, il peu prendre l’ un ou l’autra sa election...').

204 The 1559 edition refers to '25 Edw 4 Feoff 96', the 1641 edition to '15 Edw 3. 41', the 1757 edition to '15 E3 14' and the last edition in 1827 to '15 Ed 4 Feoff 96'. These seem to be references to 25 Edw 3 pl 14 fo 84a, Seipp no 1351.039 (trespass for grain cut and carried off), reported in Fitzherbert's Abridgment (1586), Feoffment 69. In the last edition of Perkins in 1827 the editor says in the Preface 'The original marginal references have been retained but the Editor does not hold himself responsible for their accuracy; most of these are to Fitzherbert's Abridgment and some to the Year Books...'. In *Cochrane v Moore* (1890) 25 QBD 57 at p 58, Counsel failed to note that the citation was inaccurate or that the (likely) correct citation did not support the proposition in the text.

205 2 Stra Rep 955 (93 ER 965) 'a parol gift, without some act of delivery, wouldnot alter the property, and that such an act was necessary to establish donatio mortis causa'. The CJ who gave this judgment was Yorke CJ. See also *Tate v Hibbert* (1793) 2 Ves 111 (30 ER 548) per Loughborough LC at p 120 'it could not be by mere parol; as saying 'I give', without an act, does not transfer the property.'

206 F Bacon, *Law Tracts* (printed by E & R Nutt, 1737) contains his *Elements of the Common Laws of England* (1629). At p 156, 'By gift, the property of goods may be passed by word or writing...'. Bacon also noted that a gift to a person was still good even if called by the wrong name or the gift was mis-described (e.g. a ring with a ruby when it was a diamond). For precedents as to gifts of chattels, see W West, n 9, s 423 (a general gift of goods, in Latin); s 424 (a gift of goods and chattels by deed, with covenants to find the donor necessaries and perform his will); s 425 (a gift or grant of goods by deed), s 426 (a gift of goods, upon condition to find necessaries, in Latin).

207 For his analysis of dowery, see Coke, n 84, vol 1, 306.

208 Coke, n 84, vol 1, 17a 'Seised Seisitus, comes of the French word seisin i.e. possession, saving that in the common law, seised or seisin is properly applied to freehold, and possessed or possession properly to goods and chattels; although sometime the one is used instead of the other.' Coke's observation is something of an intellectual quibble. See also Ibid, 266b, note (1).

209 This closely follows Bracton, nearly 400 years earlier.

210 Ibid, 48a-49a. See also Cruise, n 18, vol 4, pp 46-7.

211 See also Cruise, n 18, vol 4, p 51 'A gift, donatio... differs in nothing from a feoffment, but in the nature of the estate that passes by it, and livery of seisin must be given to the donee, to render it effectual.'
twig. However, simply handing over a deed on the land without accompanying words of delivery was insufficient for livery of seisin.\(^{212}\) As for the gift of a chattel, the following may be noted:

- **Oral Gift required Delivery.** It is clear that Coke did not believe that the oral gift of a chattel without delivery was valid, since he referred to cases where even an oral gift without delivery by the sovereign was invalid;\(^{213}\)

- **Wortes v Clifton (1614).**\(^{214}\) Coke stated: *‘le civile ley est que un done des biens nest bon sans tradition mes auterment est en nostre ley.’* (the civil law is that a gift of chattels is not good without delivery but it is otherwise in our law). Although counsel in *Irons v Smallpiece* (1818) argued that this meant that Coke supported the proposition that an oral gift without delivery was valid.\(^{215}\) Abbott CJ held otherwise.\(^{216}\) He stated (what seems indubitably correct):

> I am of opinion, that by the law of England, in order to transfer property by a gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.\(^{217}\)

**(e) Wills – Developments**

Finally, it may also be noted that by 1677 - wills were required to be in writing.

- **Statute of Frauds 1677.** Wills of land or movables could be oral until this Act, which was designed to suppress fraud and perjury, provided that:
  - If a will of personality (chattels) of more than £30 in value was not proved for 6 months after it had been made, it had to be evidenced by a writing which was brought into existence within 6 days of the date of the execution of the will;
  - A will of land had to be in writing, evidenced by 3 or 4 credible witnesses;\(^{218}\)

- **Wills Act 1837.** This Act, s 9, further simplified matters by providing that a will of land, or personality, had to be in form of a ‘written instrument’ signed at the foot or end thereof by the testator and witnessed by 2 witnesses.\(^{219}\) This was further simplified in 1982 when this section was amended to provide that no will was valid unless in ‘writing’ and signed by the testator in the presence of 2 witnesses.\(^{220}\)

**(f) Conclusion**

In the period 1290-1766 the law on deeds changed little from that in 1290 save that it became less complex. In the case of:

- **Chattels.** As well as a gift of the same being able to be made orally with delivery, from the 14th century, a deed was also sufficient. That is, delivery of the deed was the same as delivery of the chattel. Thus, once the deed was delivered, a person did not also have to deliver the chattel;

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212 Coke, n 84, vol 1, 49b ‘Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of anything, it is a good delivery, but to the livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the door (if it be of an house) or a turf or twig (if it be of land) and the feoffor laying his hand on it, the feoffor say to the feoffee, here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the form and effect of the deed (as has been said); and if it be without deed, then the words may be, here I deliver to you seisin of this house or land etc to have and to hold to you for life, or to you and the heirs of your body, or to you and your heirs for ever, as the case shall require.’

213 See n 185.

214 1 Rolle Rep 61 (81 ER 328).

215 *Irons v Smallpiece* (1818) 2 B & A 551 (106 ER 467) at p 552 ‘In Wortes v Clifton…it is laid down by Coke CJ that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognised in Shepherd’s Touchstone, tit Gift, 226.’

216 Ibid, p 553 ‘The dictum of Lord Coke in the case cited must be understood to apply to a deed of gift; for a party cannot avoid his own voluntary deed, although he may have his own voluntary promise.’ See also *Cochrane v Moore* (1890) 25 QBD 57 per Fry J at p 72.

217 Ibid, p 552.

218 Borkowski, n 4, ch 1. See also Statute of Frauds 1677, ss 5, 19-20.


220 See Halsbury, *Statutes* (5th ed), vol 50, p 399 and s 9 ‘No will shall be valid unless (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness) but no form of attestation shall be necessary. Cf. The simpler form of will for soldiers and sailors, see s 11.
- **Land.** Delivering a sod of land or twig was replaced by delivering a deed and - although livery of seisin was still a mode of conveying land (including by way of gift) - alternative methods were being (successfully) used to circumvent this. Pollock and Wright thought that, in practice, livery of seisin of land - post 1688 - was rare.221

As for wills, since 1540, a legacy could include land and, since 1677, wills - except for small amounts - were required to be in writing by virtue of the Statute of Frauds 1677. In the case of dower (a gift of the husband to his wife on marriage which took effect on his death), this was becoming more rare by the 17th century. And, in the case of dowry, marriage settlements by way of deed stipulated the precise terms.

8. **BLACKSTONE (1766)**

Sheppard, *The Touchstone of Common Assurances*,222 was a popular work on conveyancing. The first edition of was in 1648, the last in 1826. However, the work may (initially) have been that of Doderidge J and not of Sheppard.223 Further, this work is not of high quality (so too, with regard to his Abridgment).224 Although this work had little to say on the law of gift,225 it was quoted in subsequent cases with respect to two matters:

- **Definition.** Sheppard stated: ‘This word [gift], importing no more than the transferring of the property of the thing from one to another.’ This definition is unsatisfactory - and was not followed by Buckley LJ in *Berry v Warnett* (1980)(see 10(a)) - since it makes no reference to the essence of a gift being gratuitous;

- **Oral Gift Sufficient.** Sheppard, referring to Perkins (see 7(e)), stated that a person could:

  > by word of mouth...grant or sell me the trees standing upon his ground, the corn growing upon his land, his horse, sword, plate or other household stuff; this is a good grant’. 226

This was true if this was a grant (since, by way of deed) but not if a gift made orally, where delivery was also required. However, Sheppard, referring to Coke CJ in *Wortes v Clifton* (1614) (see 7(d)), thought Coke had asserted that an oral gift without delivery was valid 227 - ignoring that this contradicted *Smith v Smith* (1733)228 as well as the more recent decision of *Irons v Smallpiece* (1818) where Abbott CJ had indicated that Coke CJ’s statement was made in the context of a deed.229 In so doing Abbott CJ rejected the contention in Sheppard’s text. However, subsequent editions of Sheppard failed to note this correction.

Thus, Sheppard’s work on gift is of little assistance. As well as Sheppard’s writing, Wood, *An Institute of the Laws of England* - the first edition of which was in 1720 and the last in 1772 - 230 also considered gift. However, in both cases, matters were better put by Blackstone in his *Commentaries on the Laws of England* (1765-9) which is now considered.231

(a) **Land**

Blackstone, in the second volume of his work (published in 1766) noted that gift was often confused with a grant (which was always by way of deed). 232 As with prior writers, Blackstone indicated that, although there might be a deed (of fooffment) to evidence the transfer of a corporeal hereditament such as land:

> by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called livery of seisin; without which the feoffee has but a mere estate at will. This livery of seisin is no

221 Pollock & Wright, n 73, p 55 ‘since the Restoration, the seisin and possession of land are hardly ever transferred by livery. The Statute of Uses [1536] destroyed, not by its principal design but by its collateral results, the consistency of the common law, and indeed went far to make the whole system unintelligible.’


223 The work may actually have been that of Doderidge J, the manuscript of which Sheppard bought after the former’s death. See W Holdsworth, *A History of English Law* (Sweet & Maxwell, 2009 rep), vol 5, p 391.

224 Holdsworth, n 223, vol 5, p 377.

225 See e.g. 2nd ed (1651), p 228 and last edition (8th ed, 1826), vol 1, p 227.


227 Ibid, p 227 ‘a gift… is, or may be, either by word or by writing.’ In a fn (a) he stated ‘By the civil law a gift of goods is not without delivery, yet in our law it is otherwise. Per Coke CJ 1 Rol Rep 61. ’For this, see n 214.

228 See n 205.

229 See n 215.


231 Blackstone, n 61.

232 Ibid, vol 2, p 317 ‘In common accetpation gifts are frequently confounded with the next species of deeds: which are, grants, concessiones; the regular method by the common law of transferring the property of incorporeal hereditaments, or, such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, etc, to lie in grant….These therefore pass merely by delivery of the deed… ’.
other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation... Livery of seisin, by the common law, is necessary to be made upon every grant of an estate in freehold in hereditaments corporeal, whether of inheritance or for life only.  

Blackstone noted that seisin could be in deed (in fact) or by law. Finally, Blackstone explained how livery of seisin was subverted by employing conveyancing devices such as the: use, bargain and sale, and lease and release. That said, it seems that - even in Blackstone’s time - livery of seisin in the case of land was still employed, in, at least, a few cases.

(b) Chattels

As for gifts of chattels (movables), Blackstone stated:

Gifts then, or grants...are ...to be distinguished...gifts are always gratuitous, grants are upon some consideration or equivalent: and they may be divided with regard to their subject matter, into gifts or grants of chattels real, and gifts or grants of chattels personal... Grants or gifts, of chattels personal, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately; and if A gives to B 100 pounds, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor’s power to retract it; though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety [drunkenness], or surprise [trickery]. But if the gift does not take effect, by delivery of immediate possession, it is not then properly a gift, but a contract: and this a man cannot be compelled to perform, but upon good and  

233 Ibid, pp 311, 314.
234 Ibid, p 315 ‘The feoffor...or his attorney, together with the feoffee...or his attorney...come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment...on which the livery is to be made. And then the feoffor, if it be of land, does deliver to the feoffee, all other persons being out of the ground, a cloud or turf, or a twig or bough there growing, with words to this effect. ‘I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.’ But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut the door, and then open it, and let in the others.’
235 Ibid, p 316. ‘Livery in law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, ‘I give you yonder land, enter and take possession...’ This livery in law cannot however be given or received by attorney, but only by the parties themselves.’
236 Ibid, pp 324-39. See also J Doderidge, The English Lawyer (1631, rep Lawbook Exchange Ltd), p 138 ‘Livery and seisin is the instrumental efficient cause of the conveyance of a freehold estate in land, and sufficient alone to perform the same, and yet it is not the sole cause, for it may be conveyed by other means, as by fine, bargain and sale, by devise, and otherwise.’
237 e.g. W Newnham, The Complete Conveyancer (printed for S Bladon, 1st ed, 1781, last ed 1800), vol 2, p 238 where the text provided a precedent of livery by the feoffor to the feoffee ‘Be it remembered that this [10th June 1780] peaceable and quiet possession and seisin of the messuage and lands, and other the premises in his deed contained was delivered by the within named [X] to the within named [Y] according to the form and effect of this deed...’. Newnham also provided voluminous commentary on what constituted livery of seisin in vol 3, p 134 et seq. As to the benefit of seisin, he stated, vol 3, p 135 ‘The manner of conveyance by feoffment is so ancient, and the ceremony of livery of seisin being inseparably incident to it, it is much favoured in law; and therefore it is expounded and taken strongly against him that makes it, and beneficially for him to whom it is made.’ Ibid, pp 134-5 ‘Livery of seisin is the giving possession of lands or tenements corporeal; or it is a solemnity or overt ceremony required by law in passing lands or tenements corporeal, as an evidence or testimonial of the willing departing by him that makes the livery from the thing whereof livery is made, and the willing acceptance thereof by the other party. Seisin is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which, no freehold could be constituted or pass.’ For the original intent and manner of transferring lands by livery or seisin see Spelman Glossary 510 [reference to H Spelman, Glossarium Archæologiæ (London, 1664)].Mad Form Angl Dissert 9 see n 84, Livery of seisin was first invented as an open and notorious act, to the end that the country might take notice how lands pass from man to man, and who is owner thereof; that such as have title thereto may know against whom to bring their actions, and that others may know that have cause, of whom to take leases, and of who to require warships etc. And by this means, if the title comes in question, the jury can better tell in whom the right is.’
238 Blackstone, n 61, vol 2, p 440 ‘Under the head of gifts or grants of chattels real may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold...though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and, in the case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.’
Blackstone noted that a gift of chattels could be 'in writing'. As authority for this Blackstone cited Perkins (as did Comyns and Newnam). However, this may have been a case of Homer nodding and - unintentionally - Blackstone may have changed the law, since Perkins only referred to a deed - not just to writing - and:

- In early times, as previously noted, a gift (indeed, any transfer) of chattels had to be made by livery of seisin; that is, physical delivery by the donor to the donee. However, by the 14th century (see 7(a)) it was accepted a deed was sufficient instead;
- The alternative to livery of seisin had to be by deed- and not just writing - since the pre-requisite of a deed - as opposed to a mere writing or an escrow - was that it was: (a) in writing; (b) sealed; and (c) delivered. The latter was essential because it reflected what it replaced - livery of seisin; the physical delivery of the chattel. By the time of Coke, however, delivery had become constructive - words or conduct evidencing delivery were sufficient, as opposed to actual delivery.

Thus, Blackstone seems to have taken this one step further by holding that, in the case of chattels, writing alone (and not a deed) was sufficient for a grant - or gift - of the same. Blackstone may also have been influenced by the position on wills. Since they were much older than the law on deeds (going back to Anglo-Saxon times whereas a ‘deed’ was a medieval legal concept, see 7(a)), writing was sufficient for a will. It did not have to be by way of deed.

(c) Dower, Will, Donatio Causa Mortis etc

Blackstone considered the law on dower - the gift of the husband to his wife. He noted that:

Dower is called in latin by the foreign jurists doarium, but by Bracton and our English writers dos; which among the Romans signified the marriage portion, which the wife brought to her husband [i.e. dowry]; but with us is applied to signify this kind of estate [i.e. dower]…for the sustenance of the wife, and the nurture and education of the younger children.

Thus, a wife was by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee simple (or fee tail) at any time during the coverture (marriage); and of which any issue, which she might have had, might have been heir. A seisin in law of the husband was as effectual as one in deed, to render her dowable.

Finally, after noting various changes to the law on dower, Blackstone indicated that:

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom and that jointure (marriage settlement) tended to be preferred. As for gifts by will (legacies), Blackstone noted...

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239 Ibid, pp 440-1.

240 A Comyns, A Digest of the Laws of England. The first edition was in 1762-7, the last in 1822. See e.g. 3rd edition (ed. Kyd) in 1792, vol 2, p 137 which states ‘if a man grant all his goods, the property vests in the grantee. And the grant may be made without deed. Perk. Grant, sect 57.’

241 Newnam (in 1781), n 237, vol 3, p 206 ‘The word gift imports no more than the transferring of the property of a thing from one to another without a valuable consideration. [...] it is or may be either by word or by writing ....’. Ibid, p 529 ‘A gift is a transferring the property in a thing from one to another without a valuable consideration. For to transfer any thing upon a valuable consideration, is a contract or sale... By gift, the property of goods may be passed by word or writing. But a parol gift, without some act of delivery, will not alter the property [Newnam cited 2 Sta Rep 955, with is Smith v Smith (1833), see n 205]. By the common law all chattels real or personal may be granted or given without deed, except in some special cases; and a free [voluntary] gift is good without a consideration.’ Newnam cited Perkins 57, see n 201 and Hob 230 with Smith v Smith (1833), see n 205.

242 Thus, Paston JCP stated in 1431, ‘It is nothing more than a escrow unless he delivers the deed to him (‘il n’est pas sinon que un escrow jusque le livere soit fait a lay’). See YB 10 Hen 6 pl 85, fo 25a-b (1431), Seipp No 1431.177. See also McBain, n 1(f), part 1, p 34, n 214.

243 See n 200.

244 Ibid, p 129 ‘Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised during the coverture, to hold to herself for the term of her natural life.’


247 Ibid.


that:

- **Chattels by Will.** It was uncertain exactly when a person had the unfettered right to dispose of his chattels by will but the law (in Blackstone’s time, in 1766) was that a man might devise them freely.250

- **Oral Will of Chattels.** As to nuncupative (oral) wills of chattels, Blackstone indicated that they had fallen into dis-use due to the requirements of the Statute of Frauds 1677,(see 7(e)),251 and that wills of chattels were now in writing (although they did not, strictly, have to be).252

Finally, Blackstone dealt with DMC, stating:

Besides these formal legacies, contained in a man’s will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods...to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only in the contemplation of death, or *mortis causa*. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession; and so far differs from a testamentary disposition...255

Blackstone seemed to think that DMC derived from Roman law.254 However, it also had a basis in Anglo-Saxon law (see 2(c)) and had precedent in the Bible.

**d) Conclusion**

Blackstone provided the most lucid exposition of the law on gift since Bracton. By his time (in 1766) the law had been further simplified in that a gift of a chattel could be in *writing* and a *deed* was not required255 - though quite what the source for this was, in not clear.256

- By his time, *dower* was also on the wane, being replaced by marriage settlements (jointures). These were, invariably, detailed and by way of deed since - even though they stated they were made by way of natural affection *etc* - they were also stated to be by way of grant (contract) with consideration being given. This was to enable them to be sued on more easily as well as a grant presuming consent by the grantee;257

- This, also, often occurred in the case of gifts within the family. They were not formulated as gifts but as grants (contracts).

**Newnam, Conveyancer (1781) - one of the standard texts on precedents - provided examples. Deeds of gift:**

- by a father to his son of his house, goods, stock in trade *etc*, with the son to pay the father’s debts and allow him an annual sum. On default, the father to re-enter *etc*;258

- of money by an aunt to her nephew, in consideration of paying her an annuity during her life;259

- of goods and chattels by an uncle to his nephew, conditionally;260

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250 Ibid, p 493. For the requirement to give a third part to his heirs and a third to his wife and whether this was the common law at the time of Glanvill or just a special custom, see n 105.

251 Ibid, p 501 ‘Thus has the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse; and hardly ever heard of, but in the only instance where favour ought to be shown to it, when the testator is surprised by sudden and violent sickness.’

252 Ibid.

253 Ibid, p 514.

254 Ibid ‘[it] seems to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks.’ Blackstone cited the Institutes of Justinian 2.7.1 ‘There is, again, another mode of acquiring property, donation, of which there are two kinds, donation *mortis causa*, and donation not *mortis causa*. See Sanders, n 40, p 147. Sanders noted that a *donatio mortis causa* (under Roman law) was to be made in the presence of 5 witnesses. Ibid, p 148. See also Borkowski, n 4, p 13 (no clear evidence of any Greek connection). See also Hyland, n 4, pp 181-2.

255 See also T Potts, *A Compendious Law Dictionary* (1815) *gift* ‘a transferring the property in a thing from one to another without a valuable consideration, for to transfer any thing upon a valuable consideration, is a contract or sale: he who gives any thing is called the *donor*; and he to whom is given is called the *donee*. By the common law, all chattels real or personal may be granted or given, without deed, except in some special cases; and a free gift is good without a consideration, if not to defraud creditors. Potts cited Perkins 57, see n 201.

256 See ns 240 & 241.

257 See McBain, n 1(f), pt 1, pp 6-7 (deeds and consideration).

258 Newnam, n 237, vol 2, p 101. It stated ‘To all to whom these presents shall come...know ye that [X] as well for and in consideration of the natural love and affection which he has and bears for and towards [Y] his only son and heir apparent as [a reference was made to the payment by Y of the sum of certain designated debts owed by X to others]...and for divers other good and valuable causes and considerations...etc.’

259 Ibid, p 102.
of a father of his personal estate to two trustees in trust for his daughter (to make provision for her education and maintenance). However, if she died under age - or remained unmarried - then, to his wife. Also, a power of revocation during his life or by will.261

All these were in the context of family, the first three being the means in which - in those times - persons provided for their sustenance in old age, when there were no State (or private) pensions.

9. LAW ON GIFT: 1766 - 1925

In respect of the law on gift, this period saw further simplification of the law. Thus:

(a) Land

The Real Property Act 1845 enacted that - in future - corporeal hereditaments were to lie in grant and not in livery. Alexander noted:

The importance of this Act in the history of conveyancing it would be difficult to overestimate. Henceforth all land of freehold tenure could be conveyed by deed, one deed, and that deed usually a simple grant. This Act of 1845 marks definitely the break of our law with the old feudal system…since a deed is one of the appropriate mode of conveying chattels or personal property.262

This event was a decisive break with the Anglo-Saxon and medieval past in respect of land. Land was now transferred by document (by deed of grant). It could no longer be transferred orally accompanied by the symbolic delivery of a sod of earth or a twig.

(b) Chattels

The Anglo-Saxon position remained. Chattels could still be transferred by delivery and, doubtless, a huge number of gifts (like today) were still transferred by delivery. However, chattels could be also transferred by writing. This was, usually, in the form of a deed, in order to enable it to be enforced as a contract, if not as a gift. Doubtless, this was done ex abundante cautela.

(c) Dower

This was abolished by the Administration of Estates Act 1925.263 In any case, marriage settlements had superceded dower. They were in the form of a deed, in order to enable it to be enforced as a contract, if not as a gift. Doubtless, this was done ex abundante cautela.

(d) Wills

Wills were (save in the case of minor sums) required to be in writing by the Statute of Frauds 1677.264 The Wills Act 1837 mandated writing in all cases - providing that a will for land or chattels (personalty) had to be in the form of a written instrument (i.e. in writing) signed by the testator and witnessed by two witnesses.

(e) Donatio Mortis Causa

Although referred to by Bracton (c.1240), it is likely DMC were not of much significance, legally, up to 1677, since wills could be oral. Thus, there was little to distinguish an oral deathbed gift (with delivery of the chattel) from an oral will which disposed of a chattel. It was only after the Statute of Frauds1677, which required most wills to be in writing, that they assumed greater significance and, when they did, they were closely associated with gifts inter vivos - both requiring delivery of the chattel. 265

260 Ibid. It stated: ‘Know etc that I [X] in consideration of the natural love and affection which I have and bear to my nephew [Y] for and towards the better support and maintenance of him after my decease, and divers others etc have given, granted and sold [all goods and chattels, provided Y allowed him to enjoy them during his life] and that, from and after my demise, [Y] … shall or lawfully may have, hold and enjoy the same…’ This deed also involved livery of seisin.


263 Administration of Estates Act 1925, s 45. See also Dower Act 1833, noted in Halsbury, n 220, vol 50, p 384.

264 See 7(e). Where minor sums were involved an oral will was still possible.

265 Ward v Turner (1752) 2 Ves Sen 431 (28 ER 275) per Hardwicke LC, p 442 ‘tradition or delivery is necessary to make a good donation mortis causa.’ A gift, therefore, of South Sea stocks (shares) by delivering the receipts for the purchase of them was insufficient to constitute a gift, although there was evidence of an intent in the donor to make such a gift. Ibid, p 444. Also, p 437 ‘it was impossible to make such a complex donation mortis causa as a general bequest of all the personal estate, or of a residue without some proof of delivery; for that would be the same as a nuncupative will; and it was a pity the stat. of frauds [Statute of Frauds 1677] did not set aside all these kinds of gifts.’See also Borkowski, n 4, p 11.
(f) Conclusion
This historical analysis shows how the law of gift developed. However, considerable simplification had been made in:

- 1837 (by the law on wills which mandated a written will);
- 1845 (by the abolition of seisin, with land being, then, transferred by way of grant only);
- 1925 (by the abolition of dower).

The present law on gift is now considered. It may be noted that Halsbury contains the best assessment of the law.

10. PRESENT LAW ON GIFT: DEFINITION

(a) Gift is Gratuitous - No Legal Compulsion
Halsbury notes that gifts can be made: (a) between living persons (inter vivos); (b) in contemplation of death (mortis causa); and (c) by will. The definition Halsbury provides in respect of (a) is as follows:

A gift made between living persons *inter vivos* may be defined shortly as the transfer of any property from one person to another *gratuitously* while the donor is still alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the intention that the thing shall not return to the donor. (italics supplied)

As to the definition of a gift, the word ‘*gratuitous*’ is key, which word reflected the concept in Roman law. Thus, the Digest of Justinian provided (quoting the Roman jurist Julian):

When someone makes a gift with the intention that it should immediately become the property of the recipient and will not revert to himself in any circumstances, and when he does this for no other reason than to practice *liberality* and *generosity*, this is a gift in the proper sense. (italics supplied)

This was followed by Bracton who stated:

A gift is a disposition arising from pure liberality and without legal compulsion, that is, neither of civil or natural law, payment, duress or force playing no part. It proceeds from the full and free disposition of a donor [wishing] to transfer his property to another. (italics supplied)

Fleta said much the same, ‘out of pure generosity and without legal compulsion.’ Thus, a gift occurred when the donor intended his act to be a legal act and, yet, was under no legal obligation to give.

(b) Alternative Definition - No Consideration
Halsbury, however, also cites a more recent definition of gift. In *Berry v Warnett* (Inspector of Taxes)(1980) Buckley LJ stated:

Notwithstanding the passage to which we were referred in Sheppard’s Touchstone on Common Assurances (8th edn, 1826, vol 1, p 227), I think that the ordinary primary meaning of ‘*gift*’ is now a voluntary transfer of property made without consideration.

However, this definition is not felicitous, being affected by the Elizabethan concept of consideration, as a pre-requisite for a valid contract.
• ‘Gratuitous’ does not mean that no money (or other consideration) is given by the donee. It means that the donor has no legal obligation to give. Thus, the absence of consideration does not, ipso facto, make the transaction a gift - although the presence of consideration does, strongly, suggest that the act is not a gift but a grant (contract);

• Thus, consideration is not required in the case of a voluntary (gratuitous) bond which can be enforced against the person who created it; 276

• Similarly, a trust does not require consideration to be valid - it may be gratuitous or not. 277

This definition of Buckley LJ may have been influenced by a statement in Kekewich v Manning (1851) 278 where Knight Bruce LJ referred to the fact that a person: has it in his power to make, in a binding and effectual manner, a voluntary [i.e. gratuitous] gift 279 of any part of his property… it is…clear… that a gratuitously expressed intention, a promise merely voluntary, or, to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably. 280

The word ‘voluntary’ was clearly intended to be synonymous with ‘gratuitously’. 281 However, the latter sentence by Knight Bruce LJ merely indicated that a verbal promise to make a gift without delivery was insufficient. This (which is always been the law) 282 was not intended to constitute the definition of a gift.

• As a result, the definition of Buckley LJ is better restricted to the instant case - one in which tax legislation was considered (the Finance Act 1965) 283 which seemed to make it clear that - if full consideration (market value) was given - there was no gift; something the court held on the facts, 284

• More particularly, the fact that consideration (or small consideration) has passed does not prevent a transaction being a gift since consideration may be employed to feign (pretend) that a legal act is one thing when it is another - whether for tax purposes or otherwise.

Halsbury cites cases where a gift was coloured to be a purchase:

• *Howard v Earl of Shrewsbury* (1867). 285 A voluntary settlement of land worth £130,000-140,000 was given in return for £1000. This was, in fact, a gift ‘coloured’ as a purchase. 286 Thus, the donor intended to make a gift, albeit - for other purposes - it feigned to be a purchase;

• *Mansukhani v Sharkey* (1992). 287 A transfer of a flat by parents to their son (a student) due to natural love and affection was held to be a gift, not a purchase, 288 - even though the son covenanted to pay themortgage and indemnified his parents on their liability to observe their mortgage covenants.

consideration required there to be an obligation (charge) to one party or a benefit (profit) to the other, in order to create a valid contract. For the origin of such as doctrine see Baker, n 145, vol 3, pp 1176-1201 ‘Origins of the’ ‘Doctrines of Consideration 1535-1585.’

276 Halsbury, n 267, vol 52, para 201 ‘A voluntary [gratuitous] bond in favour of a trustee for a beneficiary can be enforced by the beneficiary where it is established that there is a completely constituted trust of the chose or thing in action, the benefit of the covenant… Ibid, n 8 ‘Consideration is not essential to constitute a valid bond.’

277 See 1 De GM & G 176 (42 ER 519) at pp 189-90 where Knight Bruce LJ stated ‘a trust may certainly be created gratuitously. So that the absence of consideration for its creation is in general absolutely immaterial.’

278 1 De GM & G 176 (42 ER 519).

279 ‘voluntary gift’ is, actually, tautologous. Elsewhere, at p 187, Knight Bruce LJ referred to an ‘act of bounty’ to describe a gift.

280 1 De GM & G 176 (42 ER 519), pp 187-8.

281 See also S Johnson, *A Dictionary of the English Language* (1st ed, 1755)(‘gratuitous’) 1. Voluntary; granted without claim or merit.’ (underlining supplied). See also Oxford English Dictionary (‘OED’)(‘gratuitous’) ‘1. Freely bestowed or obtained; granted without claim or merit; provided without payment or return; costing nothing to the recipient; free. B spec[ially] sc. Law. Of a charter or deed: made or granted without any value given in return.’ (voluntary) ‘5. Of gifts, etc: Freely or spontaneously bestowed, rendered, or made; contributed voluntarily or by reason of generous or charitable motives.’

282 See 7(e).

283 See [1980] 3 AE 798 at p 804 where Ackner LJ cited the Finance Act 1965, sch 7, para 19(4) ‘references to a gift includes references to any transaction otherwise than by way of bargain made at arm’s length so far as [this might better read ‘if’] money or money’s worth passes under the transaction without full consideration in money or money’s worth.’ This suggests that para 19(4) was designed to treat as a gift acts (other than bargains. i.e contracts) where the consideration was at an under value, such as in *Howard v Earl of Shrewsbury*, see n 285.

284 Ibid, per Ackner LJ, p 808 ‘I agree with Buckley LJ…[a gift] cannot though, on the ordinary use of language, be made to cover a transaction for full consideration in money or money’s worth. It is not contended that the sum paid…for the reversionary interest was other than its market value. The taxpayer…retained the rest of the beneficial interest, so that there was no act of bounty involved.’ See also Earl of Fitzwilliam’s Agreement [1950] 1 AE 191 per Dankwerts J, especially pp 195-6. See also Wheatcroft, n 4, p 111.

285 A Dictionary of the English Language (1851) 278

286 ‘act of bounty’ money or money’s worth passes under the transaction without full consideration in money or money’s worth.’ This suggests that para 19(4) was designed to treat as a gift acts (other than bargains. i.e contracts) where the consideration was at an under value, such as in *Howard v Earl of Shrewsbury*, see n 285.

287 Cairns LJ at p 778 ‘The transaction was not…a bona fide transaction of sale and purchase. It was in reality a voluntary settlement, in which the forms of the Court of Chancery, and the payment out of court of £1000, were resorted to in order to give the transaction the appearance of a purchase, and in order to give, if possible, to the voluntary settlement the statutory character of inalienability.’ (italics supplied).
These cases evidence the fact that a description employed by the parties to describe a legal act is not determinative. It is for a court to determine. In *Esso Petroleum Co Ltd v Custom & Excise Commissioners* (1973),

Pennycuick VC stated:

> the nature of the transaction depends upon the terms upon which the parties entered into it and not upon the label which the parties attached to it...I do not think that the fact this transaction is described as ‘a gift of free coins’ advances this contention very far. One has to look at the terms of the transaction."\(^{290}\)

**In conclusion, an inter vivos gift is where one person (the donor) intends to, and transfers, ownership in property to another (the donee): (a) gratuitously (i.e. when under no legal obligation); and (b) with no intention of reverter. Consideration is usually evidence that a legal act is not a gift. However, its presence does not, ipso facto, mean that it is a gift - since it may have been to ‘colour’ the transaction.**

*What is determinative is the intention of the donor. Did he give without any legal obligation to give. That is freely, voluntarily? As Fleta put it, ‘without legal compulsion’? If so, it is a gift. If not so, it is not a gift. Further, the donor must have the intention to give as opposed to sell, loan etc.*\(^{291}\)

11. **PRESENT LAW ON GIFT: ACCEPTANCE (CONSENT)**

Halsbury states:

Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of a gift. This is so even where a gift is of an onerous nature, or of what is called an ‘onerous trust.’\(^{292}\)

This statement of Halsbury is too terse, since it does not indicate the historical development of a presumed acceptance (and that fact that notice, consent and acceptance were all used indiscriminately in earlier times).

**a. Gift - Oral with Delivery**

In Anglo-Saxon times, land and chattels were transferred - including by way of gift - only one way. Delivery of seisin. Thus, there was physical delivery of the chattel (or sod of earth or twig to represent the land) with words conveying it to the donee, and his acceptance. This would have been contemporaneous -the donor and donee being on the land (or in view) or at the giving ceremony. On this occasion the donee could either accept or reject the gift.

If the latter, there was no valid gift. The position is no different in the time of Bracton (c.1240), Britton (c.1290) or Fleta (c.1290) all of whom emphasized there had to be consent by the donee to make the gift effective. As Bracton put it:

> A gift is of no effect unless there is mutual consent and agreement on the part of both the donor and the donee, that is that the donor have the animus donandi and the donee the animus recipiendi.\(^{293}\)

Livery of seisin of land continued until the Real Property Act 1845 and land cannot now be given orally with delivery. A deed or, at least, writing is required (see 13). However, a chattel can be given orally with delivery. The issue, then, is *when must acceptance by the donee occur?* It seems clear the courts have moved from there being: (a)

\(^{287}\) (1992) 24 HLR 600.

\(^{288}\) This was for the purposes of the Rent Act 1977, sch 15, pt 1, case 9. Fox LJ at p 603 ‘Consideration by way of love and affection is a familiar recital in deeds of gift and voluntary settlements…There is no reference to a sale in the instrument itself; nor is there anything which suggests that the transaction was dressed up in some way to hide its true nature. The reference to love and affection strongly suggests a gift…’ That said, it should be noted (see 8(d)) that, from the 17th century onwards, in family and marriage settlements, it was common to refer to ‘natural love and affection’ in a deed - as well as to consideration - to enable the legal act (settlement) to be enforced as a grant (due to consideration) it was enforceable as a gift. Also, it was by way of deed, since land was invariably involved, and delivery of the deed replicated delivery of seisin.

\(^{289}\) [1973] 1 WLR 1240. Coins, bearing the face of English football players, were given free to motorists buying petrol at the plaintiff’s filling stations or from other dealers, on the basis of one coin per four gallons of petrol bought. Customs claimed they were chargeable goods under the Purchase Tax Act 1963, sch 1, group 25, being ‘produced in quantity for general sale’ and, thus, subject to tax. This was upheld.

\(^{290}\) Ibid, pp 1246-7. Pennycuick VC cited *Inland Revenue C-ers v Wesleyan and General Assurance Society* [1946] 2 AE 749, 751 per Goddard CJ ‘The doctrine means no more than that the language that the parties use is not necessarily to be adopted as conclusive proof of what the legal relationship is. That is, indeed, a common principle of construction. To take one example, when parties enter into a contract, though they describe it as a licence, but the contract, according to its true interpretation, creates the relationship of landlord and tenant, the parties can call it a licence as much as they like, but it will be a lease…’.

\(^{291}\) Ibid, p 1246-7. Pennycuick VC cited *Esso Petroleum Co Ltd v Custom & Excise Commissioners* (1973),289 Pennycuick VC cited *Inland Revenue C-ers v Wesleyan and General Assurance Society* [1946] 2 AE 749, 751 per Goddard CJ ‘The doctrine means no more than that the language that the parties use is not necessarily to be adopted as conclusive proof of what the legal relationship is. That is, indeed, a common principle of construction. To take one example, when parties enter into a contract, though they describe it as a licence, but the contract, according to its true interpretation, creates the relationship of landlord and tenant, the parties can call it a licence as much as they like, but it will be a lease…’.

\(^{292}\) See eg, Halsbury, n 267, vol 52,para 232. It cites *Douglas v Douglas* (1869) 22 LT 127 where the intention, on the facts, was not to make a gift (of a sword) but to give temporary possession (custody) of it to the recipient.

\(^{293}\) Halsbury, n 267, vol 52, para 249. See also *R v Hinks* [2000] 3 WLR 1590, 1614 per Lord Hobhouse (dissenting) ‘It is not necessary for the donee to know of the gift. The donee, on becoming aware of the gift, has the right to refuse (or reject) the which case it revests in the donee with [restitutive] effect.’
delivery and acceptance; to (b) acceptance (i.e. consent to the gift) being presumed with delivery. This shift was founded on a legal fiction as to benefit.

- **Not Contemporaneous.** If the donor and donee were both present at the gift giving, acceptance/rejection was clear - as it would have been in Anglo-Saxon and early medieval times when only livery of seisin in the presence of witnesses was possible. However, with the advent of deeds, the gift and acceptance might not be contemporaneous. The chattel may have been delivered to the home of the donee who was abroad or unaware of it. Or delivered to a third party, to give to the donee. Or set apart for the donee in some fashion.
  - **Tudor Times.** It seems, in Tudor times, this issue was considered.294 However, there is no evidence the courts were prepared to let ‘livery of seisin’ be undermined by recognizing as valid an oral gift of a chattel when there had been no delivery of possession.295 Or, that they were prepared to over-ride Bracton (and Britton and Fleta) that it took consensus (agreement) between the donor and the donee -one to make a gift, the other to receive it as a gift. To assert otherwise would be to negate the customary words of gift that had prevailed for centuries;296
  - **Presumed Acceptance.** However, by the 14th century, delivery of a deed specifying the gift of a chattel was held - legally - to be the same as delivery of the chattel.297 Further, in 1467, it seems the courts were prepared to hold that a gift vested (i.e. it took legal effect) on the delivery of the deed (or goods), subject to the right of the donee to, later, disclaim. Coke JCP and the other justices are accredited with stating:
    
    if one make a deed of gift of his goods to me this is good and effectual without delivery (livere)
    
    made to me [of the goods] until I disagree to the gift. …298 (underlining supplied)

Similarly, in Butler & Baker’s Case (1591), 299 a case concerning a deed of feoffment, the court held that:

The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that the property and interest will be devested and such disagreement need not be in a court of record. 300 (underlining supplied)

The rationale seems to be that the gift was for the ‘use’ (benefit) of the donee. Reference is made in these cases (and others), variably, to ‘notice’, ‘consent’, ‘assent’, ‘agreement’, ‘acceptance’. However, they were (it is asserted) synonyms for acceptance of the gift by the donee. The legal fiction of presumed acceptance on delivery was more clearly enunciated in Stirling v Vaughan (1809).301 In a prize case (and, virtually, by way of an aside) Ellenborough CJ stated:

The law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit.302

Ellenborough cited no authority for this proposition. Nor did he limit his observation to a document by way

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294 See J Baker (ed), The Oxford History of the Laws of England (OUP, 2003), vol 6, pp 739-40 ‘when, in 1558, it was disputed whether goods could be effectively given to someone who was not present, the difficulty seems to have arisen from the lack of an opportunity to indicate consent rather than the need for a physical transfer.’ In a fn, Baker cited ‘Anon (1558) BL MS Harley 1624, fo 67; MS Hargrave 4, fo 124 (tr ‘If a man gives goods to someone who is absent, it seemed to some that the property is changed and that it is in the donee until he disagrees to it; but others said that the goods do not pass before the donee consents to the gift; query’).

295 Ibid, p 740 ‘if the donor had possession but did not deliver it to the donee, it was arguable that title could nevertheless pass. It would pass if the possession was delivered to a third party to convey to the donee, and it might pass even if there was no change of possession, in the sense the donee attained possession.’

296 See Bracton, see ns 133 and 140. Also, Fleta, see n 162 (‘I give that you may do’). Also, Coke, see n 212.

297 See n 182.

298 See n 200.

299 3 Coke Rep 25a (76 ER 684).

300 Ibid, 26b-27a.Unlike the court in 1467 (see n 200), Coke thought that disclaimer of a gift could be in pais and was not required to be in a court of record. See also Siggers v Evans (1855) 5 El & Bl 367 (119 ER 112), per Campbell CJ at p 380. Also, Leach v Thompson (1690) 1 Show KB 296 (89 ER 584) (argument of Shower) at pp 300-1 ‘in the case of Butler v Baker… a grant of goods and chattels vests the property in the grantee before notice.’ For the employment of the expression ‘unto and to the use of’, see J McGhee (ed), Snell’s Equity (33rd ed, 2015), para 25-016.

301 11 East 619 (103ER 1145). See also Sheppard, n 222, (7th ed, 1820)-1 ‘The law presumes that every grant, etc; and therefore till the contrary is shown, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void ab initio, as if no grant had been made. See Thompson v Leach [see n 320] …and in intendment of law the freehold never passed from the grantor.’

302 At p 623.
of deed.303

In conclusion, one would assert that - initially - there had to be delivery and acceptance. Then- and this was (likely) due to the influence of the law on use and on deeds - acceptance was presumed (implied)304 on delivery. This was a more workable proposition in practice. Immediate vestment on delivery, subject to a right to, later, disclaim. Halsbury states, today ‘Express acceptance by the donee is not necessary to complete a gift.’ 305 Halsbury also states:

Even a parent’s gift of such things as a watch, books or clothes to a child during minority cannot be recalled if given absolutely in the first instance.306

It cites the following cases (minority now ends at 16; thus, such cases would not occur today):

- **Hunter v Westbrook (1827).**307 A father gave his son a watch, books and clothing. It was held that, although the son was under age (he was c. 16 years old), the father could not maintain trover against a person who detained the property since the right of possession was in his son and not in him;

- **Smith v Smith (1836).**308 If a father made to an underage son (he was c. 17 years old) an absolute gift of clothing, or an article such as a watch, he could not afterwards claim it without the son’s consent.309

Given that presumed acceptance by the donee, likely, derived from the development of the law on deeds and on the use (trust), the position in respect of them is now, also, considered.

(b) Gift - Deed - Contemporaneous

As previously noted - by the 14th century - the gift of a chattel could be effected not just orally with delivery of the chattel but, alternatively, by delivery of a deed which provided for a gift.310 Delivery of the deed - in law - was treated the same as delivery of the chattel. And, when the deed was executed by both parties (the donor and the donee), the latter was clearly consenting to the same.

- Thus, it is understandable that - when parties, present at the same time - executed a deed which contained a gift of a chattel - the law would hold it was effective on execution of the deed - even if delivery of the chattel did not occur until later (if the donee, later, rejected the chattel when delivered, the gift was revoked by disclaimer);311

- Thus, by 1351, it seems that a gift of growing crops (still attached to the land) by way of deed vested immediately and it did not become effective only when the growing crops were, later, cut and delivered.312

In short, delivery of the deed was treated as delivery of the goods. In both ‘livery of seisin’ was accomplished. If the deed was not delivered, the gift was incomplete, and there was no vestment. In a case in 1469, it was asserted by Sarjeants Catesby and Pygot that:

if one give me all his goods by a deed, even though the deed be not delivered to the donee, yet the gift is good, and if he (donee) wanted to take the goods, he (defendant donee) could justify this by the gift, even if notice be not made to him (donee) of the gift, and also if a donee commit felony before notice (of the deed of gift), etc. yet the king will have the (donee’s) goods, and even if notice be material, yet when he (cest, defendant) has notice, this will have relation to the time of the gift, etc. but the Court said that such a gift is not good, without notice, because one

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303 However, it does seem the principle was long established. e.g. *Leach v Thompson* (1690) 1 Show KB 296 (89 ER 584)(argument of Shower) at p 299 ‘there is a presumption in law, that it is for a man’s advantage to take an estate…now no man can be supposed unwilling to that which is for his advantage: where an act is done for a man’s benefit, an agreement is implied till there be a dissent.’ (*italics supplied*). Ibid, p 300 ‘the general reason and intendment of the law, that what is for a man’s benefit, it is supposed every man is for it.’

304 Shower used the word ‘implied’, see 303.

305 Halsbury, n 267, vol 52, para 249.

306 Ibid.

307 2 C & P 578 (172 ER 263).

308 7 C & P 401 (173 ER 178).

309 Shower used the word ‘implied’, see 303.

310 See n 182.

311 In the large majority of cases the execution of the deed and the delivery of it were contemporaneous, and witnessed by the witnesses. Coke, n 84, vol 1, 7a ‘In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin, by express terms was but of later times…’

312 See n 204. See also the case in 1467, see n 200.
Thus, the deed must be delivered. Further, the donee must accept. However, the court appeared to accept that-implicit within the word ‘delivery’ - was that the donee had notice of the gift and accepted (consented to) the same. The problem arose, then, when delivery of a deed became constructive. This happened by the time of Coke since he stated:

as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or oblige Go and take up the said writing, it is sufficient for you, or it will serve your turn; or Take it as my deed, or the like words, it is a sufficient turn.

The legal adequacy of this - of touching or pointing to the deed - is reasonable since livery of seisin of land could be effected by touching the sod of earth or in view of the land, providing words of gift were spoken (see 4(d), in Bracton’s time). Further, this also pre-supposed that the donee was present and could reject the deed of gift (e.g. by saying so or walking away) or consent to the gift (e.g. by saying so or by picking it up). Also, the deed could be bilateral or unilateral (a deed poll). After the abolition of seisin of land by the Real Property Act in 1845 (see 9(a)), the whole rationale for delivery went and it is, therefore, unsurprising that in Xenos v Wickham (1867), Blackburn J stated that a deed was delivered:

as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient...it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the oblige, nay before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the oblige may refuse it.

At this stage, the prerequisite of ‘delivery’ for a deed should have been abolished since it had become meaningless. However, it still remains a prerequisite. Given, however, that ‘delivery’ today means no more than an intention to be bound - if a deed of gift is made and the donee is present and also executes it or sees the donor execute it and is aware of the contents- there is acceptance.

(c) Gift - Deed - Not Contemporaneous

From the 14th century - when it became possible to make a gift of a chattel by way of deed, and not just orally with delivery - there also rose the possibility of the donee having the deed delivered to him but not knowing the contents. For example, it was delivered to his house and he was away or abroad. Or, it was delivered and he had not had time to read it. Likely, on the basis of the trust (use), the courts developed the notion that a gift by way of trust (use) was valid on its making and that the donee did not need to accept it (nor have notice or consent to it) to make it valid, since it was for his ‘benefit’ (use). Thus, the donee might be presumed as a matter of law to have accepted it. This was reflected in various cases:

- **Butler & Baker’s Case (1591).** This has already been discussed in the context of an oral gift with delivery (see (a));

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313 7 Edw 4 pl 14 fo 29a-29b, Seipp no 1469.014. Cited in Cochrane v Moore [1890] 25 KB 57 per Fry LJ at pp 67-8.

314 Thus, if an obligor seals an obligation and throws it on the table without more it is not delivery but if he throws it towards the oblige or if the obligee immediately takes it and the obligor says nothing, it is delivery. See Coke, n 84, vol 1, 36a, fn 6 referring to Staunton v Chambers (1586).

315 See n 200 and Coke, n 84, vol 1, 36a, n (7) which cites Gibson v Tenant (1560). Also, Ibid, 36a ‘delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition [delivery] is only requisite [required].’

316 (1867) LR 2 HL 296, 312. See also Mc Bain, n 1(f), part 1, p 29. See also Vincent v Premo Enterprises (Voucher Sales) Ltd [1969] 2 QB 609, 619 per Lord Denning ‘A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. ‘Delivery’ in this connection does not mean ‘handed over’ to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound.’

317 If a deed poll, the same position applies if the donee is present.

318 Ecclesiastical law developed the use (trust). That is, the holding of property for the benefit of another. This may have originated with the Franciscan order, enabling it to retain property and, yet, meet (in its view) its vow of poverty. It seems to have arisen in the 13th century, if not before. Giving possession of goods to X for the benefit of Y, enabled the latter, often, to (effectively) acquire all the benefits of title without a transfer of ownership, hence being made. For the use see also HAL Fisher (ed), The Collected Papers of Frederic William Maitland (Cambridge UP, 1911), vol 2, p 408 ‘to all seeming the first persons who in England employed ‘the use’ on a large scale were, not the clergy, nor the monks, but the friars of St Francis.’ The use, after various transitions, became the concept of equitable ownership. Ibid, p 409. See also P & M, n 18, vol 1, p 436 & vol 2, pp 228-32.

319 3 Coke Rep 25a (76 ER 684).
• **Thompson v Leech (1690)**. L held an estate as tenant for life, remainder to his first son, remainder in tail to Sir S. Prior to the birth of his first son, L - by a deed, sealed and delivered to the use of Sir S (but in his absence and without his notice) - surrendered his estate to Sir S. However, L continued his tenancy until after the birth of his son when Sir S agreed to the surrender. The issue was when the surrender took effect. The House of Lords (following Ventris JCP) held it occurred prior to the birth. It is to be noted that the deed was delivered;

• **Smith v Wheeler (1691)**. A rectormade an assignment by deed of a beneficial interest in a rectory to 2 trustees, on trust for himself for lifeand - after his death - for the payment of his debts, and for raising other sums on other trusts. The trustees had no notice of the assignment until after his death, when one trustee assented and the other disclaimed. The assignor had committed treason and been attainted 11 years before his death. The question was whether anything more than the trust for his own life was forfeited. This depended on whether any estate passed by the deed, without the assent of the trustee- the title of the Crown having intervened between the execution of the deed and the assent. It was held the Crown’s title was barred by the deed without any assent;

• **Stirling v Vaughan (1809)**. This has already been discussed in the context of an oral gift with delivery (see (a));

• **Small v Marwood (1829)**. By a composition deed the insolvent assigned to 4 trustees all his goods on trust to sell and apply the proceeds to discharge his debts among his creditors provided the trustees and creditors made proof of their debts (if required) and executed the composition deed. The creditors - in release of their debts - covenanted they would not implead the insolvent or his goods. Only 2 of the trustees executed the deed. It was held that it was not, thereby, void. Thus, the debt of a trustee who had executed it was, thereby, extinguished and he could not sue out a commission of bankruptcy;

• **Siggers v Evans (1855)**. H executed a deed of assignment conveying all his property to S (a creditor) in trust for S and his other creditors. H sent the deed to S, with whom he had not previously communicated on the subject. S received it the next day. On that same day, a judgment creditor of H delivered a fi fa to the sheriff. The following day, S wrote to H signifying his assent. The jury found the deed was honest and bona fide. It was held that S was entitled to the property, the deed not being revocable by H, since it was for the benefit, in part, of S and S’s assent was not necessary to vest the property in himself, for the same reason. CampbellCJ stated:

> It was admitted that the general rule of law is that the assent of a party to a deed conveying property to him is to be presumed: but it was said that deeds conveying property upon ‘onerous trusts’ do not operate to pass the property without some act of assent. We do not agree to this distinction. There is no doubt that a grant of goods, like any other common law conveyance operating by grant passes the property without assent. Of this general proposition, then, there can be no doubt. And it seems to have been adopted as a rule of law, from the earliest times, for the purposes of convenience, that, as generally grants are for the benefit of the grantee, he may come in at any time and say ‘I claim by the deed’, if he has done nothing to show a dissent; but that he has the full power, if he has done no act to assent, to say that he declines and will have nothing to do with the deed if he is charged with any burthen arising from it, or does not chose to take under it; (italics supplied)

• **Cook v Lister (1863)**. In respect of a composition concerning bills of exchange,Willes J stated:

> with respect to the necessity for showing the assent of the debtor, [to the deeds of composition] I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed

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320 2 Vent 198 (86 ER 391).
321 At p 202 ‘in conveyances at the common law, generally the estate passes to the party, till he devests it by some agreement.’
322 1 Vent 128 (86 ER 88).
323 This had been argued in 1469, see n 313 ‘if a donee commit felony before notice’.
324 See also Siggers v Evans (1855) 5 El & Bl 367 (119 ER 518) per Campbell CJ at p 382. See also Halsbury, n 267, vol 52, para 249 ‘The doctrine has been applied so as to defeat the Crown’s title, which intervened between the execution of a voluntary assignment to a trustee and his knowledge of, and assent to, the deed.’
325 11 East 619 (103ER 1145).
326 9 B & C 300 (109 ER 112).
327 At p 309 per Bayley J ‘the property vested in the two willing trustees.’ This case followed Smith v Wheeler (1691), see text.
328 5 El & Bl 367 (119 ER 518).
329 Campbell CJ cited Butler & Baker’s Case (1591) and Thompson v Leach (1690), see text.
330 At pp 380-1.
331 13 CBNS 543 (143 ER 215).
to be accepted by him, until the contrary is proved;\textsuperscript{332}

- **New, Prance and Garrard’s Trustee v Hunting (1897).**\textsuperscript{333} A bankrupt, 2 days before his bankruptcy, executed a deed by which he conveyed an estate to a person on trust. The deed was not communicated to any of the beneficiaries. It was held the deed was not a revocable mandate but created the relation of trustee and *cestui que trust* as between the grantee and the persons interested in the trust estate. Consequently, it was irrevocable. The bankrupt also - shortly before his bankruptcy - deposited certificates of shares in a box with memoranda to the effect that they were deposited as securities for the moneys due to the several trust estates. The certificates remained in his custody and control and the transaction was not communicated to the beneficiaries. It was held the transaction constituted a good declaration of trust in respect of the shares in favour of the trust estates;

- **Shephard v Cartwright (1955).**\textsuperscript{334} Shares were registered by a father in the names of his children (who were not informed). They were later sold and the proceeds dealt with under mandates signed by the children, unaware of the nature of the transactions until after the father’s death. The court held the shares registered in the name of the children to be an advancement. Counsel contended there had been no acceptance by the donees (the children) to the gift of the shares, citing *Cochrane v Moore.*\textsuperscript{335} Lord Simonds stated:

> the legal estate in the shares was vested in the appellants in the only way in which it could be vested, and the only question is whether the beneficial interest attended the legal interest by virtue of the equitable doctrine of advancement or whether there was a resulting trust.\textsuperscript{336}

It may be noted that most of the above involved deeds.\textsuperscript{337} They also involved a *use* (trust). The presumption of acceptance by the donee, therefore, was the concomitant effect of: (a) the ‘delivery’ of a deed becoming nominal; (b) the presence of a benefit. In conclusion, it is understandable - with the demise of delivery for a deed - that acceptance was pre-supposed. The major step forward was to posit, in *Siggers v Evans* (1855), that a person was presumed in law to accept not just a benefit but ‘onerous trust’, subject to disclaimer. It is noteworthy that Campbell CJ referred to a ‘grant’ of goods without appearing to notice that a ‘gift’ and a ‘grant’ (contract) were distinct. ‘Grant’ was an older term for a contract and implied *consensus* (agreement), *per se*, whereas gift required separate acceptance by the donee.

**(d) Declaration of Trust**

The trust developed from the *use*, and the former was an equitable device designed to benefit a party with all (or certain) incidents of ownership without passing the legal title as such. Further, the idea of ‘benefit’ (arising from the use) was, certainly, an argument used in holding that a gift by deed vested without consent of the donee, subject to revocation. Today, an express trust which is completely constituted is, generally, binding and irrevocable unless a power of revocation is reserved. A declaration of trust may be oral.\textsuperscript{338}

**(e) Legislation**

In the case of certain choses in action, legislation did not require the consent of the donee for the grant or gift to vest. Thus, in *Standing v Bowring* (1885)\textsuperscript{339} the National Debt Act 1870 provided that stock (shares) in public funds could be transferred by the transferee (donor) signing an instrument in the books of the Bank of England. Further, the transferee did not have to accept - although he could (if he wished) do so by signing his acceptance.\textsuperscript{340} More recently, a gift can also be presumed pursuant to the Consumer Protection (Distance Selling)
The present position in law is a compromise between the older law and modern exigencies.

- Under the older law, a gift was made with the donor and the donee being physically present, accompanied by witnesses. The donor offered the sod of land (or chattel) to the donee, with words of giving. And the donee accepted (consented) with words of acceptance. The donee could not be forced to accept;
- The more modern law accepts that a gift can be made in writing with no delivery of the land (sod of land) or goods (or, if a deed, with actual delivery of the deed not being required). Further, the donee need not be present. And, legislation has excluded the need for acceptance by the donee, in certain cases.

Thus, there are competing legal rationales:

- **Forcing a Gift on a Person.** The first is that a person should not treated as accepting a gift when he has not - and may not wish to do so - since it may impose an obligation (including a tax obligation) or be dangerous or result in expense etc. Statements to this effect may be found in Thompson v Leach (1690), Townsend v Tickel (1819), Re Stratton’s Deed of Disclaimer, Stratton v IRC (1957) and Re Gulbenkian’s Settlement Trusts (No 2), Stephens v Mann (1970);

- **Legal Presumption - Benefit.** The second is that it is reasonable, in law, to presume that a person will accept something to his benefit. Halsbury states:

> The presumption of acceptance in these cases is artificial, but is founded on human nature: a person may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of doing so were given to him.\(^{347}\)

However, this logic is strained where an obligation, not a benefit, is imposed.

One would assert both these rationales should be discarded as inadequate and unnecessary today. Instead, the issue should be one of: ‘When does the gift vest in law?’

- **Legislation.** If legislation stipulates on the vesting of property (e.g. with respect to a transfer of shares) it should govern the matter and a gift should only vest if it has complied with such provisions - including whether (or when) acceptance by the donee is required;
- **Rules - Choses in Action.** When rules are established by the relevant issuer of the chose in action - whether it be shares, insurance policy proceeds, pension proceeds, savings account proceeds etc. - a person should be held to have impliedly accepted these terms *vis-à-vis* any transfer by him by way of gift or grant, including whether (and when) any acceptance by a donee is required;
• **Chattel - Delivery.** Vestment should occur on delivery, with subsequent disclaimer. 348 Whether delivery has occurred should be a matter of fact - determined on a case-by-case basis, in light of all the attendant evidence. There should be no distinct requirement of acceptance/consent/notice, as such; 349

• **Negotiable Instrument - Delivery.** In the case of negotiable instruments such as cheques, bills of exchange (‘BOE’) and promissory notes, if title is transferred to the donee by delivery, they should vest on the same; 350

• **Writing.** Deeds should be abolished, including in the case of gift. In the case of a gift made in writing, vestment should occur on execution, with subsequent disclaimer. 351 This would be subject to any legislative requirements; 352

• **Trust.** A gift should vest when the trust is completely constituted, subject to a power of revocation/disclaimer. 353

The effect of the above removes the competing legal rationales - neither of which is wholly satisfactory. It also synchronises the various modes of making a gift. It will also enable gifts inter vivos and mortis causa (see 22), to be treated similarly, re vestment and acceptance.

In conclusion, the law on acceptance (consent/notice) is not required. The issue should be when the gift vests – with the donee having a right to disclaim.

12. PRESENT LAW ON GIFT: DISCLAIMER

Halsbury states:

A person cannot be compelled to take what he does not desire to accept. A donee, therefore, on becoming aware of the gift is entitled to repudiate it, and by doing so may not only disclaim all benefit, but will be relieved of all burdens or liabilities which the acceptance of the gift might have imposed on him. 350 A disclaimer of an attempt to make a gift inter vivos cannot be withdrawn. 351 However, a voluntary disclaimer of interests in the estate of a deceased person is not operative if executed before the death of the deceased and will not prevent the person making it from claiming under the will. 352 Disclaimer by the original trustee of a voluntary trust which has been duly declared does not cause the trust to fail. 353

The word 'disclaim' 354 in the context of a gift is the legalese for a party not accepting (i.e. rejecting) it and in the old caselaw synonyms employed included ‘rejection’, ‘refusal’, ‘renunciation’ and ‘dissent’. Today, one would suggest that the work ‘reject’ is more readily understandable in popular (and legal) speech.

13. PRESENT LAW ON GIFT: CHANGE OF MIND

Bracton, Britton and Fleta all asserted that there had to be consensus for a valid gift. The donor had to intend to make, and the donee to receive, a gift. 355 The case of Dewar (1975) 356 confused this. It held that a gift - of £500 by a mother to her son - towards buying a house vested when she intended to make a gift and the son received the £500 and kept it. 357 A statement by him that he would only accept a loan did not prevent (the court held) it being a gift unless she agreed that it should be a loan. 358 This case is also problematic since:

348 This would be subject to any condition.
349 Ibid.
350 Halsbury, n 267, para 250. It cites Mallott v Wilson [1903] 2 Ch 494 at 501 per Byrne J.
351 Ibid. Halsbury cites Re Paradise Motor Co Ltd [1968] 2 AE 625 (it also considered whether a disclaimer had to be in writing or not).
354 OED, n 281, (disclaim). ‘1. To renounce, relinquish, or repudiate a legal claim. 3 To renounce a legal claim to; to repudiate a connexion with or concern in. 5. To refuse to admit (something claimed by another); to reject the claims or authority of, to renounce.’
355 That said, there is a passage in Bracton which might seem to contradict this. Bracton, n 99, vol 2, p 63 ‘if there is agreement as to the thing transferred, though none as to the cause of giving and receiving, an error of that kind is not fatal, as where I hand you a sum of money or some other thing [as a gift] and you accept it as a loan, it is settled that the property passes to you.’ See also Hyland, n 4, pp 169-70. However, it is asserted Bracton was indicating that title in the money passed, but was not asserting that the borrower was treated as a donee as such.
357 Cf. Bracton, n 99, vol 2, p 63 ‘if there is agreement as to the thing transferred, though none as to the cause of giving and receiving, an error of that kind is not fatal, as where I hand you a sum of money or some other thing [as a gift] and you accept it as a loan, it is settled that the property passes to you.’ See also Hyland, n 4, pp 169-70.
358 Goff J was hampered (he said) by the fact that the pleadings prevented him from holding the sum to be a loan. At p 732 ‘It is not open to me, on the pleadings, to find that it was a loan, or became a loan at some later stage, when the mother accepted - as she appears to have done - that that was the true position. Therefore, I am left with this: either it was a gift or it failed as such, and there being no retreat to the ‘loan’ position, I am left with a vacuum which I am forced to fill by the presumption of a resulting trust, if I get that far…’.

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Donor changed Mind. On the facts, the donor changed her mind at a later stage and agreed to treat the £500 as a loan (as the donee wished) and died without changing her mind again. Thus, there was no consensus between the parties as to a gift and, therefore, no gift. Instead, there was a loan since the son retained the money on the accepted basis of both of them that it was a loan;

Disclaimer of Gift by Donee. Even if the donee is presumed to have accepted the £500 as a gift (on the basis that one is presumed to accept a benefit, see 11), the clear rejection of the donee of such, was a disclaimer.

Also, this case was contrary to Hill v Wilson (1873) which was not cited. Here, a gift was accepted as a loan and evidenced by a promissory note. Mellish J stated:

It requires the assent of both minds to make a gift as it does to make a contract. No doubt you may infer that a person has assented to that which is obviously for his benefit on slighter evidence than would be required to show that he assented to a contract which may be to his prejudice; but still it is by no means uncommon, particularly in the case of money transactions between relatives, that the party intended to be benefited may prefer to receive as a loan what has been offered as a gift.

He held the money given to be a loan. Halsbury states, following Dewar but not following Britton:

It has been said that there must be an intention on the part of the recipient to retain the thing entirely as his own without restoring it to the giver, but it seems that this is incorrect and that a gift is effective when the donor intends to make a gift and the recipient takes the thing given and keeps it, knowing that he has done so: the mere fact that the recipient regards the thing given as a loan and intends so to treat it does not by itself prevent the transaction from being effective as a gift.

In conclusion, one would assert that Dewar (1975) was wrongly decided. It was not a gift but a loan since the mother did not ask for the money back when her son said that he would only treat it as a loan. As a result, she implicitly (and, it seems, later, expressly) accepted it as a loan. If the son had - later - come round to his mother’s view and retained the £500 as a gift - providing she also accepted this and the other pre-requisites for a valid gift were still extant (they had capacity etc) then, as a separate legal incident, it would have been a gift and the fact that there was now delivery first, gift later, would not affect this.

14. PRESENT LAW ON GIFT: MAKING A GIFT - WRITING

(a) Ways of Making a Gift

Halsbury states that an inter vivos gift may be made by:

(1) deed or other instrument in writing;
(2) delivery, where the gift admits of delivery; or
(3) declaration of trust.

The first two derive from common law, the third from equity. The oldest is (2). A gift can also be presumed pursuant to the Consumer Protection (Distance Selling) Regulations 2000. Making a gift by way of (1)-(3) is now considered.

See n 358.

8 Ch App 888. See also Halsbury, n 267, vol 52, para 249, n 2.

Ibid, p 896.

Halsbury referred to Britton, see n 155.

Halsbury, n 267, vol 52, para 201.

365 See 15(b).

How an instrument is described is not indicative of its legal nature. Thus, in Hawksby v Kane (1913) 47 ILT 96 - although the deceased called the instrument a deed - it was treated as a will. West, n 9, s 45 `An instrument… is a formal writing made in [on] paper or parchment, wherein are contained and described contracts, covenants, last wills, or other facts and things of persons, for the testimony or memory thereof. And first we say it is a formal writing, to distinguish instruments from ordinary letters, private notes, reckonings, and remembrances made by any for a man’s own private use and memory and from all books of arts, histories, divinity, philosophy, and such like.’ It is clear from the other propositions made about ‘instruments’ that West was referring to what, today, we would call a legal document - the latter word (like an instrument) connoting a writing generally intended to have legal effect. However, the word ‘instrument’, today, tends to be used in a different sense; not to a legal writing but to an object, a tool. And, the word ‘document’ may, or may not, be to a legal one. Thus, the tendency in modern legislation is simply to refer to ‘writing’.

See n 341.

Confusingly, Halsbury goes on to consider the capacity of the donor and donee (Halsbury, n 267, vol 52, paras 204-21) and the subject of gifts (paras 222-30) before returning to (1)-(3).
(b) Deed or other Writing

Halsbury notes the following in respect of making a gift by way of deed or other instrument in writing:

- **Land - Legal Estate.** In general, a legal estate in land must be granted by deed. This is provided for by the Law of Property Act 1925, s 52(1). If the land is registered land, a gift of the legal estate must be made by registered transfer. If unregistered land, registration of title is compulsory on the transfer of a qualifying estate by way of a gift in the same fashion as on a transfer for valuable (other) consideration.

- **Land - Equitable Interest.** Equitable interests in land (registered or unregistered) may be dealt with by way of gift off the register. Such a disposition must be in writing signed by the donor (or lawfully authorized agent). This is provided for in the Law of Property Act 1925, s 53. The owner of registered land can create and give to others limited interests in that land. For example, by creating a trust of land under which those others have limited interests (which interests may be protected by notices or restrictions).

- **Ship.** A British registered ship (or share therein) must be transferred in writing - by way of a bill of sale (duly attested and registered at her port of registry) unless the transfer will result in the ship ceasing to have a British connection.

- **Other Chattels.** Halsbury states that these can be “conveyed by deed” but that - if possession is taken and retained by the donee - no conveyance is required. The first part is not felicitously expressed by Halsbury since chattels (unless legislation provides otherwise) can now generally be conveyed in writing - as noted by Blackstone (in 1766) especially since delivery of seisin has been abolished.

- **Shares in Companies.** Some choses or things in action may be disposed of only by deed or in writing.
  - **Companies Clauses Consolidation Act 1845.** A transfer of shares in companies formed under this Act must be by deed.
  - **Companies Act 1895.** A transfer of shares must be: (a) in the manner provided in the articles of association; or (b) by a stock transfer (i.e. in writing); (c) or, in certain cases of specified securities, via a computerized system (and exempt transfer); or (d) without a written transfer in accordance with regulations.

- **Life Insurance Proceeds.** An assignment of the same must be by an instrument in writing. To perfect the donee’s title to the money assured by the policy, notice of the assignment must be given to the insurance office. The actual policy document is a piece of paper which can be transferred by delivery, like other chattels (see above).

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368 Halsbury, n 267, vol 52, para 231.
369 This section does not apply to (a) assents by a personal representative; (b) disclaimers made in accordance with sections 178 to 180 or sections 315 to 319 of the Insolvency Act 1986, or not required to be evidenced in writing; (c) surrenders by operation of law, including surrenders which may, by law, be effected without writing; (d) leases or tenancies or other assurances not required by law to be made in writing; (da) flexible tenancies; (db) assured tenancies of dwellings-houses in England that are granted by private registered providers of social housing and are not long tenancies or shared ownership leases; (e) receipts other than those falling within section 115 below; (f) vesting orders of the court or other competent authority; (g) conveyances taking effect by operation of law.
370 Halsbury, n 267, vol 52, para 231.
371 Subject to the provision hereinafter contained with respect to the creation of interests in land by parol (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law; (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
372 See also Companies Clauses Consolidation Act 1845, s 14 ‘by deed…in which the consideration shall be truly stated.’
373 These could specify that a deed is required. However, generally, writing would be sufficient.
374 Halsbury cites Ramsey v Margrett [1894] 2 QB 18 and French v Gething [1922] 1 KB 236. See also Douglas v Douglas (1869) 22 LT 127.
375 See text to n 239.
376 Ibid, para 233. See also Companies Clauses Consolidation Act 1845, s 14 ‘by deed…in which the consideration shall be truly stated.’
377 Ibid.
378 Re Williams, Williams v Ball [1917] 1 Ch 1.
379 ‘This is actually not involving any question with regard to the right to the money secured by the policy of insurance, but for the determination of the paper writing only. This was a gift of the policy, and although there was no...
• **Government Stock and Bonds & Savings Depots.** Government stock and registered bonds are transferable as per Treasury regulations;\(^{382}\)

• **Friendly Society.** A member of a friendly society (over 16) may nominate in writing a person to whom any sum of money not exceeding £5,000 payable by the society (or any branch) on the member’s death is to be paid;\(^{383}\)

• **Registered Industrial & Provident Society.** A member (over 16) may in writing - delivered at (or sent to) the society’s office during his life (or made in a book kept there) - nominate a person to whom his property in a society is to be transferred at his death to the extent of £5,000;\(^{384}\)

• **Trade Union Society.** This is similar to registered industrial and provident societies (see above). That is, in writing;\(^{385}\)

• **Pension Scheme.** These normally provide for death benefits to be paid (at the discretion of the trustees) to one (or more) persons in a named class living at the date of the member’s death in such shares as the trustees may decide. The named class normally includes any person (or charity) named in a nomination in writing signed by the member and deposited with the trustees before his death or named as a beneficiary under any will made by him;\(^{386}\)

• **Post Nuptial Settlement (Civil Partnership).** This is a form of gift unless made pursuant to a binding anti-nuptial or pre-registration agreement.\(^{388}\) It would be in writing.

(c) **Conclusion**

As can be seen from (b), there is a disparity between gifts required to be made by way of deed (e.g. a legal estate in land or shares under the Companies Clauses Consolidation Act 1845) and the more modern statutory and other provisions which require writing only.

- The former reflects the older law that land could only be transferred by livery of seisin, with a sod of earth or twig being replaced by writing, which writing had to be a deed since it was a prerequisite to a deed that there be delivery;

- However, with livery of seisin being abolished by the Real Property Act 1845 and replaced by grant, thereafter only writing should have been necessary - not least since ‘delivery’ had long been a formality anyway and constructive delivery was permitted, at least, since the time of Coke.\(^{389}\)

Today, it is asserted that - to prevent otherwise substantively valid legal acts being made void on the grounds of a formality - all the above should only be required to be in writing. Indeed, a prior article argues for the abolition of deeds (and specialities)\(^{390}\) since there is, now, no need (with the abolition of livery of seisin, delivery not being required and individuals no longer being required to seal documents), for deeds to be categorized differently in law to any other writing executed by a party. Further, the prerequisites for a deed are now, in any case, artificial, viz:

- **Deed: Pre-1989.** The document had to be: (a) in writing; (b) on parchment or paper; (c) sealed; (d) delivered. The requirements of (b) and (c) were abolished in 1989, pursuant to the Law of Property (Miscellaneous Provisions) Act 1989. As to (d), delivery could be constructive (by 1867, words alone were sufficient delivery and, by 1969, an intention to be bound was sufficient).\(^{391}\) Thus, by 1989, in reality, a deed was no different in form to any other signed writing;

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\(^{382}\) Ibid, para 235. See also Finance Act 1942, s 47 and Government Stock Regulations 2004 SI 2004/1611. Also, Halsbury, n 220, vol 10(1).

\(^{383}\) Ibid, para 236. Friendly Societies Act 1974, s 66.

\(^{384}\) Ibid. See also Industrial and Provident Societies Act 1965, s 23.

\(^{385}\) Ibid.

\(^{386}\) Ibid. The named class normally includes any person (or charity) named in a nomination signed by the member and deposited with the trustees before his death or named as a beneficiary under any will made by him.

\(^{387}\) Ibid, para 236.

\(^{388}\) Halsbury, n 267, vol 52, para 201. Halsbury refers to Goodright d Humphreys v Moses (1775) 2 Wm Bl 1019 (96 ER 599). A settlement by a tenant in fee for the maintenance of herself and for her children for life, to raise portions for younger children, and the surplus to her heir-in-law (she having then many sons and daughters) is a voluntary settlement.

\(^{389}\) See n 200.

\(^{390}\) See McBain, n 1(f).

\(^{391}\) See n 316.
Deed: Post-1989. Thus, a deed post 1989 has to be (a) in writing; (b) delivered (albeit this is always presumed). However, legislation artificially preserved the deed by adding (c) a ‘face value’ requirement; (d) attestation. Both of these can only be described as unnecessary makeweights since:

- A court will always determine what a legal act is, regardless of what the parties call it and simply calling a document a ‘deed’ does not, per se, add anything;
- Attestation can be used for any writing and it is not specific to a deed. Further, it was never a prerequisite for a deed before - and, in practice, the courts have ignored this requirement. Also, the effect of this prerequisite is to make a deed, in form, more onerous than a will - which does not seem appropriate or necessary. There is no evidence, in any case, that attestation helps prevent fraud. If people wish to commit fraud, then, it is (usually) easy to secure compliant attestees.

In conclusion, a gift can be made by way of a deed or in writing. It is asserted that the requirement of a deed now be abolished since the latter creates undue inconsistency and a deed was only required in the days, pre-1845, when livery of seisin of land could occur (a deed necessitating delivery and, thus, symbolically replacing a sod of earth or twig).

15. PRESENT LAW ON GIFT: MAKING A GIFT - DELIVERY

(a) Mere Promise - Insufficient

It was always the early law that a mere promise to give was incomplete and, thus, not a valid gift. Doubtless, there is a good public policy reason behind this. People often get carried away and offer to give something which they later regret. Further, an oral promise - unlike a document or physical delivery - has considerable evidential problems, with considerable capacity for mis-interpretation. Halsbury states:

there cannot be a gift without a giving and a taking. Gifts of chattels are more often made by delivery than by deed. It is well settled that, if there is no deed, a gift of chattels is not complete unless accompanied by delivery. Actual delivery is not mere evidence of the gift, but is part of the gift itself, so that an oral gift of chattels without delivery passes no property to the donee, and is not a gift at all. To constitute delivery the act must be such, or be accompanied by such words, as to be unequivocal.

In terms of cases, Halsbury refers to:

- Shower v Pilck (1849). A man promised to give to his daughter-in-law silver plate of his which was in her possession. It was held that a verbal gift of a chattel to a person in whose possession it was, did not pass the property in the same to the donee. Thus, there was no valid gift;
- Trimmer v Danby (1856). On the death of the famous artist, William Turner, bonds were found in a box in his house with a signed writing that 5 of them ‘belong to and are HD’s property’. HD was Turner’s housekeeper and had

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392 Law of Property (Miscellaneous Provisions) Act 1989, s 1(2) ‘An instrument shall not be a deed unless (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or by expressing itself to be executed or signed as a deed or otherwise). This does not apply to deeds required or authorised to be made under the seal of the county palatine of Lancaster, the duchy of Lancaster or the duchy of Cornwall, s 1(9).
393 Ibid, s 1(3) ‘An instrument is validly executed as a deed by an individual if, and only if (a) it is signed (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature…’.
394 See n 290.
395 Attestation means that a witness signs an instrument following a statement (an attestation clause) that a document was signed or executed in his presence. However, there is a difference between attesting a document and witnessing it and authenticating it, which simply complicate matters. See McBain, n1(f), part 1, p 30.
397 See Wills Act 1837, s 9, where no form of attestation is required and where the two witnesses do not have to be present at the same time. See n 220.
398 e.g. there is no reason why the transfer of shares in some companies should be by way of deed and others not.
399 See n 185. See also 7(c).
400 The classic is at birthdays, Christmas, charitable occasions etc., where emotional ebullience can overawe rationality.
401 Ibid, para 237.
402 4 Exch 478 (154 ER 1301).
403 At p 479 per Alderson B ‘To pass the property, there must be both a gift and a delivery: here there is hardly a gift, for the words are in the future tense.’ Ibid, per Rolfe B ‘There must be a delivery to make the gift valid: here there is a mere statement that the goods, which the defendant has in her possession the owner will give her.’ Cf. Halsbury, n 267, vol 52, para 238, n 7 and Orway v Gibbs [2000] 2 LRC 302, [2000] 2 AE (D) 1615.
404 25 LJCh 424.
custody of the key to the box. Kindersley VC held that ‘The delivery of the key did not constitute a delivery of these five bonds;’ and that the gift failed through lack of actual delivery, since the bonds were capable of being transferred by hand; 405

- **Bourne v Fosbrooke (1865).** 406 A mere gift of a chattel, without delivery of possession, passes no property; 407

- **Cochrane v Moore (1890).** 408 A gift of a chattel capable of delivery (a horse), made per verba de presenti (orally) by a donor to a donee and assented to by the donee - whose assent is communicated to the donor - does not pass the property in the chattel to the donee without delivery.
  - Fry LJ cited prior cases such as Iron v Smallpiece (1818) 409 per Tenterden CJ ‘by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee’; 410
  - The early law clearly supports the decision in Cochrane - such as two cases in 1330 cited by Coke CJ where even the sovereign could not verbally pass title without delivery. 411 These cases were not cited to the court (it seems) but would, likely, have been definitive;

- **Valier v Wright and Bull Ltd (1917).** 412 An attempted gift of a car - without delivery or a change of garage or registration - was held to be ineffectual; 413

- **Re Swinhurst, Sutton & Featherley (1926).** 414 Warrington LJ indicated that - to make an inter vivos gift effectual, there had to be a transfer of the subject of the gift or of indicia of title to it.

**In conclusion, a mere promise to make a gift is insufficient at common law - delivery is required.**

(b) **Nature of Delivery**

Halsbury states the following propositions:

- **Possession by Donee.** Manual delivery by the donor to the donee of a chattel is not essential to complete the gift of it. It is sufficient if the donee is: (a) put by the donor in possession; or (b) obtains possession with the donor’s consent;

- **Constructive Delivery.** If chattels cannot be actually delivered owing to their bulk, they can be constructively delivered (e.g. delivery of the key of a warehouse in which they are stored) or by delivery of a part to represent the whole (e.g. a chair for all the furniture);

- **Delivery can be First.** Delivery need not be made at the time of the gift. Delivery first, gift afterwards is as effectual; 415

- **Donee in Possession prior to being Donee.** If the donor’s chattel is already in possession of X (though not for the purpose of an intended gift) an effectual oral gift of it to X is sufficient - delivery already having been made, in effect; 416

- **Gift to X for Y.** A gift to X - for Y’s use - is sufficient delivery to vest the property in Y;

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405 At p 426.
406 18 CBNS 515 (144 ER 545).
407 In this case the jury held that certain items of female jewellery and clothing were ‘given to the plaintiff by her aunt and the property in them transferred to her in the aunt’s lifetime’, per Erle CJ, at p 524.
408 25 QBD 57.
409 2 B & A 551 (106 ER 467). See also Tyler, n 4, p 306.
410 At p 525.
411 See n 185.
412 33 TLR 366. See also Re Churchill, Taylor and Manchester University [1917] 1 Ch 206. X handed over 11 cabinets containing coins and medals to the University, but not certain other coins and medals. There was no delivery of the latter. See also Tyler, n 4, pp 301, 306.
413 At p 367 ‘He (his Lordship) [Shearman J] felt constrained to hold that there had been no valid gift because there had been no actual or constructive delivery, and therefore the plaintiff had no valid title to the car.’ See also Re Cole (1963) 3 AE 433.
414 [1926] Ch 38, at p 44 ‘in order to make an effectue gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title thereto.’
415 See also Re Stoneham [1919] 1 Ch 149 per Lawrence J at pp 153-4 ‘In principle, I can see no distinction between a delivery antecedent to the gift and a delivery concurrent with or subsequent to the gift.’ See also Tyler, n 4, p 307-8.
416 Halsbury, n 267, vol 52, para 238. See also Pascoe v Turner [1979] 2 AE 945 and Woodard v Woodard [1995] 3 AE 980. See also Palmer, n 4, para 3-013 which cites Wueggatsch v Weurgatsch (unreported, 28 July 1960, Supreme Court of Tasmania) per Gibson J ‘The plaintiff already had possession by an arrangement, either express or tacit, with the defendant. But delivery first and gift afterwards is as effectue as gift first and delivery afterwards.’
• **Choses in Action**. Some choses or thing in action pass by delivery (e.g.) bills of exchange, promissory notes, bearer cheques, bearer bonds, bearer debentures etc. A gift, therefore, is validly effected by their delivery to the donee.417

**In conclusion, a mere promise to deliver is insufficient to create a gift. Delivery is required. The position as to delivery inter vivos and mortis causa (see 22) should be the same - including in respect of constructive delivery and delivery of a chose in action.**

16. **PRESENT LAW ON GIFT: MAKING A GIFT – TRUST**

Halsbury also considers the making of a gift by way of declaration of trust. As previously noted, trusts (uses) were developed a long time ago, to avoid seisin of land. The courts were also prepared, in equity (that is, when there was a trust), to allow chattels and choses to be transferred orally- even without delivery.418 Further, the Married Woman’s Property Act 1861 gave impetus to the courts presuming a trust in an inter-familial context. The effect of all this is that the modern law is that a gift is valid if:

- in writing (or by deed, where required by legislation);419
- if oral, providing there is also delivery of the chattel or negotiable chose in action; and
- by declaration of trust.

The latter ‘saves’ chattels given orally, where there has been no delivery. Thus, it is an equitable extension to the common law. As to a declaration of trust:

(a) **Declaration of Trust**

Halsbury states:

> If an intending donor of full age and capacity declares a trust for another, although for no consideration, it is binding generally on the creator of the trust and irrevocable by him 420 … and the donee takes an equitable and enforceable interest whatever the nature of the property affected by the trust.421

Also,

- **Notice to Donee**. It is immaterial whether the trust has been communicated to the donee;422
- **Terms don’t refer to a Trust**. A trust may be created even if there is no declaration of the same.423 However, the court must be satisfied there is a present (and irrevocable) intention by the donor to declare himself a trustee;424
- **Legal Estate given to a Third Person**. If the legal estate (or right in the property) given is in a third person there must be sufficient evidence of a declaration of trust by the owner of the equitable interest.425

(b) **Writing or Oral**

Halsbury states:

> A declaration of trust of land must be in writing, signed by the person who can by law declare the trust,426 but a trust of pure personalty can be declared orally,427 although it cannot be assigned without writing.428

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417 Ibid, para 239. See also Tyler, n 4, pp 307-10.
418 See M’Fadden v Jenkyns (1842) 1 Ph 153 (41 ER 589). A, shortly before his death, send a verbal message to B (his debtor), desiring him to hold the debt in trust for C. B accepted the trust and the transaction was communicated to C both by A and B. Held binding on A’s estate. Lyndhurst LC at p 157 ‘a declaration by parol is sufficient to create a trust of personal property.’
419 The exception, as Halsbury notes, is when a power or revocation is expressly reserved.
420 Halsbury, n 267, para 240.
422 Ibid. Halsbury refers to Page v Cox (1852) 10 Hare 163 (68 ER 882); Milroy v Lord (1862) 4 De GF & J 264 (45 ER 1185); Re Flavell, Murray & Flavell (1883) 25 ChD 89. Also, Paul v Constance [1977] 1 AE 195.
423 Re Cozens, Green v Brisley [1913] 2 Ch 478. The absence of communication to anyone, where the entries were made in pencil in a private account, raised a strong inference against a trust.
424 Halsbury, n 267, vol 52, para 240. See also Tyler, n 4, pp 311-3.
425 See Law of Property Act 1925, s 53(1)(b).
426 See M’Fadden v Jenkyns (1842), see n 418.
427 Halsbury, n 267, n 240. Ibid, Law Property Act 1925, s 53(1)(c). This sub-section does not apply if: (a) the beneficial owner of the whole beneficial estate is able to give directions to his bare trustee to deal with the legal, as well as the equitable, estate. Vandervell v IRC [1967] 2 AC 291, Vandervell’s Trusts (No 2), White v Vandervell’s Trustees Ltd [1974] Ch 269 at p 308; (b) any transfer of title to uncertificated units of a
(e) **Resulting Trust (‘RT’)**

Halsbury states that an RT may arise in certain circumstances: 429

- **Purchase in Name of Another.** If a person buys property (real or personal) and pays the price (or part) but takes it in the name of another - who is neither his child, adopted child nor spouse or civil partner (for which see (d) below) - *prima facie* there is no gift, but a RT for the person paying the money. That is, the money is held on trust for the purchaser (or part purchaser);

- **Several Purchase in Name of One.** An RT also applies where several persons buy property in the name of one;

- **Joint Purchase or Transfer.** An RT also applies to a purchase in the joint names of the person paying and of another. Also, to a voluntary transfer of personality into the name of another jointly with the transferor (or into the other’s name alone).

Halsbury also notes that proof of payment of money, *prima facie*, imports an obligation to repay in the absence of circumstances tending to show anything in the nature of a presumption of advancement. 430 And that - whether there is an RT (or not) - depends on the surrounding circumstances. 431

(d) **Presumption of Advancement (Gift)**

Halsbury notes there is a presumption of a gift in the following circumstances:

- **Transferor retains control during Lifetime.** The fact that the transferor retains control during his lifetime over the property transferred into the joint names does not prevent a presumption - even if it appears to be of a testamentary nature and not in conformity with the Wills Act 1837 - being a gift from the time of its making, so as to vest the legal title to the property in the donee by survivorship on the death of the transferor. 432

- **Voluntary Conveyance - Real Property.** In a voluntary conveyance of real property, a RT for the grantor is not implied merely by reason that it is not expressed to be conveyed for the use (or benefit of) the grantee (i.e. no trust is declared). 433

Contrariwise, in the case of public voluntary contributions, here, any surplus - if not intended to become the absolute property of the donee - is held on a RT for the donor (and their representatives), on the donee’s death. 434 The same applies in the case of public appeals. 435 Other presumptions of a gift arise in the following cases:

- **Spouse or Child.** If a person in whose name a purchase (or transfer) is taken is the spouse (civil partner) or child (or adopted child) of the person paying the purchase money (or making the transfer), there is a presumption a gift was intended; 436

security by means of a relevant system and any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee. See Uncertificated Securities Regulations SI 2001/3755, reg 38(5) & 6.

429 Ibid, para 241. For resulting trusts see also D Hayton (ed), *Underhill and Hayton* (18th ed, 2010) and Snell, n 300, para 25-003 et seq.

430 Ibid, citing *Seldon v Davidson* [1968] 2 AE 755 per Edmund Davies LJ at p 758 ‘[it is] for the plaintiff to prove that the money was advanced by way of a loan and not as a gift.’

431 Halsbury, n 267, vol 52, para 242 ‘The presumption that no gift is intended can be rebutted by sufficient evidence, even though it may be that of the person in whose name the purchase has been made. The surrounding circumstances must be taken into consideration. If a transfer into the joint names is accompanied by an expressed wish as to the mode of employing the property transferred and a declaration that no legal obligation is intended to be imposed, the presumption of a resulting trust is rebutted.’

432 Ibid.

433 Ibid, para 242. Halsbury continues ‘[However,] if a conveyance is expressed to be for valuable consideration (though, in fact, none was paid) the grantee, if he asserts a gift was intended, must produce the clearest evidence of the alleged donor’s intention. Otherwise there may be a resulting trust for the grantor.’

434 Ibid, para 243.

435 Ibid, ‘Where there is a public appeal for subscriptions to a fund for a charitable purpose and either the purpose proves to be impracticable or it requires less money than is actually given, the destination of surplus funds depends both upon whether or not a general charitable intention can be found and upon the manner in which the subscriptions were made, so that the surplus will not necessarily have to be returned to the donors but may be applicable *cy-pres*. On the other hand, where donations are made or are taken to have been made out and out for a non-charitable purpose, any surplus will be *bona vacantia* and as such will pass to the Crown. So if honorary members of a friendly society which is not a charity make absolute gifts of it, and all the beneficial interest in the society’s funds is exhausted, there is no resulting trust of the surplus in favour of the honorary members, but it passes as *bona vacantia.*’

436 Ibid, para 244. Halsbury continues ‘The rule has been extended to the case of an illegitimate child and to that of a grandchild whose father is dead when the father and grandfather, respectively, have placed themselves *in loco parentis*, but has been held not to have applied in the case of a woman with whom the alleged donor has gone through a form of marriage, but whom he could not legally marry, or with whom he merely cohabited. The presumption that a gift is intended may notwithstanding that the spouse or civil partner or parent has actually received the income during his life and made leases of the property.’
• **Other Cases between Spouses & Civil Partners.** Receipt by a spouse (civil partner) of the partner’s income - if living together in amity - raises a strong presumption of a gift. The burden of proof of a gift lies on the recipient. There is no such presumption with an investment of (or purchase with) money of a spouse (civil partner) - whether capital or income - in the name of the other. The intention will be determined from the circumstances;

• **Life Policy - Third Party.** If expressed to be for the benefit of a third party, the proceeds go to the estate of the person taking the policy out - unless he has constituted himself trustee for the same. As to the latter:
  - **Spouse (Civil Partner) or Child.** A policy by a spouse (civil partner) on his life for the benefit of a spouse (civil partner) or a child creates a trust in their favour;
  - **Premiums - Child.** Premiums paid by a parent on a life policy for a child are presumed to be made by way of advancement. Thus, the child’s estate is entitled to the proceeds. This also applies where a trust has been effected in the child’s favour.

However, a presumption of a gift may be rebutted by showing: (i) there was no present intention to benefit; or (ii) by a contemporaneous act (or declaration) by the alleged donor. Thus:

• **Subsequent Acts or Declarations.** Acts (or declarations) subsequent to the purchase (transfer) - if not so connected with it to be reasonably regarded as contemporaneous - are inadmissible in favour of the donor to rebut a presumption of a gift. They are only admissible against the donor. However, subsequent declarations of the alleged donee may rebut a presumption of gift - since it is against his interest to make them;

• **Business Relationship.** The business relationship of the parties may rebut the presumption of a gift (e.g. a son was solicitor to his father);

• **Taking Possession.** A formal and unmistakable act of taking possession by an alleged donor at the time of the purchase shows his ownership and the trusteeship of the person in whose name the property has been purchased.

In the case of **cumulative** gifts:

• **Shares.** If the original purchase of stock in the name of another (or a transfer of stock into that other’s name) is a gift, a subsequent repetition is so presumed;

• **Mortgage.** In the case of a purchase of land with the aid of an instalment mortgage by a spouse (civil partner) in his spouse’s (civil partner’s) name to which the advancement of presumption applies, if paid off by the purchasing spouse (civil partner) over a period of years, each instalment is treated as a supplementary gift;

• **Annuity.** If the donor (by deed) gives annuities to certain persons and (by another deed) gives annuities of different amounts to some of the same persons, they are treated as supplementary -even though the donor may stand in loco parentis to some of the annuitants.

**In conclusion, a gift may be made by way of declaration of trust, which may be oral in the case of chattels.**

**17. PRESENT LAW ON GIFT: CAPACITY**

(a) **Donor**

Halsbury states:

*Prima facie* any person who is of full age and capacity can dispose by way of gift of any property, or of any estate or interest in it, to which he is absolutely entitled. It is clear on legal and equitable principles that a person of full age and capacity acting freely, fairly and with sufficient knowledge ought to have and has the power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual

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436 Ibid, para 245. There is no such presumption if a party receives the capital of the other’s property but is, prima facie, a trustee. See also Married Women’s Property Act 1964, s 1.

437 Halsbury continues ‘although that spouse or civil partner may have a lien for any contributions they may have made, and if one spouse or civil partner voluntarily assigns property to the other for a particular purpose, such as raising money, the property remains that of the assignor, subject to the fulfilment of the particular purpose. ’

438 Ibid, para 246.

439 Ibid.

440 Ibid, para 247.

441 Ibid.

442 Ibid. Halsbury cites Stock v McAvoy (1872) LR 15 Eq 55.

delivery, whether in possession or reversion, and howsoever circumstanced.\textsuperscript{445}

Halsbury then considers the capacity of the following:

- **Spouses & Civil Partners.** Halsbury notes that - save where a presumption of a gift arises - a gift between spouses (or civil partners) must be established in the same way as a gift between strangers. Thus, it must be by deed or delivery and there must be a clear and distinct act of gift with evidence that a gift was intended;\textsuperscript{446}

- **Alien.** Like a British citizen, an alien can dispose of real and personal property apart from a British ship;\textsuperscript{447}

- **Limited Company.** A limited company, often, has the express power - pursuant to its memorandum of association - to gratuitously benefit employees (and their relatives) as well as to subscribe to charitable objects. Further, without such an express power, a company incorporated by a special Act of Parliament (or under the Companies Acts) can give gratuities if this tends to the prosperity of the company’s business;\textsuperscript{448}

- **Chartered Corporation.** Prima facie, a corporation created by royal charter has the power to deal with its property in the same manner as an ordinary person;\textsuperscript{449}

- **Statutory Corporation.** It is a creature of - and derives its powers from - the Act creating it. The funds of a non-commercial statutory body are, in effect, trust funds. Therefore, they cannot be applied without statutory authority to the making of presents;\textsuperscript{450}

- **Local authorities.** They are not trustees for their ratepayers or council tax payers. However, they owe an analogous fiduciary duty to their ratepayers and council taxpayers in relation to the funds contributed by them. Thus, in the absence of clear statutory authority, they are not entitled to make a gift (or a present in money’s worth) to a particular section of the local community at the expense of the general body;\textsuperscript{451}

- **Minors.** Such gifts are voidable. This becomes final when the minor reaches full age, when he might affirm it or not;\textsuperscript{452}

- **Mentally disordered person.** A gift by a person - incapable by reason of a mental disorder, of managing and administering his property and affairs, so that the management of his property had been committed to the Court of Protection - is not valid;\textsuperscript{453}

- **Intoxicated person.** A gift by an intoxicated person not \textit{compos mentis} is void. Also, if not so intoxicated, if the donee took unfair advantage of his state; \textsuperscript{454}

- **Bankrupt.** The property of a bankrupt at the commencement of the bankruptcy vests in the trustee in bankruptcy, on his appointment. It cannot, thereafter, be the subject of a gift by the bankrupt;\textsuperscript{455}

\textsuperscript{445} Ibid, para 204. Halsbury cited \textit{Kekewich v Manning} (1851) 1 De GM & G 176 (42 ER 519) at 187-8 \textit{per} Knight Bruce LJ ‘it is, on legal and equitable principles, we apprehend, clear that a person \textit{sui juris}, acting freely, fairly and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced.’ Halsbury also cited \textit{Hall v Hall} (1873) 8 Ch App 430 at p 437 \textit{per} James LJ ‘The law of this land permits anyone to dispose of his property gratuitously, if he pleases…’ On comparative aspects of capacity, see Hyland, n 4, ch 4.

\textsuperscript{446} Ibid, para 205. Halsbury continues ‘An act showing an intention to change the ownership may constitute sufficient delivery, notwithstanding that the chattels continue to be used by the spouses or civil partners in common: the act, however, must be such or be accompanied by such words as to be unequivocal; for if the facts are equally consistent with an intention to make an absolute gift of the property and an intention to allow the other spouse or civil partner to have the use of it, then title does not pass to that other spouse or civil partner.’

\textsuperscript{447} Ibid, para 206.

\textsuperscript{448} Ibid, para 207 ‘A company may not subscribe, however, without express power, towards objects which do not tend to the benefit of a company, and a public body cannot forgo money owing to it where this would prejudice others to whom it has to account. Furthermore, the power to give a gratuity does not extend in all circumstances to a company in liquidation, as the gratuities cannot in such a case tend to the prosperity of the company’s business; this rule is, however, substantially qualified by statute, under which the powers of a company include, if they would not otherwise do so, power to make, for the benefit of persons employed or formerly employed by the company or any of its subsidiaries, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company or that subsidiary.’

\textsuperscript{449} Ibid, para 218.

\textsuperscript{450} Ibid, para 208.

\textsuperscript{451} Ibid, para 208.

\textsuperscript{452} Ibid, para 211.

\textsuperscript{453} Ibid, para 212.

\textsuperscript{454} Ibid, para 213.

\textsuperscript{455} Ibid, para 213.
Persons in Fiduciary Position. Trustees and others in a fiduciary position cannot (unless authorized) make gifts out of property they hold for others.\(^{456}\)

Tenant for Life. For the benefit of the settled land, tenants for life (and persons having their powers) can grant water rights etc to statutory authorities.\(^{457}\)

Halsbury also notes that a gift alleged to have been made by a deceased person requires corroboration.\(^{458}\) And, that a deed of gift can be executed under a power of attorney - provided it was executed as a deed and authorized the gift. If not, there can still be a delivery\(^{459}\) (or the equivalent to the same) by a donor which will validate the gift.\(^{460}\)

(b) Donee

Halsbury states that, in general, 'all persons, whether of full age and capacity or not, are competent to receive gifts; but there are certain exceptions.'\(^{461}\) It then considers the following:

- **Minors.** They are capable of receiving property, other than a legal estate in land. However, they may avoid the gift on attaining their majority;\(^{462}\)
- **Alien.** An alien can receive a gift of property - except a British ship (or a share in it);\(^{463}\)
- **General Public.** Gifts may be made and received for the general public, such as the dedication of a highway or footway;\(^{464}\)
- **Vicar.** A vicar (in relation to the freehold of a church and its fixtures) and churchwardens (in relation to movable goods) are the owners - not the trustees or custodians of - gifts given to their church. However, the disposal of such gifts is at the discretion of the consistory court;\(^{465}\)
- **Local Authority.** For the purpose of discharging any of its functions, a local authority may accept, hold and administer gifts of property (real or personal) made for that purpose or for the benefit of the inhabitants of its area (or some part). A local education authority has express power to accept, hold and administer any property (or trust) for the purposes of education. District councils and national park authorities are expressly authorized to acquire by way of gift any estate in (or rights over) a common regulated by a scheme;\(^{466}\)

Halsbury then considers persons incompetent to receive gifts,\(^{467}\) as well as gifts for non-charitable purposes.\(^{468}\)

*In conclusion, both the donor and donee must have capacity to make a gift.*

18. PRESENT LAW ON GIFT: SUBJECT OF A GIFT

Halsbury states:

As a general rule all property, real and personal, corporeal and incorporeal, may be the subject of a gift; but some gifts are inalienable by their nature, for example titles of honour or dignities, or may be made inalienable by Act of Parliament.\(^{469}\)

Halsbury then considers the following:

\(^{456}\) Ibid, para 214.
\(^{457}\) Ibid, para 215.
\(^{458}\) Ibid, paras 216-7.
\(^{459}\) Halsbury refers to ‘redelivery’. However, the reference should be to ‘delivery’.
\(^{461}\) Ibid, para 218.
\(^{462}\) Ibid, para 218. It continues ‘Where property is given to a minor, it vests in him immediately upon the gift’s being completed, and a gift inter vivos to a minor cannot afterwards be revoked. A gift of a legal estate in land will vest in him the equitable estate only. A minor cannot give a good discharge for money paid to him in pursuance of an instrument, unless expressly authorised thereby to do so, except that a married minor or a child who has formed a civil partnership can receive a receipt for income, including accumulations of income made during his or her minority.’
\(^{463}\) Ibid.
\(^{464}\) Ibid.
\(^{465}\) Ibid.
\(^{466}\) Ibid, para 221.
\(^{467}\) Ibid, para 220. It particular, it refers to gifts to: (a) a trustee by his beneficiary out of trust property; (b) by a beneficiary to an executor; (c) by a member to an officer or employee of a friendly, industrial or provident society; (d) to an agent; (e) to the personal representatives of a person dead at the execution of a deed; (f) to a corpse.
\(^{468}\) Ibid, para 221.
\(^{469}\) Ibid, para 222. See also Hyland, n 4, p 198.
• **Land & Chattels Real.** A gift of an advowson (right of presentation) to a benefice is invalid unless the statutory requirements governing the transmission of a patronage are observed.470

• **Personalty.** Unreclaimed wild animals cannot be the subject of a gift. Nor corpses;471

• **Choses in Action.** These may be subject of a gift but not mere expectancies or possibilities - save for a possibility coupled with an interest.472 A promissory note not given for value does not make the payee a creditor and, thus, cannot be a gift.473 (however, a voluntary bond can be a gift and the debt enforced against the person who creates it (or his estate)).474 Legislation limits the gift of premium bonds and individual savings accounts (ISA's).475

Halsbury also considers a gift: (a) of property subject to a charge,476 (b) of land with an uncompleted building on it,477 (c) for a particular purpose,478 (d) of a dangerous thing.479

*In conclusion, a gift must be alienable.*

19. PRESENT LAW ON GIFT: REVOCATION

Halsbury considers the law on the revocation of a gift.

(a) **Prima Facie Irrevocable**

Halsbury states:

*prima facie* the donor of a completed gift is not entitled to revoke it nor to recall any payment made voluntarily.480

In respect of deeds, Halsbury notes:

• **Retention.** If an instrument is formally executed as a deed and delivered and there is nothing but the retention of the deed in the possession of the executing party to qualify the delivery - and nothing to show he did not intend it to operate immediately - it is a valid and effectual. Thus, delivery to the party who is to take under it or to any person for his use is not essential. Even if the contents have not been communicated to the beneficiaries, it cannot be revoked unless a power of revocation is reserved;

• **Gift by way of Deed.** If a voluntary deed is complete, in good faith and valid - and is unaffected by any statutory disability - it is indistinguishable from one executed for valuable consideration and it carries with it all the same incidents and rights attached to the property. With stronger reason, delivery to a third person for the use of the beneficiary in whose favour the deed is made - where the grantor parts with all control of the deed - makes it effectual from the instant of the delivery;

• **Reversionary Interest.** A gift of a reversionary interest is irrevocable - even though no notice has been given to the trustees in whose names the reversionary interest is vested nor to the trustees of (or beneficiaries under) the voluntary deed. On the same principle, with successive voluntary deeds, the first takes effect, even though it is retained by the donor or settlor.

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470 Ibid, para 223. Also ‘Where the registered patron of a benefice, or the representative of that patron, is a clerk in holy orders or is the wife of such a clerk, that clerk is disqualified for presentation to that benefice.’

471 Ibid, para 223. ‘There is said to be no property in a dead body, so that a person cannot dispose of his own body either by will or by any other instrument, although he may consent to his body or any part of it being used for the purposes of medical research or connected purposes. A person also cannot dispose of the body of anyone else by way of gift.’

472 Ibid, para 225.

473 Re Whitaker (1889) 42 ChD 119, 124 per Cotton LJ ‘at law there cannot possibly be any claim by way action on a promissory note by the original person to whom the promissory note was given if he never gave any consideration for it. Neither in law nor in equity can the payee under apromissory note, which appears on the facts before the court to be voluntary, have any claim as a creditor.’

474 See n 276.

475 Halsbury, n 276, vol 52, para 230.

476 Ibid, 226 ‘Where a person makes a gift of property which with other property is subject to a charge, and in the gift there is no reference to the charge, nor any covenant for title, then, if the donor created the charge and is personally liable to pay it, the donee cannot be called on to pay any part of it, as it is considered equitable that he who is under a personal obligation to pay the debt should bear it, but if the donor took the property subject to the charge, whether he is or is not personally liable to pay it, the donee takes subject to the charge, or to a proportionate part of it if another property is also subject to it.’

477 Ibid, para 227.

478 Ibid, para 228. ‘Where a person obtains an absolute conveyance or gift for a particular purpose, and afterwards makes use of it for another purpose, the court will interfere on the ground of fraud, but the mere expression by the donee of his intention to use it in a particular way, without a contract, express or implied, that he will so use it, does not prevent him from using it in another way.’

479 Ibid, para 229.

480 Ibid, para 257.
The above deal with deeds and delivery. However, ‘delivery’ of a deed is now simply a matter of intent and it has been asserted that deeds should now be abolished.

(b) Creditors’ Deed

Halsbury states:

A deed executed in favour of creditors who are not parties or privy to it is revocable by the debtor at any time before the creditors have assented to it.

Halsbury notes that the principle on which this doctrine is founded is that - in executing the deed - the debtor has no intention to create a perfect trust for the benefit of his creditors. Instead, he desires to make an arrangement for his own person convenience for payment of his debts in an order prescribed by himself and over which he retains control. This principle, therefore, does not conflict with cases providing that a trust perfectly created in favour of a volunteer cannot, later, be revoked. Such a deed is irrevocable in various circumstances.

(c) Fraud, Undue Influence & Fraudulent Transactions in Land

Halsbury states:

Donors, even though of full age and capacity, are entitled to set aside their gifts if induced by fraud, coercion or undue influence, for the donee must not profit by his own wrong, nor must the influence arising from relations existing between the parties be abused. Where there is a relationship of trust and confidence, and inexplicably large gifts are made, the presumption of undue influence will be rebuttable only by proof of full, free and informed thought on the part of the donor. The equitable doctrine relating to unconscionable bargains does not apply to gifts…A voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

A court may also impeach gifts in various circumstances.

(d) Mistake & Misrepresentation

Halsbury states:

Although a gift may be set aside on the ground of mistake alone, where there is no fraud or undue influence, and no mistake has been induced by those who derive benefit under the gift, the mistake must be of a very serious character to induce the court to order the donee to restore the gift. Where a gift has been induced by an innocent misrepresentation of fact by the donee, the donor has the right in equity to recover the gift. If the gift is made under the influence of a delusion relating to matters spiritual or temporal, the right to set it aside is clear. Imperfect knowledge on the donor’s part of the effect of the instrument making the gift is a ground for setting aside the gift.

(e) Transactions avoided in Bankruptcy & by Creditors

Halsbury states:

Where an individual is adjudged bankrupt and he has at a relevant time entered into a transaction with any person at an undervalue, the trustee of the bankrupt’s estate may apply to the court for such an order as the court thinks fit for restoring the position to what it would have been if that individual had not entered into the transaction. For these purposes an individual enters into a transaction with a person at an undervalue if he makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for him to receive no consideration.

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481 See n 316.
482 See McBain, n 1(f).
483 Halsbury, n 267, vol 52, para 258.
484 i.e. (a) a creditor is a party (or privy) to the deed; (b) the trustee of the deed takes a beneficial, as well as a legal, interest under it; (c) a creditor is not a party to the deed - but has had notice given to him by or through the debtor of its existence - by being expressly, or impliedly, told that he may look to the trust property for payment of his demand. In such a case he becomes a beneficiary; (d) the trust was created for the purpose of repairing a breach of trust; (e) the surrounding circumstances show an intention to create the relation of trustee and beneficiary; (f) after the death of the settlor (or of one of them); (g)its provisions are not to take effect until after the settlor’s death.
486 Ibid, para 280. i.e (a) made with the intention of defeating a claim for financial relief in a matrimonial (or civil partnership) cause; (b) pursuant to a claim of failure to maintain during the subsistence of a marriage (or civil partnership); (c) made with the intention of defeating an application for an order that the will of a deceased person fails to make reasonable financial provision for family members who make the application.
487 Ibid, para 261.
488 Ibid, para 262. Halsbury continues ‘There are further provisions relating to transactions entered into at an undervalue which are not restricted to transactions taking place within a certain period and which apply whether or not insolvency proceedings have been taken. These further provisions, however, only apply if the court is satisfied that the transaction was entered into by the person entering into it for the purpose
In conclusion, Halsbury considers revocation in the context of: (a) deeds; (b) creditors’ deeds; (c) fraud; (d) undue influence; (e) fraudulent transactions in the case of land; (f) mistake and misrepresentation; (g) transactions avoided in bankruptcy and by creditors. In the case of (a), if deeds were abolished the position would be simplified (not least, since ‘delivery’ now is simply a matter of intention). As to (b)-(g), these grounds of revocation apply generally and not just to gifts. Thus, legislation on gifts would not need to set them out.

20. PRESENT LAW ON GIFT: CONDITIONAL & ILLEGAL GIFTS

Halsbury notes that gifts may be subject to conditions precedent or subsequent489 and that the former is ‘one to be performed before the gift takes effect’ while the latter is ‘one to be performed after the gift has taken effect.’ If the condition precedent is unfulfilled, it will put an end to the gift. However, if a condition subsequent is void, the gift remains good.490 In particular, Halsbury considers the following:

- **Gift Intended for Spouse (Civil Partner)**
  - **Engagement Ring.** Such a gift is presumed to be absolute. However, this presumption may be rebutted by proof that the ring was given on the express (or implied) condition it should be returned if - for any reason - the marriage did not take place;
  - **Condition.** A party to an agreement to marry (or civil partnership agreement) who makes a gift of property to the other party on the express (or implied) condition it is to be returned if the agreement is terminated, is not prevented from recovering the gift by reason of having terminated it;
  - **Wedding Presents.** There is no particular principle of law applicable to wedding (civil partnership) presents so as to make them joint gifts to both spouses (civil partners). The nature of the gift may supply evidence of the donor’s intention. If there is evidence of intention on the part of the donor, such a gift may be found to have been given either to one or to the other party (or to both). If no intention is clear, an inference may be drawn that gifts originating from each party’s family and friends were intended for that party.491

- **Repugnant Condition.** If there is an absolute gift of real (or personal) property and a condition is attached inconsistent with - and repugnant to - the gift, it is void and the donee takes free from it;

- **Restraining Alienation.** Although any restraint on alienation of an absolute interest in possession during a certain period is bad, a condition that the donee shall not alienate a reversionary interest appears to be good - since it is a condition that the donee shall not alienate to a particular person (or class of persons). A restraint on alienation to anyone other than: (a) one person (or to anyone other than one - or more - of a small or diminishing class), is bad; (b) one (or more) of a small class which is likely to increase, is good; 492

- **Restraining Marriage (Civil Partnership).** Prima facie, a condition in total restraint of marriage (or civil partnership) is void. However, the basic issue is whether the donor intended this. If the intention is to provide for a person while single (or to benefit the object in whose favour the gift is made) and not to restrain marriage (civil partnership) or to ‘compel’ celibacy - the gift is effective. A condition in partial restraint is good in the case of a personal estate unless there is a gift over on (or the gift is so made that it is revoked by) the marriage (civil partnership). Then, it is treated as a threat and invalid;494

of putting the assets beyond the reach of a person who is making, or may at some time make, a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make. Where those further provisions apply, the court may make such an order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims of the transaction. An application for an order under these provisions can only be made (1) in a case where the person entering into the transaction at an undervalue has been adjudged bankrupt, by the official receiver, by the trustee of the bankrupt’s other case, by a victim of the transaction, and an application so made is to be treated as made on behalf of every victim of the transaction.’


490 Ibid. Halsbury continues ‘If the words of the condition are capable of being construed either as a condition precedent or as a condition subsequent but the words of the written instrument point to the inference that the donor intended the condition to be subsequent rather than precedent, the court will hold the condition to be subsequent.’

491 Halsbury, n 267, vol 52, para 252. On engagement rings see also Palmer, n 4, paras 3-028 to30.

492 Ibid, para 253.

493 Ibid, para 254. Halsbury continues ‘One property can be given on condition that another is not alienated, for such a gift does not interfere with the donee’s power to alienate the property given, and so there is no repugnancy.’

494 Ibid, para 255.
Separation. A gift to induce a person to live apart from their spouse (or civil partner) is bad. However, the following gifts are good: (a) for the maintenance of a spouse (or civil partner) during desertion; (b) by post-nuptial settlement (or during a civil partnership) to a spouse (or civil partner) during co-habitation. The basis for voiding certain gifts in the case of marriage (civil partnership) is one of public policy. Halsbury also considers: gifts for illegal purposes; tainted gifts; gifts promoting illegality; and gifts and appropriation under the law relating to theft.

In conclusion, legislation on gifts should note that they can be subject to conditions (precedent and subsequent) and they must not be contrary to law.

21. PRESENT LAW ON GIFT: INCOMPLETE GIFTS

(a) Incomplete
Halsbury states:

Where a gift rests merely in a promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee the right to enforce the promise. A promise made by deed is, however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. A gift is intended to be effectuated by one mode, for example by actual transfer to the donee, the court will not give effect to it by applying one of the other modes.

If the law on gift was placed in legislation, then, what is required to make a gift valid (that is, its pre-requisites) as well as what is required to complete a gift (that is, for it to vest) will be specified. Halsbury also states:

An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete. No question of conscience enters into the matter, for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete.

(b) Chose or Thing in Action
Halsbury states that, for a voluntary equitable assignment of an equitable chose or thing in action to be valid:

it must be in all respects complete and perfect, so that the assignee is entitled to demand payment from the trustee or holder of the fund or debt and the trustee or holder is bound to make payment to the assignee, with no further act on the assignor’s part remaining to be done to perfect the assignee’s title. Notice to the debtor is not necessary to make the gift complete between the assignor and assignee.

Halsbury refers to specific instances:

- Shares. If a person entitled to an allotment of shares in a company gives a direction in writing to the company to allot them to a donee, the direction may constitute a valid equitable assignment of the shares and, thus, a complete gift;

- Cheque. This is a mandate to the donor’s bank, revoked by his death, unless paid prior to then. However, if the donee pays away a cheque for valuable consideration (or in payment of a debt of his own) before the bank is aware of the donor’s death, the gift is not revoked;

495 Ibid, para 256.
496 Ibid, paras 263-6.
497 Ibid, para 267.
498 Ibid, para 267.
499 Halsbury, n 267, vol 52, para 267.
500 Ibid, para 268.
501 Ibid. See also Hewitt v Kaye (1868) LR 6 Eq 198, 200 per Lord Romilly ‘A check [cheque ] is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the bankers or anywhere else.’ Re Swinburne, Sutton & Fetherley [1926] Ch 38, 44 per Warrington LJ ‘A cheque is not money. It is not the indicia of title to money. A cheque is nothing more than an order directed to the person who has the custody of the money of the testatrix requiring him to pay so much to the person in whose favour the cheque is drawn.’ If a person places a cheque, drawn by a third person in his favour, into the hand of another and then takes it away and locks it up, is is not a complete gift. Jones v Lock (1865) 1 Ch App 25. See also Hyland, n 4, p 180; S Stoljar, A Rationale of Gifts and Favours (1956), vol 19, pp 237-54 and Snell, n 300, para 24-010.
• **Promissory Note.** Neither in law or equity can a payee under a promissory note, which appears to be gratuitous (voluntary), have a claim as a creditor.\(^{502}\)

Today, promissory notes are less likely to occur - as is the inability to have a cheque paid in prior to the donor’s death.\(^{503}\) Further, legislation or rules invariably establish the position on share transfers.

(c) Incomplete Gift & Declaration of Trust

Halsbury indicates that words of gift are distinct from any declaration of trust.\(^{504}\)

Consequently equity will not assist in completing an imperfect gift by holding that the intended donor is a trustee for the intended donee. With yet stronger reason, equity will not in general compel the donor’s executor to complete the gift, even though partly performed during the lifetime of the deceased, but if there has been true consideration for the promise, as where the promisee has expended money or incurred an obligation on the faith of the promise, the deceased’s estate is liable to the extent to which the money has been spent or obligation incurred.

Equity will not however strive officiously to defeat a gift; and a valid trust has been established in an intermediate case where in a composite transaction taking place on the same day a donor declares that he is giving, and the latter that he has given, property to a trust which he has himself established and of which he has appointed himself to be a trustee.\(^{505}\)

Halsbury also notes that:

- **Charitable Object.** A promise to pay a sum of money to some charitable object cannot be enforced against the promisor’s estate - even if part may have been paid in his lifetime. However, if a person promises to leave money to a school society for the prosecution of its undertaking and - in consequence - the society establishes a school, it can recover the sum promised;

- **Trust not Upheld.** If: (a) the intention to declare a trust is incomplete; (b) the trust is an attempt to evade the law; or (c) the object(s) intended to be benefitted are insufficiently ascertained, a gift will not be upheld.

- **Several Objects.** If it is uncertain which of several objects is intended to be given, there is no valid gift - unless the donee is given power to choose which he will take. The right of selection may be given expressly or by inference and, except in special cases, will rest with the donee;

- **Court Assistance.** Although the court will not generally assist an intended donee to complete an incomplete gift, neither will it - at the instance of the donor who repents of his intended gift - compel a deed of inchoate gift to be delivered up.\(^{506}\)

(d) Completion of Incomplete Gift

Halsbury indicates that subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift, for example:

- **House.** If a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly - and with the donee’s consent - expends money on building a house, the donee can call on the donor (or his representatives) to complete the gift.

- **Appointment as Executor/Administrator.** An imperfect gift may be perfected by the donor appointing the donee to be his executor or administrator (or one of them). The principle is that, where a testator has expressed the intention of making a gift of property belonging to him to one who -on his death becomes his personal representative (‘PR’) – and that intention continues unchanged - the PR is entitled to hold the property for his own benefit.\(^{507}\)

\(^{502}\) Ibid. Re Whitaker (1889) 42 ChD 119 at p 124 per Cotton LJ.

\(^{503}\) Many cases on cheques (especially in respect of DMC) relate to the donee not cashing it prior to the donor dying. Thus, there was no delivery of cash, merely a mandate on the bank to pay. However, since banks, today, are ubiquitous (and open every day), in most cases, a cheque can be cashed prior to the donor’s death and, indeed, banks generally allow cheques to be cashed until formal notification of the death.

\(^{504}\) Ibid, para 269. ‘The principle of the distinction between a declaration of trust and an intended gift is that in the former case a person shows an intention to make himself a trustee, whereas words of gift show an intention to deliver over the property to another, and not to retain it in the intending donor’s possession for any purpose, fiduciary or otherwise.’

\(^{505}\) T Choitram International SA v Pagarani [2001] 2 AE 492. Also, Pennington v Waine [2002] 1 WLR 2075 at p 2090 per ArdenLJ ‘the principle that, where a gift is imperfectly constituted, the court will not hold it to operate as a declaration of trust, does not prevent the court from construing it to be a trust if that interpretation is permissible as a matter of construction, which may be a benevolent construction.’ See also Snell, n 300, para 24-010.

\(^{506}\) Halsbury, n 267, vol 52, para 269.

\(^{507}\) Halsbury notes that: ‘The donor’s intention to give must not be an intention of testamentary benefaction, even though the intended donee is the executor; for, if so, the rule cannot apply, the prescribed formalities for testamentary disposition not being observed.’
For the completion of an incomplete gift by a court:

- **Present Intention.** There must be a present intention of giving certain definite property - the gift being imperfect for some reason at law - and not a mere promise to give on a future occasion;

- **Unchanged Intention.** The donor’s defective intention should continue unchanged until his death. If the proper inference from the evidence is that he probably forgot about the imperfect gift, the evidence will not establish the continuing intention required by the rule and the gift will fail. If, however, the donative intention continues until the date of the will - and the will contains a confirmation of the gift - any communication of a change of intention by the testator to a third person will not revoke (or modify) the confirmation. This rule applies to the intended forgiveness of a debt by a testator if there is sufficient evidence of his intention during his life to forgive it. 508

(e) Conclusion

In the past, there was a failure to distinguish between what the pre-requisites were for a valid gift and when a gift vested. That is, when the gift took legal effect or (using an older word) it became ‘complete.’ 509 This also applied in the case of DMC. Similarly, it was not clarified that, often, a gift did not become complete, not because certain formalities were yet to be performed, but because it was subject to a condition precedent or subsequent. Placing the law of gift in legislation will remove this confusion.

22. PRESENT LAW ON GIFT: DONATIO MORTIS CAUSA (‘DMC’) 510

(a) Introduction

DMC are neither gifts *inter vivos* nor wills. In *Re Beaumont* (1902), Buckley J stated:

A [DMC] is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor.

In order to make the gift valid it must be made so as to take complete effect on the donor’s death. 511

In the past, DMC were more common since people, often, died suddenly without being able to put their affairs in order. Today, with advances in medicine, people (usually) have time, before their death, to make a will. Further, the vast majority of the population, today, is able to write and sign their name. Thus, it would be easy for a dying person (unless *in extremis*) to put a DMC in writing - especially one relating to a chose in action by signing the relevant transfer form 512 - as opposed to making an oral gift with physical delivery, in the hope that a court will show latitude where the same would not otherwise, legally, transfer title. Also, much of the caselaw on DMC concerned: (a) various types of chose in action; and (b) the constructive delivery of chattels. However, both are less likely to arise in modern times. Thus:

- Often, DMC comprised bonds, BOE and promissory notes. These are rare types of gift today; 513
- The transfer of shares - or savings in banks, building societies, friendly societies, industrial societies etc. - is now regulated by legislation or by the rules of the relevant institution (see 14(d));
- The constructive delivery of chattels by way of a key to a personal trunk or safe etc. is also more rare;
- In times past, people resorted to litigation - both *inter vivos* and mortis causa - in respect of gifts of minor chattels (swords etc.). Today, this is less likely. 514

508 Halsbury, n 267, vol 52, para 270.
510 In *Tate v Hilbert* (1979) 2 Ves 111 (30 ER 548) it was said to be conceivable that a gift *mortis causa* might be made by deed or writing and, doubtless, a number, or perhaps many, were (and never came to litigation). See also Halsbury, n 267, vol 52, para 273, n 1. Cf. Borkowski, n 4, p 22 (Roman law). Winder, n 510(h), p 383 ‘Inter vivos a gift of a chattel may be made by deed, but it has never been held that a deed is sufficient mortis causa.’
511 Bonds also tend to be for high denominations nowadays.
Indeed, a review of Halsbury and other texts on DMC indicates how few cases there are. And, how antiquated most of them are. Given this, this area of law is ripe for modernization. However, are DMC needed at all? Lord Eldon in Duffield v Elwes (1827) did not think much of them:

if, among those things called improvements, this [DMC] was struck out of our law altogether, it would be quite as well.515

Certainly, DMC had the effect of getting round statutory requirements on wills, which explains why the caselaw developed after 1677 when oral (nuncupative) wills were prohibited, save in respect of small sums.516 However, today, making an inter vivos gift or a will is easier than in the past. And, the judicial development of this area of law has been somewhat haphazard and unsatisfactory.517 Yet, an inter vivos gift lacks a feature a DMC has. If the donor does not die, he needs to be able to recover what he has given away - in case he has impoverished himself by, for example, giving away his house.518 Thus, DMC should be retained since they are automatically revoked on the donor not dying and, indeed, he may revoke it at any time up to the point of death.519 However, it is asserted that:

- legislation should make DMC identical to gifts inter vivos apart from a very few distinguishing features;
- any additional latitude that may have been accorded in times past in the case of DMC, is not required today. This is due to: an expanded role accorded to trusts in modern times, a less rigid interpretation of the concept of ‘delivery’ (and constructive delivery) generally and the provision of legislation (and rules) on the transfer of choses in action. All these have ensured a greater chance of the donor’s intention being upheld. Further, latitude can be an open invitation to fraud and perjury.520

(b) Prerequisites of a DMC

As to the requirements of a DMC, judicial statements have asserted they possess 3 essential features, viz.:

- Russell CJ (in 1896):
  - first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death;
  - secondly, there must have been delivery to the donee of the subject-matter of the gift; and,
  - thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover.521

- Farwell J (in 1937):
  - firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor does not die then the gift is not to take effect and the donor is to have back the subject matter of the gift;

514 Borkowski, n 4, p 1 ‘it can be safely presumed that many deathbed gifts are made which do not lead to any dispute, let alone litigation.’ The cost of litigation over small sums today means that most DMC cases brought in the past would now not be brought.

515 1 Bli NS 497 (4 ER 959) at 533. In the same case, Counsel, p 508 noted that ‘The effect of these nice distinctions [with regard to DMC] is to increase litigation, because no advice can be given in such a state of the law.’ Winder (in 1940), see n 510, at p 312 ‘This statement of counsel...is also true at the present day.’ See also other statements in Borkowski, n 4, p 13.

516 See 7(e). Borkowski, n 4, p 2 ‘From the outset the doctrine of [DMC] was regarded as anomalous, a way of disposing of property conditionally on death in circumvention of the statutory formal requirements for making wills.’ Ibid, p 9. See also Sen v Headley [1991] Ch 425 per Nourse LJ at p 440 ‘Every such gift [by DMC] is a circumvention of the Wills Act 1837.’ See also Sparkes, n 510, p 38.

517 Samuels (1966), n 510, p 189 ‘In truth, English law’s flirtation with [DMC] has not worked out very well, largely because of illogicality, inconsistency and absence of clearly propounded principles. Either we should have insisted upon strict observance of the law relating to the transfer of property by gift or will; or we should have accepted and acted upon sufficient evidence of intention to make a gift by a donor.’ Baker (1994), n 510, p 19 ‘Under English law the rules [of DMC] have characteristically developed slowly and haphazardly.’ REM Megarry (in 1965) considered ‘there is a case for abolishing the doctrine of [DMC] altogether.’ See (1965) LQR at p 24.

518 As in Sen v Headley [1991] Ch 425, see n 611.

519 ‘Hedges v Hedges (1708) Prec Ch 269 (24 ER 130) (one of the earliest cases on DMC) per Cowper LC ‘where a man lies in extremity, or being surprised with sickness, and not having the opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him.’

520 Borkowski, n 4, p 3 ‘This trend of extending the scope of [DMC] is the more surprising given that such gifts are particularly susceptible to the possibility of fraud and perjury. In many cases the only evidence of the gift will be the testimony of the donee: English law, unlike some jurisdictions, does not insist on corroboration.’

521 Cain v Moon [1896] 2 QB 283 per Russell CJ at p 286.
o Secondly, the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other, but death within the near future, what may be called death for some reason believed to be impending;
o Thirdly, the donor must part with the subject matter of the donation. 522

- Nourse LJ (in 1991):
o First the gift must be in contemplation, although not necessarily in expectation, of impending death.
o Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donor’s death, being revocable until that event occurs and ineffective if he does not;
o Thirdly, there must be a delivery of the subject-matter of the gift, or the essential indicia of title thereto, which amounts to a parting with dominion and not mere physical possession over the subject matter of the gift. 523

The later definitions tend to borrow from the first. However, the following may be noted from the outset:

- **Delivery of Object.** The legal limitation of DMC only covering gifts transferred by way of delivery should end. A DMC should be able to occur in the same circumstances as a gift inter vivos: that is: (a) orally, with delivery; (b) in writing; (c) by way of trust; (d) where legislation provides. This would prevent a mis-match between gifts inter vivos and by way of DMC;

- **Conditional on Death.** There is a condition precedent. No gift takes effect unless the donor dies. 524 Thus, the donor can revoke the gift up until his last breath (unlike a gift inter vivos which, once given, cannot, generally, be revoked after it takes effect). Further, there must be an intention to give immediately and not in the future. Finally, the donor does not have to say ‘I have not died from my illness, I want my gift back’. Instead, the gift is only complete (vests) on death. Thus, it should be that the gift is revoked automatically if he survives. That is, it, automatically, becomes void. The condition precedent has not occurred. 526

23. DIFFERENCES BETWEEN DMC AND GIFT INTER VIVOS

Halsbury states:

A gift made in contemplation of death (a gift mortis causa) is neither entirely made inter vivos nor testamentary. It must be made in contemplation, though not necessarily in expectation, of the death of the donor, in circumstances which show that it is to take effect only in that event, and so as to be recoverable by the donor if that event does not occur, and void if the donee dies before it occurs. A gift mortis causa has in effect the nature of a legacy, and is only a gift on survivorship. 527

Although Halsbury (quoting Buckley J) states that a DMC ‘is neither entirely made inter vivos nor testamentary’ it is clear that - throughout its history - it has been treated, legally, as inter vivos (which it is, in fact) for the most part, and not as a will. 528 Further, although Halsbury does not note this, as with a gift inter vivos, in the case of a DMC the:

- donor and donee must have capacity (see 17);
- gift must be alienable (see 19);
- gift can be subject to conditions precedent and subsequent (see 20). 530

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523 *Sen v Headley* [1991] Ch 425 at pp 431-2. Borkowski, n 4, p 2 ‘a valid [DMC] must satisfy the following requirements: (a) The gift must be made in contemplation, although not necessarily in expectation of, impending death. (b) The gift must be made on the condition that it be absolute and complete only on the donor’s death; (c) There must be a delivery of the subject matter of the gift, or the essential indicia of title thereto, amounting to a parting with dominion over the subject matter.’ See also Tyler, n 4, p 318; Snell, n 300, para 24-017 et seq and Williams, n 510, para 42-05.
524 See also Borkowski, n 4, p 30.
525 Ibid, pp 26-7 & ch 5. *Re Patterson* (1864) 4 DeGJ & S 422 (46 ER 982) (gift of promissory notes. However, he wished to remain master of them ‘as long as he lived.’ Held to be a failed attempted testamentary gift).
526 *Re Richardson* (1885) 53 LT 746 per Kay J ‘a [DMC] does not come into effect as a gift until the death of the donor. If he recovers from the illness in consequence of which he makes the [DMC], it does not come into effect at all, and he may resume it in his lifetime.’
527 Halsbury, n 267, vol 52, para 271.
528 *Re Korvine’s Trust, Levasshoff v Block* [1921] 1 Ch 343. Eve J held that the conflict of laws rule to be applied to a DMC was that applicable to a gift inter vivos and not that to testamentary dispositions (wills), even though the subject matter of the donation was liable for the donor’s debts on a deficiency of assets and also subject to legacy and to estate duty. See also Borkowski, n 4, pp 29-30.
529 See also Borkowski, n 4, p 28 ‘The test of capacity to make a [DMC] appears to be the same as for inter vivos gifts…”.

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Halsbury notes that the donor must intend to make a DMC and not, for example, a loan or a bailment (for example, giving the chattels for custody). 534 This is the same as with a gift *inter vivos*, the donor must intend to make a gift. Given this, the above citations overlook the fact that a DMC is the same as one *inter vivos* - save for certain matters- some of which have been taken from Roman law. 535

(a) **Difference - Contemplation of Death**

The principal distinction between a gift *inter vivos* and a DMC is that the latter is made in ‘contemplation of death.’ 533 However, unlike a will, a DMC is not made in ‘expectation of death’. In the case of a will, a gift in it is made on the (definitive) assumption the donor has died. A DMC is made on an assumption that the donor may die. Because a DMC is made in contemplation of death, it is subject to a condition precedent - one a gift *inter vivos* does not possess. The donor must die. 534 In this way, a DMC is like a will. It only vests (has full legal effect) when the testator dies. 535 As a corollary to this condition precedent, a DMC is:

- **Revocable by Donor until Death.** 536 As to how a donor can revoke his incipient gift, he should be able to do so by giving notice and *dicta* can be found which give (rather weak) support to this view. 537 However, there seems to be no decision where this has actually occurred. That said, there is no good reason why the position should be different to that of a gift *inter vivos* which can be disclaimed by notice (oral or in writing). It is thought, however, that a donor cannot revoke a DMC by will - since death makes the gift complete. 538 Further, generally, if the donor resumes possession of the gift, the DMC ends; 539

- **Automatically revoked (void) if the Donor recovers.** 540 If the donor recovers from the illness during which the DMC is made, the donee has no title and holds the incipient gift in trust for the donor. 541 However, the fact that a legacy is given to the donee of an amount equal to a prior DMC is not, itself, a revocation of the DMC. 542

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530 Borkowski, n 4, pp 27-8.
531 See *Wildish v Fowler* (1890) 6 TLR 422. Also, *Ashton v Dawson and Vincent* (1725) 2 Coll 363n (63 ER 772)(DMC of a banknote and a bond. Donor said to donee ‘take these…they are yours; but if I live you must give them to me again.’ Held valid DMC). Cf. *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 SJ 215 (words not sufficiently unequivocal to establish intent to make a gift). See also Tyler, n 4, p 301.
532 See *Tate v Hibert* (1793) 2 Ves 111 (30 ER 548) at p 122. Also, Borkowski, n 4, ch 1 and Sanders, n 40, p 147 citing the Institutes of Justinian, 2.7.1 ‘A donation mortis causa is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given.’ See also Yaron, n 510, p 1 & ch 8.
533 Borkowski, n 4, 25-6, 30-1 and ch 4.
534 *Jones v Selby* (1710) Prec 300 (24 ER 143) per Lord Cowper at p 303 ‘a gift in praesenti, to take effect in futuro, after the party’s death.’ *Duffield v Elwes* (1827) 1 Blt NS 472 (4 ER 959) per Lord Eldon at p 530 ‘the title is not complete till he [the donor] is actually dead.’ *Edwards v Jones* (1836) 1 My & Cr 226 (40 ER 361) per Cottenham LC at p 235 ‘A [DMC] leaves the whole title in the donor, unless the event occurs which is to divest him.’ *Walter v Hodge* (1818) 2 Swans 36 (36 ER 490) per Sir Thomas Plummer at p 97 ‘Many conditions…accompany [DMC]; if the donor recovers, if he repents his gift, if the donee dies before him: the property is not vested absolutely till after death.’ See also Halsbury, n 267, vol 52, para 272.
535 Borkowski, n 4, pp 30-1, 106-5. When the donor of a DMC dies it has retrospective effect. *Re Korvine’s Trust* 1921] 1 Ch 343 per Eve J ‘If he [the donor] dies without revoking the gift the donee’s title is derived from the act of the donor in his lifetime and relates back to the date of that act.’ A gift - not completely vested in the donee at the time of the donor’s death - raises, by operation of law, a trust and the court, in equity, assists the donee to perfect his title. Thus, the donee is entitled to call on the donor’s personal representatives to lend their name (or give their endorsement) to enable him to complete his title. See Halsbury, n 267, vol 52, para 272; Borkowski, n 4, ch 8 and Snell, n 300, para 24-021.
536 Borkowski, n 4, p 26; Tyler, n 4, p 320 and Snell, n 300, para 24-022.
537 Halsbury, n 267, vol 52, para 277 cites *Jones v Selby* (1710) 2 Eq Cas Ab 573 (22 ER 483); *Bunn v Markham* (1816) 7 Taunt 224 (129 ER 90), *Walter v Hodge* (1818) 1 Wils Ch 445 and *Re Korvine’s Trust* [1921] 1 Ch 343. See also Borkowski, n 4, pp 58-61. For the revocability of a DMC under Roman law see Borkowski, n 4, p 6 ‘A [DMC] was regarded in principle as revocable before the donor’s death. It was automatically revoked by the donor’s bankruptcy or his surviving the donee. And, as a general rule, it was revocable at will by the donor.’
538 Ibid, per 277.
539 Ibid. However, Halsbury notes this does not apply where the donor, with the consent of (or at the request of) the donee, merely takes custody of the subject matter of the gift. See also Borkowski, n 4, pp 58-61.
540 Borkowski, n 4, p 58 and Tyler, n 4, p 318. Halsbury, n 267, vol 52, para 272 and Borkowski, n 4, pp 58, 107. See also *Staniland v Willott* (1852) 3 Mac & G 664 (42 ER 416)(recovered from illness).
541 Ibid, per 277. Halsbury continues ‘The legacy may be a satisfaction of the prior gift if the circumstances show that this was the testator’s intention: for example, it may be a satisfaction where the doctrine of double portions applies, or of the gift is made in satisfaction of a creditor’s debt and a legacy of equal amount is given to that creditor. If, however, there are no circumstances showing such an intention, the donee will be
(b) Difference - Debts

Another difference to a gift *inter vivos*, is that a DMC is available to pay the dead donor’s debts.\(^{543}\) In respect of tax, DMC are subject to Inheritance and Capital Gains Tax in the same fashion as gifts *inter vivos*.\(^{544}\)

(c) Other Differences

Other differences between a gift *inter vivos* and a DMC have been proposed, *viz*.

- **Donee Predeceases Donor.** A DMC lapses (becomes void) if the donee dies prior to the donor.\(^{545}\) This is similar to a testamentary gift which lapses if the beneficiary dies before the testator. The position in respect of a gift *inter vivos* is not wholly dis-similar. A corpse cannot receive a gift.\(^{546}\) Also, if an *inter vivos* gift was made subject to a condition precedent and the donee died before its satisfaction, the gift would lapse. However, an *inter vivos* gift can vest in the donee, with his then dying prior to the donor, without the gift being revoked. Thus, the difference reflects the fact that the DMC can be given but there may be an interim period prior to its vesting (on the donor’s death), in which period the donee may expire;

- **Undue Influence.** Borkowski suggests (by reference to Canadian cases) that the rules on undue influence in respect of a DMC might resemble those on testamentary gifts.\(^{547}\) However, he cites no precedent and it is asserted that the position under English law in respect of undue influence should be the same as that in respect of a gift *inter vivos* (see 19(c));

- **Statutory Exceptions.** The Forfeiture Act 1982, s 1 refers to a rule of public policy which, in certain circumstances, precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing. Pursuant to s 2(4) this can be modified, *inter alia*, in the case of DMC.\(^{548}\) Also, a DMC is part of the donor’s net estate for the purpose of claims for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975, s 8(2).\(^{549}\)

- **Satisfaction - Pre-Existing Debt.** A DMC can satisfy a pre-existing debt owed to the donee.\(^{550}\)

In conclusion, DMC are very similar to gifts *inter vivos* - save that they are subject to a condition precedent (death of the donor) as well as their being treated as a legacy in two respects. In practice, they have also been restricted to an oral gift with delivery - though there is no specific reason why this should be so. This is now considered.

24. DMC – DELIVERY OF CHATTEL

In *Ward v Turner* (1752), Hardwicke LC indicated that tradition (delivery) was required for a DMC.\(^{551}\) Halsbury states:

> There must be delivery to the donee or his agent of the subject of the gift, or a transfer of the means or part of the

\(^{543}\) See *Smith v Casen* (1718) 1 P Wms 406 (24 ER 447) (see note to *Drury v Smith* (1717) 1 P Wms 404 (24 ER 446)) per Jekyll MR. See also Halsbury, n 267, paras 278-300 and Borkowski, n 4, pp 11, 33, 110. Cf. Warnock-Smith, n 510.

\(^{544}\) Halsbury, n 267, paras 278-300.

\(^{545}\) See *Delgoffe v Fader* [1939] 3 AE 681 `A [DMC] is one made in contemplation of the death of the donor and is to take effect in that event, being recoverable by the donor if that event does not occur. Such a gift is in effect in the nature of a legacy, being subsequent to a condition, express or implied, that it is to take effect only in the event of survivorship of the donee'. See also Borkowski, n 4, p 31 and Tyler, n 4, p 321. Also, *Tate v Hibbert* (1793) 2 Ves Jun 111 (30 ER 548) and *Walter v Hodge* (1818) 2 Swans 92 (36 ER 549).

\(^{546}\) Halsbury, n 267, para 220 `A person dead at the date of the execution of a deed cannot take under it, so that his personal representatives cannot claim a transfer of the property comprised in such a deed to them, but the person named in a deed and intended to take under it is presumed to have been alive at the date of its execution until the contrary is proved. A corpse cannot receive a gift, so that a shroud or winding sheet remains the property of the person who owned it when the dead body was wrapped in it.'

\(^{547}\) Borkowski, n 4, pp 31-2.

\(^{548}\) Ibid, pp 34, 110. However, he cites no case of a person forfeiting a DMC by killing the donor to speed up his gift.

\(^{549}\) Ibid, pp 33-4, 110.

\(^{550}\) Ibid, pp 34-5, 110. Borkowski cites an Australian case, *Harness v Public Trustee* (1940) 40 SR (NSW) 414. A person owed rent to his landlord. Later, he made a DMC to her of money in a bank account. Held that the rent arrears were satisfied by the DMC it being in the nature of a legacy. Thus, she could not claim a legacy and rent. Cf. *Clavering v Yorke* (1725) 2 Coll 362 (63 ER 772)(DMC may not be in satisfaction of another debt).

\(^{551}\) See n 265.
means of getting at the property;\textsuperscript{552} although the actual delivery need not be by the donor himself, but may be by a person directed by him to make it;\textsuperscript{553} but the delivery must be to the donee or someone for the donee, for mere delivery to an agent in the character of agent for the donor amounts to nothing.\textsuperscript{554}

Halsbury also notes:

- **Donee as Trustee.** Delivery to the donee may be as trustee for any other person (s) or for a special purpose.\textsuperscript{555} The expression of the trust (or condition) must form part of the donation and be either contemporaneous with it or so coupled with it by contemporaneous words of reference as - in effect - to be incorporated with it; \textsuperscript{556}

- **Delivery can be First.** Delivery of the subject matter of the gift need not be at the moment of the gift. Antecedent delivery - even for another purpose - is sufficient; \textsuperscript{557}

- **Constructive Delivery.** Complete dominion over the subject matter of the gift must be intended to pass to the donee. If the property is too bulky for delivery the means of coming at the possession or making use of it (e.g. a key) may be delivered instead; \textsuperscript{558}

- **Insufficient Delivery.** Delivery of something merely as a symbol of the subject matter of the intended gift is insufficient.\textsuperscript{559} So, too, the giving of a power of attorney; \textsuperscript{560}

- **Donee as Agent.** A donee may take as agent for another. If a joint gift is intended he may take delivery for himself and as agent for the joint donee.\textsuperscript{561}

In \textit{Wasserburg} (1915),\textsuperscript{562} the court adopted a more relaxed concept of constructive delivery in the case of a DMC as opposed to a gift \textit{inter vivos}, accepting that ‘partial dominion’ was sufficient.

- Even if this was appropriate in 1915, it is asserted there is no need for this today. What constitutes delivery as - well as constructive delivery - for gifts \textit{inter vivos} and by DMC (and, indeed, under the law of pledge)\textsuperscript{563} should be the same; \textsuperscript{564}

- Further, what constitutes delivery (including constructive delivery) should be a matter of fact and not of law. Indeed, the caselaw on DMC is vivid evidence that seeking to determine delivery by way of legal construction has resulted in confusing (and, perhaps, confused) decisions.

Borkowski, after reviewing the caselaw, states:

the issue of delivery is one on which most cases have turned…The resulting case law is both rich and - at times -
This is a polite expression for the truth of the matter - the caselaw is confused and unhelpful with judges also seeking to distinguish 'dominion' from physical possession.566

- However, delivery of the chattel, after all, was simply the means, in past times, by which a donor evidenced his intention to transfer title to the chattel to the donee by livery of seisin. That is, delivery of physical possession by its being handed over with words indicating divestment;

- Adopting expressions such as 'control', 'dominion', 'partial dominion' 'legal right to control' to subdefine 'delivery' has only produced fragmentation in the concept of 'delivery' for the purposes of gifts inter vivos and DMC.

In conclusion, the current legal analysis of delivery (and constructive delivery) for the purposes of DMC is unsatisfactory. It has left great uncertainty whether a DMC is valid or not, resulting in complex court cases. In Woodward v Woodward (1995), rather like with the issue of livery of seisin, Dillon LJ stated:

It seems to me that the question is perhaps not so much one of dominion as of evidence of intention.567 (italics supplied)

One would suggest that this is the correct - and crucial - issue. In that case, a dying father in hospital said to his son 'You can keep the keys, I won't be driving it [the car] anymore'. The crucial issue was his intention.

- For example, was he intending for the son, in respect of the car to have: (a) custody (bailment);568 (b) a pledge, for an antecedent debt; (c) an inter vivos gift; (d) a DMC? The judge held it to be (d);

- The secondary issue was delivery and this should have been the same for all of (a)-(d). Was there constructive delivery by telling the son to keep the car keys? To have distinct interpretations of constructive delivery for (a)-(d) simply confuses the law;

- Further, whether there had been constructive delivery should have been determined as a fact with regard to the circumstances of the case. For example, it might (or might not) be relevant that the son had the keys physically on him or not. Or there was more than one set of keys. Or, that his wife also drove the car etc.

In conclusion, delivery (and constructive delivery) for gifts inter vivos and DMC should be the same and both should be a matter of fact, not law. Thus, the relevant question should be - Did the donor deliver (constructively deliver) the chattel in a way sufficient to manifest an intention to pass title to the donee?

25. DMC – DELIVERY OF CHOSE IN ACTION

Unlike, gifts inter vivos, in the case of DMC there is a more relaxed attitude in respect of upholding the validity of gifts of choses in action. Tyler (in 1973) put it thus:

The rule that equity will not perfect an imperfect gift is relaxed in the case of [DMC] by an anomalous doctrine peculiar to these gifts but established by the decision of the House of Lords.569 Thus choses in action may pass by [DMC] in circumstances ineffective to constitute a valid transfer inter vivos. The test is whether the instrument delivered contains the essential indicia of title, possession or production of which entitled the possessor to the money or property to be given. 570

For its part, Halsbury states:

In the case of a gift mortis causa of a chose or thing in action, delivery is necessary unless there is a formal transfer to

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565 Borkowski, n 4, p 63. S Stoljar, The Delivery of Chattels (1958) 21 MLR 27 at pp 40-1 ‘what becomes of the famous delivery rule? The strict answer is that it has no consistent design. Taken singly some results seem practical and clear, but en bloc the pattern is fragmentary and confused…The simple truth, then, is that the law is split into divergent and disconnected rules. They are nominally kept together by something called ‘delivery’, though delivery which can be actual delivery, constructive delivery or no delivery at all. Is it not astonishing how unaxiomatic a legal axiom can be?See also Barlow, Gifts Inter Vivos of a Chose in Possession by Delivery of a Key (1956) 19 MLR 394 who noted, at p 396, the confusion between symbolic and constructive delivery in the cases.

566 Ibid, p 73 ‘Dominion’ is rather a strange word when used to describe the making of gifts.’ Further, none of the caselaw adequately explains what ‘dominion’ means. In Vallee v Birchwood [2014] Ch 271, p 281 per Jonathan Gaunt QC (sitting as a judge) ‘The meaning and requirement of ‘dominion’ is easy enough to understand in the context of chattels. It is used in contradistinction to ‘possession’. Cf. p 283 ‘There is no doubt that the concept of ‘dominion’ is a slippery one. Its fundamental rationale appears to be that something must be done by way of delivery of the property or indicia of title sufficient to indicate that what is intended is a conditional gift and not something that falls short of that.’ (italics supplied) However, this confuses intent with the separate issue of delivery.


568 Cf. Trimmer v Davy (1856) 25 LJ Ch 424 (had key in capacity as housekeeper), see n 404.

569 He cited Duffield v Elwes (1827) 1 Blin NS 497 (4 ER 959).

the donee, but as physical delivery is impossible, delivery of a document essential to its recovery may suffice. The test whether a chose or thing in action is validly given is whether the document actually delivered constitutes the essential indicia or evidence of title, possession or production of which entitles the possessor to the money or the property purported to be given; it is not necessary that all the terms of the contract should be expressed in the document. Dominion over the subject matter of the gift must be parted with.\textsuperscript{571}

Halsbury provides examples of gifts of choses in action held to be good and those which failed. However, the way this has been set out is not helpful since - if set out according to the nature of the chose - some of the examples are now (long) obsolete. Further, the position in respect of many of the examples given has been superceded by legislation or the rules of the relevant institution issuing the chose, which invariably requires some form of written instruction (not least, to prevent fraud)\textsuperscript{(see 14(b)).} The following, Halsbury notes, were held good (or, where indicated, bad) for the purposes of a valid DMC:\textsuperscript{572}

- **Bank Notes.** (i) bank notes.\textsuperscript{573} A bank note is a negotiable instrument. More particularly, it is a promissory note payable on demand without the need for indorsement.\textsuperscript{574} Thus, delivery of the note is the same as delivery of coin; the following three - being negotiable instruments - produced the same outcome in the past but not today since cheques, invariably, are now issued by banks, crossed and marked ‘account payee’.

- **Cheques.** (i) cheque drawn by donor, cashed in his lifetime; (ii) cheque handed to a bank official in the donor’s house (obsolete); (iii) cheque payable to donor or order, though not indorsed.\textsuperscript{575} But not (i) cheque drawn by donor, not paid in his lifetime; (ii) cheque for part of the money on a deposit account.\textsuperscript{576}

  - **Cheque Drawn by Donor.** A cheque is a (revocable) mandate to a banker - not property (cash), in itself. Thus, if the donor’s cheque is not cashed (or duly presented for value) prior to his death, there is no delivery;\textsuperscript{577}

  - **Bearer & Order Cheques.** Today, cheques are crossed and marked ‘account payee’. The former makes it payable only through a bank, but does not affect its negotiability as such.\textsuperscript{578} The latter removes its negotiability; it makes it merely a mandate (payment instruction) to the bank to pay the payee.\textsuperscript{579} Thus, a donee, today, in contemplation of death, would not be able to make a valid DMC by: (a) purporting to indorse a cheque to the donee (being a crossed cheque with ‘account payee’) made out to himself (i.e. still

\begin{itemize}
  \item Halsbury, n 267, vol 52, para 274. For a useful analysis see Borkowski, n 4, pp 85-104. See also Snell, n 300, para 24-020.
  \item See generally, Winder, n 510(b), p 388.
  \item \textsuperscript{572}AG Guest (ed), Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes (17th ed, 2009), p 675 ‘The purpose of crossing a cheque is to diminish the risk that the item may be misappropriated [stolen] and payment made to person not entitled to it. Payment of a crossed cheque will not be made by the drawee bank across the counter…The cheque must be presented for payment through a bank, to which the payment will be made. Crossing does not, however, in itself affect the negotiability of the instrument. If payable to order it can be negotiated, i.e. transferred, by the holder to another by indorsement and delivery or (if payable to bearer) by mere delivery, just as if it were not crossed.’ See also para 2-063.
  \item Ibid, p 692 ‘the Cheques Act 1992 s 1 introduced into the 1882 Act [Bills of Exchange Act 1882] s 81(A)(1) which renders non-transferable a crossed cheque bearing these words across its face.Since most cheques supplied by the United Kingdom banks to their customers, whether commercial or private, are now crossed and pre-printed with the words ‘account payee only’ within the crossing, it follows that the vast majority of cheques issued in the United Kingdom are no longer negotiable instruments but merely payment orders by which the customer instructs his banker to pay the sum of money specified in the cheque to the person named therein as the payee.’ This also applies to: (a) a crossed banker’s draft payable on demand; (b) a crossed dividend warrant; (c) crossed post-dated cheques. As a result cheques now omit the words to ‘order’ or to ‘bearer.’ Cf. p 693 ‘such words [‘account payee’] on a bill of exchange or promissory note would not have this effect: nor would they have effect if placed on an uncrossed cheque.’
\end{itemize}
treat it as if to order); or (b) by handing over such a cheque made out to himself to the donee (i.e. still treat it as if to bearer);\(^580\)

Thus, today, the position on a cheque is, invariably, that of a donor writing one in favour of the donee as a DMC. If cashed (or duly presented) prior to the bank being notified of his death, it would vest the proceeds in the donee. This is not different to the position inter vivos;

- **BOE.** (i) BOE payable to donor or order (though not due until after his death and not indorsed);\(^581\) (ii) BOE drawn by donor in favour of wife (to buy mourning and maintain her);\(^582\)
  - Cheques are BOE, drawn on a bank.\(^583\) Thus, the position of BOE and cheques should be the same re a DMC, prior to cheques being crossed and marked ‘account payee’;
  - That is: (a) if not drawn by the donor it will be a valid DMC if payable to bearer and delivered to the donee; also if payable to order and indorsed to the donee;\(^584\) (c) if drawn by the donor, it will be a valid DMC if paid out, presented or negotiated prior to notification of the death of the donor;

- **Promissory Notes.** (i) promissory note to order and not indorsed.\(^585\) **But not** (i) promissory note drawn by donor in favour of donee;\(^586\) (ii) an IOU.\(^587\) The position of promissory notes and BOE should be the same;

In the case of certain choses in action, the courts have been prepared to take a more lenient approach in the case of a gift by DMC. Thus, in **Birch v Treasury Solicitor** (1951), the transfer of the chose in the case of certain savings deposit passbooks\(^588\) was held valid if it comprised:

the document or thing the possession or production of which entitles the possessor to the money or property purported to be given, as distinct from mere evidence of title.\(^589\)

As to these, Halsbury notes:

- **Bonds:** (i) bonds;\(^590\) (ii) registered Victory bonds (obsolete); (iii) exchequer bond deposit book with a certificate that the donor has been registered as the holder of the bond (obsolete).\(^591\)

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\(^{580}\) The Bills of Exchange Act 1888, s 81(A)(1) makes no exception for a DMC.

\(^{581}\) Halsbury, n 267, vol 52, para 275 refers to **Rankin v Weguelin** (1832) 27 Beav 309 (54 ER 121) and states ‘it does not appear whether the bills were indorsed by the donor or his executors’. Williams, n 510, para 42-18 ‘It seems that the ground on which unendorsed negotiable instruments may be the subject of a gift mortis causa is not that property is transferred by law by delivery, but that the delivery of the instrument gives the donee an interest that, on the death of the donor, a court can enforce in equity so as to make the gift complete.’

\(^{582}\) Ibid, para 275 and Borkowski, n 4, pp 94-5. See also **Lawson v Lawson** (1718) 1 P Wms 441 (24 ER 463) (BOE drawn on a goldsmith for £100) approved in **Tate v Hilbert** (1793) 2 Ves 111 (30 ER 548) at 120. It is uncertain whether this case would be followed today. See also C Viner, *General Abridgment of Law and Equity* (1st ed, 1741-53), vol 4, pp 157-8.

\(^{583}\) **Scrutton**, n 574, p 34 ‘a cheque is a [BOE] drawn on a bank by its customer, payable on demand.’

\(^{584}\) The concession of it simply being to order but not indorsed (see n 581), one would assert, would likely not be followed today, since **Rankin v Weguelin** (1832) was prior to the Bills of Exchange Act 1882 which Act, clearly, envisages the need for indorsement in order to transfer a BOE made to order (if not so indorsed, it, effectively converts an order BOE into one to bearer, something the drawer did not intend). Although **Clement v Cheeseman** (1884) 27 ChD 631 upheld this exception with regards to cheques, today this will not occur with crossed cheques marked ‘account payee’ and indorsement is an important device to prevent fraud. BOE to order, anyway, are rare, as noted by Guest, n 578, para 2-064.

\(^{585}\) Halsbury, n 267, vol 52, paras 275 & 276 and Borkowski, n 4, p 94. See also **Veal v Veal** (1859)27 Beav 303 (54 ER 118) following **Rankin v Weguelin** (1829) 27 Beav 309 (54 ER 121). On this see n 584.

\(^{586}\) **Scrutton**, n 574, p 34 ‘a promissory note drawn by the donor is not good as a [DMC].’

\(^{587}\) **Re Dillon, Duffin & Snellgrove v Treasury Solicitor** [1951] Ch 298 per Evershed MR at p 308. See also Halsbury, n 267, vol 52, para 275. Also, **Re Dillon, Duffin & Duffin** (1890) 44 ChD 76. See also Borkowski, n 4, p 15-6 and Tyler, n 4, p 319.

\(^{588}\) Halsbury, n 267, vol 52, para 275. See also **Re Lee, Treasury Solicitor v Parrott** [1918] 2 Ch 320 (Exchequer bond deposit book issued by the Post Office containing a certificate of the holder’s title to registered Exchequer bonds acquired through the Post Office).See also **Snellgrove v Baily** (1744) 3 Atk 214 (26 ER 924)(bond for a debt of £100).
• **Savings (Deposit) Passbook.** (i) Deposit passbook; (ii) Deposit account book; (iii) London Trustee Savings Bank book; (iv) National Savings Bank (‘NSB’) book as regards a cash deposit; **But not**(i) NSB deposit book (so far as Government stock is concerned); (ii) private savings bank book;594

  o Today, most banks and building societies issue bonds (including e-bonds) which are non-bearer and which are evidenced not by a certificate but by a confirmation in writing (which usually confirms the interest rate and maturity date). It is asserted that such a confirmation cannot be treated as an *indictum* of title;

  • **Investment (Savings) Certificates.** (i) War Savings certificates; (ii) National Savings certificates; **But not**(i) investment certificates re Government stock; 600 (ii) receipts for Government stock; (iii) Post Office savings certificates of the former Irish Free State.

  o Today, such certificates are not ‘certificates’ as such. They, often comprise a letter or online confirmation of the investment and cannot be treated as *indictia* of title as such. So too, the statements issued by Open Ended Investment Companies (OEIC’s).601

  • **Bank Statements, Paying-In Slips etc.** There would seem no evidence that these, as such, in the past were held to comprise sufficient *indictia* of title and one would suggest there is no good reason for being so treated today;

591 *Ibid*, paras 275 & 276. See also *Re Richards, Jones v Rebeck* [1921] 1 Ch 513 (registered Victory bonds) and *Re Lee, Treasury Solicitor v Parrott* [1918] 2 Ch 320.

592 *Ibid*. Borkowski, n 4, pp 95-6 and Williams, n 510, para 42-20. *Ward v Turner* (1752) 2 Ves Sen 431 (28 ER 275) per Hardwicke LC at p 442 ‘the bond was delivered, and I held it a good donation mortis causa.’ He also noted, ‘a bond, which is a specialty, is a chose in action.’ The logic of his so holding is assisted by the fact that delivery of a specialty (and a deed) effected livery of seisin in the case of a gift *inter vivos*. Borkowski, n 4, p 12 ‘This decision amounted to a significant extension of the scope of [DMC] because in certain earlier decisions it had been held that a *donatio* of a chose in action was ineffectual unless title to the chose was capable of passing by delivery’ *Ibid*, p 14. See also Winder, n 510, p 310.

593 So too, with other choses in action which are bearer, see *Guest*, n 578, para 15-020 (debentures to bearer, bearer scrip, bearer shares, bearer share warrants, bearer letters of allotment etc).

594 Halsbury, n 267, vol 52, paras 275 & 276. See also *Birch v Treasury Solicitor* (n 589); *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680 (Post Office Savings Bank deposit book); *Re Andrews, Andrews v Andrews* [1902] 2 Ch 394 (Post Office Savings Bank deposit book, case criticised in *Re Lee*, see n 591) and *M’Gonnell v Murray* (1869) Ir 3 Eq 460. For older cases on bankers’ deposit notes (receipts), see Halsbury, n 267, vol 52, para 27 and Scrutton, n 574, pp 85-6 (not a promissory note).

595 *Roberts*, n 510, p 119 ‘accounts controlled by passbooks are becoming increasingly rare.’

596 This is with exception to where a person has executed a power of attorney or enduring power of attorney or is the executor of the account holder.

597 *e.g.* the Skipton Building Society Third Party Transactions rules provide, *inter alia*, 1. Please ensure the [form] has been completed in full. Please ensure the customer has signed the form. The Third Party must bring identification with them to verify their identity. 2. Please ensure you come into the branch with the form and the customer’s passbook. Without the passbook we cannot complete the withdrawal. 3. If there is no signature in the back of the passbook or the signature does not match we will contact the customer to verify their instructions and ask the Third Party to return to the customer to have another Third Party withdraw form completed or provide further signature ID. If we are unable to contact the customer will retain the passbook until the close of business that day and then post it back to the customer. 4. If the signature matches, a courtesy call will then be made to the customer to inform them a third party withdrawal has been requested, if we cannot contact the customer the withdraw can still take place and the branch will continue to try and contact the customer for 24 hours. 5. [if unable to obtain verification third party withdrawals will not be offered]. 6. Once a Third Party withdrawl has taken place the passbook will not be given back to the Third Party. It will be posted back to the customer. Under no circumstances would we allow the third party to take the passbook back following a withdrawl.’

598 The effect of such a withdrawal consent is that the donee can withdraw savings (including making regular withdrawals) until notification death of the donor to the relevant society.


600 Halsbury, n 267, vol 52, paras 275 & 276. See also *Mills v Shields* (No 2) [1950] IR 21.

601 *Roberts*, n 510, pp 120, 122.
• **Share Certificates.** (i) building society share certificate. **But not** (i) railway stock certificate. Legislation or the articles of the institution issuing shares now govern such matters (see 14(b));
  o Share certificates are not documents of title as such, but only evidence of the same. Further, most shares are uncertificated and transferred electronically. It is asserted the position prevailing at law generally (14(b)) should apply and that any additional latitude for a DMC is inappropriate;

• **Insurance Policy.** (i) insurance policy and proceeds. Money due (or potentially due) under an insurance policy can be the subject of a DMC. Legislation, or the terms of the insurer, now governs such matters (see 14(b));

• **Mortgage.** (i) mortgage deed; (ii) mortgage deed, without a covenant to pay. Delivery of the deeds constitutes a gift of the underlying mortgage debt and conveys equitable title to the mortgaged (conditional) estate, which comprises the security for the same. Although oral, this was excepted from the Statute of Frauds 1677, being a trust by operation of law (i.e. an implied or constructive trust).
  o Today, private mortgages (those given by individuals) are rare and unregistered land is diminishing rapidly. In the case of registered land, since October 2013, the Land Registry has not issued land charge certificates. Thus, there is a disparity since it is highly unlikely a DMC concerning a mortgage in respect of registered land would be permitted by the courts today, given it lacks an indicium of title;

• **Land.** (i) title deeds to unregistered land. The basis in the first case on this, Sen v Headley (1991), was that there was a valid DMC by way of a constructive trust which did not have to be in writing. Sen was followed in Vallee v Birchwood (2014) and in King v Dubrey & Oths (2014). The following may be noted:
  o Disparity between Registered & Unregistered Land. The latter is diminishing all the time and, in the case of registered land, since October 2013, the Land Registry does not issue land certificates. Thus, there is a disparity between registered and unregistered land, with it being dubious that a DMC in respect of the former would be upheld by the courts today, given an absence of an indicium of title;
  o Oral Wills. The difficulty with cases such as Sen is that they constitute, in effect, oral (nuncupative) wills. Further, in King v Dubrey (2014) only the title deeds were delivered (and no keys to the house since the donee was living in it). Suppose, just the keys (of an unregistered property) were handed over? Would this

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602 Halsbury, n 267, vol 52, para 276. See also Borkowski, n 4, pp 100-2.
603 See Companies Act 2006, ss 768 (certificate prima facie evidence of title to the shares). See also Roberts, n 510, pp 120-1.
604 See Amis v Witt (1863) 33 Beav 619 (gift of life insurance policy); Hatley v Liverpool Victoria Legal Friendly Society (1918) 118 LT 687; Nelson v Prudential Assurance Co [1929] NI 113. See also Borkowski, n 4, pp 99-100.
605 Duffield v Elwes (1827) 1 BiI NS 497 (4 ER 959). See also Richards v Symes (1740) Barn Ch 90 (27 ER 567). Cf. Hassell v Tynte (1756) Amb 318 (27 ER 215). See also Borkowski, n 4, pp 12, 14-5, 102-3 and Halsbury, n 267, vol 52, para 275.
606 Wilkes v Allington [1931] 2 Ch 104 (release of mortgage in the event of dying). Also, Hurst v Beach (1821) 5 Madd 351 (56 ER 929) (delivery of mortgage deeds, and a bond given at the time of the mortgage, to release mortgage debt).
607 Borkowski, n 4, p 14 ‘in Duffield v Elwes (1827)…delivery of mortgage deeds amounted to a valid donatio of a mortgage of the freehold estate. Although the legal title passed to the donor’s executors on his death, they would be regarded as trustees with a duty to perfect the donee’s title. The trust arose ‘by operation of law’ and was not caught by the Statute of Frauds 1677 (which insisted on writing for a transfer of the interest in the land).’ See also Williams, n 510, para 42-21.
608 See also Borkowski, n 4, pp 12, 14, 17-8, 102-3. Baker, n 510, p 19 ‘the estate is carried along with the debt, notwithstanding the Statute of Frauds.’
609 Less than 5% of land in England and Wales is now unregistered.
610 Roberts, n 510, p 119.
611 Sen v Headley [1991] 2 AE 636. The donor was the owner of a house (unregistered freehold). In hospital with terminal cancer, 3 days prior to his death, he told the donee she was to have the house and contents, the deeds being in a box to which she had the keys (he had placed them in her bag without telling her on an earlier visit). Held a valid DMC. This overturned the view of Lord Eldon in Duffield v Elwes (1827) 1 BiI NS 497 (4 ER 959). See also Baker, n 510; Williams, n 510, para 42-17; CEF Rickett [1989] No Donatio Mortis Causa of Real Property - A Rule in Search of a Justification (1989) The Conveyancer and Property Lawyer, pp 184-91 and C Harpum, Megarry & Wade, The Law of Real Property (2012, 8th ed), p 602.
612 See Law of Property Act 1925, s 53(2). Also, Borkowski, n 4, pp 16-9, 103-4.
613 [2014] Ch 271. Four months prior to his death the ill owner of an unregistered freehold property gave his daughter the title deeds and a key to his house, after telling her that he did not expect to live very much longer and that he wanted her to have the house when he died.
614 [2014] WTLR 1411. About 4-6 months before death, the freeholder of unregistered property gave the title deeds to her nephew (living in the property and looking after her) saying ‘this will be yours when I go’ or words to that effect.
be sufficient constructive delivery of the house, if accompanied by an oral statement? Suppose this was
done up to 6 years prior to death? Would this be sufficient?

- **Aircraft, Ships, Rolling Stock, Cars.** There have been no cases of DMC in respect of first three. However, permitting
unregistered land to be transferred by DMC orally by handing over the title deeds (and a car by handing over the keys)
raises the prospect of, for example, a private jet or a helicopter being transferred by simply handing over a bill of
sale (or the transfer (or release) of a mortgage by handing over the mortgage deed). This would not seem wise
- given the potential for fraud or for mis-construing a dying man’s statement.

It is asserted that the position in respect of choses in action vis-à-vis a DMC should be no different to that in respect
of a gift *inter vivos*. Thus:

- **BOE, Promissory Notes, Cheques.** The position should now be the same as that prevailing under general law.
There is no need for added leniency in the case of a DMC;

- **Bonds, Savings, Share Certs, Insurance Policies.** The general law should prevail since the requirement of writing,
where required, is not unreasonable (see 14(b)) and it is a good prevention against fraud. In any case,
dematerialization has ended ‘certificates’ as such in many cases of bonds, savings and share certificates and it is
dubious whether a letter of confirmations (or electronic confirmation) can be construed as *indicium* of title. As for
passbooks (deposit or savings account books), they are becoming rare. Further, their physical transfer (or access to
the savings reflected therein) to a third party (for whatever reason) is generally prevented without the written consent
of the holder. Thus, it would seem dubious whether a court, today, would override this, for the purposes of a
DMC;

- **Land & Land Mortgages.** The general law should prevail in the case of registered land - not least since charge
and land certificates are not issued. As for the oral transfer of the freehold to unregistered land by DMC, as permitted in
*Sen v Headley* (1991), this is less likely to occur today - given the (rapidly) reducing volume of unregistered land.
Further, there would also seem to be good reasons not to permit a valid DMC in these circumstances:

  - **Fortuitous.** To do so draws an unnecessary - and unjustifiable - distinction between registered and
unregistered land. Further, it is fortuitous whether the donor of a DMC owns the former or the latter. There
should be consistency of application;

  - **Constructive Trusts.** ‘Discovering’ constructive trusts in respect of land undermines the general statutory
position re the transfer of a legal estate in land which requires writing (indeed, a deed);

  - **Oral Wills & Fraud.** Permitting such DMC undermines the law on wills which is pretty simple, nowadays.
To permit such oral gifts brings back (in effect) the oral will - with the potential for fraud it once had.

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618 Sparkes, n 510, p 35, n 6 ‘In some earlier cases [of DMC], as long as six years elapsed between the gift and the death.’
619 See n 558.
620 Due to stamp tax considerations, title to aircraft in England and Wales were, often, transferred by delivery with an acknowledgement
of transfer and this still, often, happens even though there are no longer stamp duty implications. Alternatively, as in many other countries, title
to aircraft can be transferred by bill of sale. Aircraft only need be registered in the UK Civil Aircraft Register if they are operated. The Aircraft
Register is not a register of title but may provide *prima facie* evidence of such. See generally, GS McBain, *Aircraft Finance, Registration,
Security & Enforcement* (Thomson Reuters, looseleaf), chapter on England and Wales, especially fn 21 (re title).
621 Aircraft mortgages do not have to be registered in the UK Aircraft Register (though they lose priority). See McBain, n 618.
622 For example, a valid DMC could be asserted by a person telling a court ‘X, when in hospital a few months prior to his death, gave me this bill
of sale (evidencing X’s title to a helicopter) and said, when we were alone, ‘If I go, this is yours’.
623 It may also be noted that the last case of a successful DMC cited inHalsbury (n 267, vol 52, paras 275 & 276) in respect of a BOE or
apromissory note was in the 19th century and ofIOU, none (*Duckworth v Lee* [1899] 1 IR 405).
624 The only added leniency (given that cheques are crossed and marked ‘account payee’) would appear to be in relation to promissory notes
and BOE if to order and *unindorsed* and one is dubious whether this would be accorded today, see n 584.
625 It should be noted that a number of legal texts (including Halsbury) are out of date in that, *inter alia*, they do not reflect: (a) crossed cheques
with ‘account payee’; (b) dematerialization; (c) the decline in passbooks (they are no longer used by the Post Office, for example); (d) the
different operation of such passbooks as remain to those in the past (today, the transfer of sums therein is much easier by building societies
accepting written consent from the holder).
626 In respect of intellectual property see Williams, n 510, para 42-27.
627 See n 369.
628 Sparkes, n 510, p 52, put it thus with regard to the case of *Sen v Headley* (see n 611) ‘The Court of Appeal has validated a death-bed gift of
a house, reportedly worth £450,000, made by the key to a deed box being slipped into the donee’s handbag. There is no evidence apart from that
of the donee, which Mummery J expressly found to be reliable and truthful. A door pushed open by an honest plaintiff, like Mrs Sen, can be
pushed further ajar by later dishonest claims. Land was not transmissible simply by delivery of delivery of the title deeds, and should not be.’
See also *Cosnahan v Grice* (1862) 15 Moo PC 215, where the Privy Council stated: ‘Cases of this kind [DMC] demand the strictest scrutiny. So
In conclusion, the law on gifts inter vivos and by DMC should be same in respect of delivery and constructive delivery.

26. TREATING DMC THE SAME AS GIFT RE DELIVERY

The law on DMC is, presently, confused and - given that a DMC need not involve a person in extremitis or, even, dying,\(^{627}\) - to prevent the subversion of the law of wills and of inter vivos transfers - DMC should be treated the same as gifts inter vivos, - apart from the distinguishing features of a DMC previously adverted to (see 23). Treating a DMC the same as a gift inter vivos would mean that a DMC:

- would cover the same forms of property as covered by gifts inter vivos;
- would no longer be restricted to delivery (thus, e.g. the gift of a chattel, in writing, by a person in contemplation of death could be a valid DMC).\(^{528}\)

The effect of this would (likely) be to increase the chances of DMC being upheld, rather than otherwise. It may also be noted that cases of DMC have always been very rare and are likely to be even more so than in the past. Indeed, the only modern cases relate to unregistered land. Thus, if DMC were treated the same as gifts inter vivos and any added leniency removed, there is no evidence that any donee would, in practice, suffer prejudice – save in relation to unregistered land (of which there appear to have been only 3 cases in the history of DMC so far).

27. CONCLUSION

Gift giving is common. Yet - as may be seen - it is, presently, a legal via crucis. There are various reasons for this.

- **Definition.** It is important that the definition of gift is based on it being without legal obligation. That is, ‘gratuitous’. One based on an absence of consideration is inaccurate (see 10);
- **Formalities.** Deeds (and specialties) confuse the law today. Their abolition would help - not least - the law of gift. Thus, gifts would then be: (a) in writing; or (b) oral. Further, since the assignment of most choses in action is required to be in writing, this will increase the chances of gifts being upheld. Writing would also mean that gifts inter vivos, DMC and wills would all be the same, in terms of writing;
- **Old Examples, Small Sums.** Many examples of gifts cited by Halsbury - such as by way of promissory note, BOE, bond, IOU, banker’s deposit note or mortgage - are unlikely to occur in modern times. Many cases also involve small sums, which are unlikely to come before the courts today (not least, on the basis of cost). Given this, the law of gift should be simple since fewer cases, anyway, are likely to come before the courts;
- **Loose Terminology.** This was, often, employed in the older caselaw with synonyms being used without the parties (or the court) noting this. For example:
  - ‘Vesting’ - reference was also made to ‘complete’, ‘legal effect’, and ‘effective’;\(^{629}\)
  - ‘Acceptance’ - reference was also made to ‘notice’, ‘consent’, ‘assent’;
  - ‘Disclaimer’ - reference was also made to ‘rejection’, ‘refusal’, ‘renunciation’, ‘dissent’.

Today, one would assert that only 3 terms are required. What makes a gift valid (i.e. its pre-requisites) When it vests (i.e. when it takes legal effect). And if the donee disclaims;

- **Presumed Acceptance.** The modern position that an inter vivos gift vests - subject to disclaimer- is the more workable, as opposed to seeking to determine if (and when) a donee has been notified of the gift and if (and when) it has formally consented to (i.e. accepted) the same. Thus, if an inter vivos gift is valid it should vest immediately - subject to any later disclaimer by the donee;

\(^{627}\) Borkowski, n 4, ch 4. For criticism of the concept of ‘in contemplation of death’ see Williams, n 510, para 42-04(‘utility is doubtful’). Perhaps, even more illogically, most DMC are actually made when a person is close to death and knows there is no hope of recovery. Thus, it, clearly, is an oral will. See also Pettit, n 510, p 124.


\(^{629}\) OED, n 281 (vest). To place, settle, or secure (something) in the possession of a person or persons. 2. To put, place, or establish (a person) in full or legal possession or occupation of something. C. To endow formally or legally with some possession or property.”
• **Delivery.** This should remain essential for an oral gift of a chattel - or any chose in action where title passes by delivery. Otherwise, it introduces too much uncertainty. However, ‘delivery’ - as well as ‘constructive delivery’ - should a matter of fact for the judge to determine on the evidence in the circumstances of the case - as opposed to legal formulation, one bound to fail, since it is impossible to cover the very divergent fact situations.

• **Donatio Mortis Causa.** The law should be the same as with inter vivos gifts (including delivery and constructive delivery) - with the exception that, being in contemplation of death, the DMC is revocable by the donor until death and immediately revocable if he does not die. Further, the DMC should be: (a) available to pay the dead donor’s debts; (b) revoked if the donee pre-deceases the donor.

Placing the law on gift in a legislative framework will modernise it, as well as make it more intelligible coherent and consistent. This would not seem unduly complicated (see **Appendix A**).

Graham McBain
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**Appendix A**

1. **Gift is Gratuitous.** A gift arises if the donor has no legal obligation to give.

2. **Types.** A gift may be made:
   - (a) between living persons (*inter vivos*);
   - (b) in contemplation of death (*mortis causa*).

3. **Valid Gift.** A gift is valid if the:
   - (a) donor has capacity;
   - (b) donee has capacity;
   - (c) donor intends to make a gift;
   - (d) subject of gift is alienable;
   - (e) gift is made:
     - (i) in writing, or
     - (ii) orally (in the case of a declaration of trust), or
     - (iii) orally with delivery (in the case of a movable),
     - (iv) orally with delivery (in the case of a chose in action where title passes by delivery);
   - (f) gift is not otherwise contrary to law.

4. **Condition.** A gift may be subject to a condition(s):

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630 For example, there should be adequate delivery if the gift is: (a) left at the property of the donee (but he is out); (b) left with a third party to give to the donee; (c) set aside, for the donee to pick up, in accordance with instructions; (d) contained in a safe, to which the donee is given the key;

631 The word ‘*gratuitous*’ is better than ‘voluntary’ or ‘freely’.

632 The donor does not have to express state his gift is made in contemplation of death, see *Gardner v Parker* (1818) 3 Madd 184 (56 ER 478) and *Re Lillingston* [1952] 2 AE 184.

633 This was (and still is) central to the law of gift. If the donor never intended to make a gift but, for example, intended to make a loan or place the property in custody, this does not (and should not) make it a gift.

634 See 18.

635 This assumes deeds are abolished and, *inter alia*, the Law of Property Act 1925, s 52(1), which refers to a deed, amended. Any additional statutory requirements re registration, for the validity of a transfer (Bills of Sale Act etc), would have to be met or else the gift will not satisfy (f) (not otherwise contrary to law).

636 This would allow land and chattels to be transferred by gift by means of an oral declaration of trust. However, any additional statutory requirements re registration, for the validity of a transfer (Bills of Sale Act etc), would have to be met or else the gift will not satisfy (f) (not otherwise contrary to law). An oral transfer of chattels by way of trust has long been permitted, see n 338.

637 The more modern word ‘movable’ would seem preferable to ‘chattel’.

638 A gift would be contrary to law if it was illegal or contrary to public policy. For example, if it (a) was tainted; or (b) promoted illegality; or (c) restrained marriage (civil partnership); or (d) induced separation etc. See 20.
(a) precedent;
(b) subsequent.

5. **Vesting.** Subject to s 4(a), a valid gift takes effect.\(^{640}\)
   (a) immediately, in the case of a gift *inter vivos*;
   (b) on the donor’s death, in the case of a gift *mortis causa*.

6. **Revocation.** A gift is revoked, and void, if:
   (a) disclaimed\(^{641}\) by the donee (whether orally or in writing);
   (b) accepted other than as a gift;\(^{642}\)
   (c) the donor does not die (in the case of a gift *mortis causa*);
   (d) the donee dies prior to the donor (in the case of a gift *mortis causa*).

7. **Mortis Causa.** A gift *mortis causa* is:
   (a) revocable, until the donor’s death;
   (b) available to pay the dead donor’s debts.

8. **Delivery.** For the purposes of section 3:
   (a) delivery includes constructive delivery; and delivery for a gift *mortis causa* shall be the same as for a gift *inter vivos*;\(^{643}\)
   (b) whether sufficient delivery has occurred to evidence the intention of the donor to transfer title to the donee, shall be determined as a matter of fact;
   (c) delivery may be to a third party, on behalf of the donee.

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\(^{640}\) The older words were ‘vest’ or ‘becomes complete.’ or ‘takes effect.’

\(^{641}\) The more modern word ‘rejected’ should be considered, see n 292 (Lord Hobhouse used the word ‘rejects’).

\(^{642}\) If the donee intends to receive the ‘gift’ as a loan, it is not a gift, though it still might have other legal incidents (e.g. treated as a loan or a transfer of possession for the purposes of custody).

\(^{643}\) This would end the additional latitude given in the case of delivery (and constructive delivery) for DMC.