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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 This material should be abolished or repealed.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

[1] For a number of articles on English commercial law indicating concepts which are obsolete or which should be modernised, see GS McBain: (a) *Time to Abolish the Common Carrier* [2005] Journal of Business Law ('**JBL**'), Sept. 545-96; (b) *Abolishing the Strict Liability of Hotelkeepers* [2006] JBL, Oct. 705-55; (c) *Codifying Common Law Liens* (2006) 20(4) Commercial Law Quarterly ('**CLQ**'), pp 3-47; (d) *Codifying the Law on Consensual Security: Pledges & Liens* (2006) 21(1) CLQ 24-47; (e) *Modernising and Codifying the Law of Bailment* [2008] JBL, Issue 1, pp 1-63; (f) *Abolishing Deeds, Specialties and Seals - Parts 1 & 2* (2006) 20 (1) CLQ, pp 15-54 and (2006) 20(2) CLQ, pp 3-28; (g) *Abolishing the Statute of Frauds Act 1677, s 4* [2010] JBL, Issue 5, pp 420-43; (h) *Modernising the Law of Notarisation and Public Notaries* [2016] JBL, Issue 2, pp 91-114; (i) *The Strange Death of the Law Merchant* (2016), International Law Research, vol 5, no 1, p 1 *et seq*.

[2] See n 1(d).

[3] Sweet & Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (Sweet & Maxwell, 1955), vols 1 & 2, list English legal texts from Anglo-Saxon times.

[4] GSA Wheatcroft, *The Taxation of Gifts and Settlements by Stamp Duty, Estate Duty, Income Tax and Surtax* (1st ed, 1953; 3rd ed, 1958). See also A Borkowski, *Deathbed Gifts. The Law of Donatio Mortis Causa* (OUP, 2005). For cases on the difference between a gift and a loan (especially with regard to artwork) see N Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd ed, 2009), paras 3-013 to 27. For a comparative study see R Hyland, *Gifts. A Study in Comparative Law* (OUP, 2009). See alsoELG Tyler & NE Palmer, *Crossley Vaines on Personal Property* (5th ed, 1973), ch 13 (gifts).

[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 [8] as was another - (d) a deed had to be on paper or parchment (this was abolished in 1989);[9]

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 paramountcy 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.[10] This is still the law, although the caselaw shows there was uncertainty, at times, in the past.[11] 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.[12] Thus, legislation should clarify that a gift can be made: (a) in writing;[13]or(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.[14]

  This is less felicitous since a gift can still be such even if there is consideration. Thus, a transaction may be '*coloured*' [15] to represent a contract when, in fact, it is a gift. Similarly, nominal consideration does not stop a gift being such.[16] 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

[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).

[11] *Cochrane v Moore* (1890) 25 QBD 57.Much of the problem derived from uncertain wording in Perkins, *Profitable Book*, a text published from 1528-1827.

[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.

[14] [1980] 3 AE 798. See **10(b)**.

[15] e.g. a giftstructured 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 positionwhere the donor intends a gift but the '*donee*' accepts it otherwise, for example, as a loan.[17] 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[18]

(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).[19] This was exacerbated with the arrival of Danish armies (the Vikings) from AD 866.[20] Even by the time of the Norman Conquest in 1066, the population of England would (likely) have been no more than 2 million people [21] 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;[22]
- ***Troubled Times***. England was, frequently, convulsed with disease, violence and war. London - and the few other major towns which existed - were, often, sacked.[23]

Anglo-Saxon England was also, mainly, agricultural. There was relatively little by way of trade [24] - 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 aheavy 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**.

[18] See generally, (a) FL Attenborough, *The Laws of the Earliest English Kings* (NY, 1963); (b) AJ Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Cambridge UP, 1925); (c) B Thorpe (ed), *Ancient Laws and Institutes of England* (printed by the Commissioners on the Public Records, 1840); (d) F Pollock & FW Maitland, *The History of English Law* (Cambridge UP, 1968) ('**P & M'**);(e) JH Baker, *An Introduction to English Legal History* (Reed, 4th ed, 2002), ch 1; (f) J Hudson, *The Oxford History of the Laws of England* (OUP, 2012); (g) FM Stenton, *Anglo-Saxon England* (OUP, 3rd ed, 1971); (h) F Palgrave, *History of the Anglo-Saxons* (W Tegg & Co, 1876); (i) W Cruise, *A Digest of the Laws of England respecting Real Property* (Saunders & Benning, 4th ed, 1835). For the asserted laws of Edward the Confessor (1042-66) see BR O'Brien, *God's Peace and King's Peace. The Laws of Edward the Confessor* (Univ. of Pennsylvania Press, 1999).

[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 3m 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.

[23] See generally, GS McBain, n 1(i)(*The Strange Death of the Law Merchant*).

[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.[25] 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.[26] However, it seems relatively clear there existed certain legal categories in respect of land, *viz*:

- ***Bookland (Bocland).*** This comprised a royal gift of land made by charter or will.[27] Bookland was, originally, restricted to religious houses and, later, extended to laymen.[28] 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);[29]
- ***Loanland***. This comprised the lease (loan) of land for a limited period. Thus, it prevented inheritance;[30]
- ***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;[31] or
    - It may have referred to land that hadpassed 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.[32]

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 and was 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 bocland 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.

[30] Ibid, pp 98-102. Cf. P & M, n 18, vol 1, p 61 (loanland was land held of a superior) & vol 2, p 12. See also Plucknett, n 27, p 519.

[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.[33]

Pollock and Maitland also noted this (likely) represented the position under ancient German and Anglo-Saxon law.[34] They described the likely ceremony:[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 (*curvatis digitis*) is demanded of him; may be, he will have to pass or throw to the donee the mysterious rod or *festuca* which, be its origin what it may, has great contractual efficacy.[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.

- ***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:

  > *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*; [37]

- ***Sandal to evidence Seisin***. When a kinsman of Elimelech gave Boas a parcel of land belonging to him, he took off his sandal and give it to Boas in the name of seisin of the land (after the manner in Israel) in the presence of witnesses.[38]

Pollock and Maitland noted that - at some historical point in Germanic times - this ceremony could be transacted *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.[39] And:

> When, under Roman influence,[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

[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 feoffor was so near to the land that he could see it or point it out with his finger.

[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.'

[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 unprovable, 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.'

[36] Ibid, p 85.

[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 cave 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 Compact NIV Study Bible. New International Version* (Hodder & Stoughton, 1998) ('**Bible**').

[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 becomefinal, one party took off his sandal and gave it to the other. This was the method of legalising transactions in Israel.'

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

[40] Roman classical law had required the handing over of the thing (*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, *Leage's Roman Private Law* (3rd ed, 1961), pp 195-200; TC Sanders, *The Institutes of Justinian* (Longmans, 1962), pp lii & 112-3; WW Buckland & AD McNair, *Roman Law and Common Law* (Cambridge UP, 2nd ed, 1952), p 112; WW Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge UP, 1921), p 232 and T Wood, *A New Institute of the Imperial or Civil Law* (printed by WB, 1704), pp 110-20.

> sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or '*levied*' (*levatio cartae*); Englishmen in later days know how to '*levy a fine.*'[i.e. a final concord (agreement) levied (lifted up, presented) in the king's court].[41]

Finally, a transfer of land could be achieved in the presence of a court.[42] 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;[43]
- 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 possesssion according to the prescribed ritual, in the presence of witnesses of good fame (reputation).[44] Thus, the words '*give*' and '*grant*' were used, virtually, as synonyms;[45]
- ***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.[46]

- 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;[47]
- 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) forsuch 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 less[55] 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 ofcoinage 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 that 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. Movables 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,[56] 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 *sale*, 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;[57]
- ***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.[58]

As for gifts, the Anglo-Saxons - like their Germanic forebears [59] - often exchanged gifts between kings (and popes), [60] chiefs and dignatories. 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 morgengifu*.[61] Among wealthy people, this took the form of land.[62] 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.[63] The laws of king Aethelberht (AD 588-616) provided for the return of such a gift on a failure to produce a child [64] and those of Canute (1016-35), on widowhood.[65] After the Norman Conquest, the morning gift seems to have died out - a dowry being given by the husband instead;

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[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 18, 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] Tactitus, 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.

[62] FE Harmer, *Select English Historical Documents in the Ninth and Tenth Centuries* (Cambridge UP, 1914), p 31. See also TE Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge UP, 1885), pp 42 & 97 and Hudson, n 18, pp 238-40.

[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) [66]

  with Pollock and Maitland believing that these two coalesced - possibly from the 9th century.[67] This is unsurprising since both tended to be oral - writing was not common among the Anglo-Saxons due to the high level of illiteracy - and since wills (as such) were rare.[68] 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.[69]

As for later Anglo-Saxon law, the so-called laws of Edward the Confessor (likely written c. 1140's) [70] 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[71] 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.[72] 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.[73] Indeed, there is no evidence that the Normans were, generally,

[66] AKR Kiralfy, *Potter's Outlines of English Legal History* (Sweet & Maxwell, 5th ed, 1958), p 243. Precedent for deathbed gifts (made orally) was Jewish law. See e.g. Isaac's deathbed oral gift to Jacob (who, by the Jewish law of primogeniture was his firstborn and was entitled to a double share of his father's property), Bible, n 37 , Genesis, ch 27, vv 27-9 and Deuteronomy, ch 21, vv 15-7. See also, Jacob's blessing to his sons, Ibid, ch 49, v 28.

[67] Ibid. See also P & M, n 18, vol 2, p 319.

[68] The position was the same with the Germans. Tacitus, n 48, p 118 'However, a man's heirs and successors are his own children, and there is no such thing as a will; where there are no children, the next to succeed are, first, brothers, and then uncles, first on the father's, then on the mother's side.' See also Blackstone, n 61, vol 2, p 491.

[69] P & M, n 18, vol 2, p 319.

[70] See n 18.

[71] Hudson, n 18, p 143 summarised the general position in respect of any alienation of land 'The desire for publicity and ceremony is clear'. The same would have applied to chattels.

[72] P & M, n 18, vol 2, p 85.

[73] Ibid, pp 105-6 'Seisin of land can not pass from man to man by inheritance, by written instrument, by confession in court, by judgment; it involves a *de facto* occupation of the land.' Hudson, n 18, p 358 'Livery of seisin was necessary to make a grant of land complete. Livery was marked by a ceremony, for example the transfer of a rod or a ring.' Ibid, p 380 'Like bequests, sales and gifts of movables *inter vivos* appear to have required an actual or at least a symbolic livery of seisin.' For '*seisin*' being the correct word to use in the context of the delivery of possession of chattels, see Maitland, n 43, vol 1, pp 329-57'*TheSeisin of Chattels*.' See also Baker, n 18, p 229, n 27 'It is probable that *seisire* was originally a transitive verb, meaning to admit a tenant.' F Pollock & RS Wright, *An Essay on Possession in the Common Law* (1888), p 50 'The ancient and regular manner of transferring the seisin of land *inter vivos* was by livery, which may be called a formal entry by the purchaser with the concurrence of the grantor.'

more literate than the Saxons. [74] Or, that they resorted to a written document (charter) to a greater extent when transferringproperty [75] - whether *inter vivos* or by will.[76] As it is:

- Reference to gift was not made in the (asserted) Laws of William I [77] while the coronation charter of Henry I (1100-35) referred to the marriage settlement; [78]
- The Laws of Henry I (c.1113) followed the laws of Canute in respect of the morning gift. [79] They also indicated that gift-giving (likely) took place in the course of formal drinking assemblies.[80]

There was a change, however, in that the legal categories of land the Anglo-Saxons employed disappeared after the Norman Conquest.[81] 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…[82]
>
> 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.[83]

The word '*feoffment*' derived from the Anglo-Norman '*feoffer*', to give a '*fee*' (alsoreferred to as a '*fief' or 'feud*')[84] 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, chs 14 & 15 on the impact of the Normans Conquest *vis-à-vis* land and movables. P & M, n 18,vol 2, p 83 'It is…very doubtful whether the Norman barons of the first generation…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.'

[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 withdrawl of the marriage-settlement from a widow on her remarriage are fairly frequent in the Middle Ages.' Robertson cited P & M, n 18, vol 2, p 422.

[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 [*morgangifam*] 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, 9ª 'Feoffment is derived of the word of art *feodum, quia est donatio foedi*: [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 a 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.[85] Such a donation was usually oral and - only in later times - was it set out in a charter (*carta*, writing).[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.[87] However, as under Anglo-Saxon law, '*livery of seisin*' was all important to convey land in medieval times - including by way of gift.

- ***Charter not Dispositive***. Pollock and Maitland cited an instance in the time of Edward I (1272-1307) when jurors - simple people '*not cognisant of English laws and customs*' - thought that a charter (writing) was sufficient without the transfer of possession.[88] They also concluded that, up to the first half of the 13th century, '*what the king's court demanded was a real delivery of a real possession*.'[89] Any charter of feoffment, in any case, tended to be short. It was also unilateral (not bilateral).[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 *seisin* (possession) was common to both.[91] Further, the word '*gift*' was more generic in medieval (and Anglo-Saxon) times than today, when it refers to refers to a specific type of legal transaction as opposed to a *genus*. In early times the word '*gift*' was utilized to cover not only a gift *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, 'g*ive 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 '*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 '*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] 'I have given and granted (*sciatis me dedisse et concessisse)*.[92]

That said, Glanvill - the first text on English law (c. 1189) [93] - recognized a more precise definition of '*gift*' since he expressly referred to atransfer by gift as distinguished from an exchange or sale.[94]

(b) Glanvill (c. 1189)

[85] It is likely this occurred only after the Conquest. Cf. Coke, n 84, vol 1, 272a, note '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 'livery of seisin formerly was and still is an essential part of the feoffment.'

[86] Kiralfy, n 66, pp 215-6 '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.' PR Hyams, *The Charter as a Source for the Early Common Law* (1991) Journal of Legal History, vol 12, no 3, p 176 'Very few charters from before about 1150 concern grants to laymen by lay grantors other than the king.'

[87] Ibid, p 216 'This…requirement of the specification of services…ceased with the Statute of *Quia Emptores*1290 [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.'

[88] P & M, n 18, vol 2, p 89 n 1. Plucknett, n 27, p 611, in the Anglo-Norman age, '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 '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.

[89] Ibid, p 90. Ibid, p 83 (charter of feoffment evidentiary, not dispositive). Ibid, p 89 '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 'Even a royal charter did not by itself confer seisin.'

[90] P & M, n 18, vol 2, p 94.

[91] Ibid, p 2 '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 'the lawyers of the time see no great gulf between rights in movables and rights in land.' Ibid, p 29 'Seisin is possession.' Ibid, p 32 '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 '*seisin*' and therefore used it freely.' See also Hudson, n 18, ch 6.

[92] Ibid, pp 12-3. See also Clanchy, n 39, p 260.

[93] R Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (c.1189)(Nelson, 1965).

[94] e.g, Ibid, p 37 where a tenant says that a thing is not his but that he '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 (*re* dower) '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.[95] Thus:

- ***Husband - Dower***. This was given by the husband to the wife on marriage.[96] 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;[97]

- ***Father - Marriage Portion (Maritagium or Dowry).*** This was given by the father to the husband on his daughter's marriage.[98] Glanvill stated:

> In Roman law [99] 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;[100]

- ***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[101] 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.'[102]

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[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 his 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 Personalty 1250-1450*).

[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, seeWood, 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, pp 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*;[103]

- ***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, advowsons *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) existed, it was evidential and not dispositive.

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particular, unless he so wishes; for the last will of everyone ought to be free, according to these laws as according to any others….A testament ought to be made in the presence of two or more lawful men, clerks or laymen, such as may afterwards be proper witnesses of it.'

[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 Watson (trans), *The Digest of Justinian*, University of Pennsylvania Press (1985), bk 39, title 5 ('*Gifts*') 1 citing Julian, *Digest, book 17* 'There 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 358-84 & 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 *ius 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 advowsons, 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 advowsons, rents, commons, estovers *etc* these cannot pass without deed, but without any livery. And the law has provided the deed in place or stead of a livery.' See also P & M, n 18, vol 2, p 140 *et seq*.

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]

[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 implememts, mostly earthernware. 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 andabsolute'* 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.[124] Various religious persons could not make gifts.[125] Nor could bastards, lepers, prisoners, persons charged with felony or a husband to his wife;[126]
- ***Donee***.A gift could be given to a minor (with the consent of his tutor) and to a Jew. [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.[128] The object of a gift also had to be ascertained.[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).[130] Bracton categorized charters into royal and private ones[131] and he recommended the use of a charter.[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.[133]

This verbal formulation was required to transfer possession (livery of seisin)[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.[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.[136] Thus, the charter may be valid, but [the gift], since without seisin, nude.[137]

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

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[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] Ibid, pp 54-6. See also Reeves, n 114, pp 290-1.

[128] Ibid, pp 57-9.

[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.'

[130] Paper making did not arrive in England until the 14th 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, fn 35.

[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 either of 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.'

[132] Ibid, p 62 'If a charter is made the gift will be more secure, for a gift may be proved more easily and more effectively by a writing and instruments than by witnesses or suit. '

[133] Ibid. This form likely derived from Biblical times, see n 37.

[134] Ibid, p 124 '[livery] 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 who 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 pacts take on their vestments.'

[135] See also ns 113 & 116.

[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*…'

[137] Ibid, p 120-1. 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 liveries 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 possidendi* [disposition to possess].[138]

The donor also had to withdraw from possession.[139] For a gift to be valid there had to be mutual agreement (*consensus)* between the donor and the donee[140] (and, sometimes, that of a third party). [141]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 inhere, and in that way, by means of a legal fiction, they are quasi-possessed…[142]

Bracton also considered, *inter alia*,

- ***Marriage Gifts***. These were in the form of the marriage portion (*maritagium*)[143] and dower.[144] Neither were compulsory. Both could be oral and could include movables.[145] 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;[146]
- ***Gift Mortis Causa***. This wasa form of conditional gift since it was only perfected on the death of the donor; [147]

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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 possidendi* 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 recipiendi.* [A bare statement in an account and a nude 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 marriage, for the maintenance of the wife and the nurture of the children when they are born, should the husband predecease 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.

[145] See J Baker, *Collected Papers on English Legal History* (Cambridge UP, 2013), vol 3, pp 1361-79. Baker noted, p 1364, that giving dower in the form of money and chattels 'had died out well before Littleton's time'.

[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

- ***Will***. A testator could dispose of his chattels (though, possibly, with restrictions as to two-thirds)[148] but not his land (save in the case of special custom) by will.[149] There was also succession.[150]

(d) Conclusion

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*, sufficient[151] (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 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 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 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

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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 alsoBorkowski, n 4, ch 1.

[148] Ibid, p 179 'It is clear that he may make a will of his moveables…'.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 discoursed on by Bracton at length. It is sufficient to say, that the completest possession which could be had, was, when the *jus* and *seisina*, the title to the land, and the *seisin* of it, went together; for the donee had then *juris and 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 gratuitatranslatio*. 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 1, 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

Britton (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.[155]

Britton also considered the capacity of the donor and the donee[156] and noted that seisin was required for gifts [157] 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…[158]

(b) Fleta

The writer Fleta (c. 1290) closely followed Bracton in respect of the law on gift [159] although his work is useful in that it put matters more succinctly. Fleta stated that a gift was gratuitous.[160] He then considered the capacity of the donor and donee and what might be the object of a gift.[161] 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.[162]

Fleta also noted that a gift *inter vivos* was confirmed only by livery of seisin for corporeal hereditaments.[163]

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.[164] 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 livery of seisin follows.'

[158] Ibid, p 187.

[159] *Fleta*, 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 gratuitaque 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 ofliteracy;
- ***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 witrnesses. 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:

- ***GiftsMortis 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 betransferred by deed of grant.[166] It may also be noted that dower was abolished in 1925[167]and that dowry 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,

[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 of feoffment.'

[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 Propertyduring 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.'

while the word '*deed*' was applied to a writing executed by a private subject, being his '*act'*.[169]As to this:

- ***Glanvill (c. 1189).*** He referred to a charter and that it was sealed,[170]although he made no reference to a deed (*factum, fait*) as such;
- ***Bracton (c. 1250).*** He distinguished royal, from private, charters.[171] He also mentioned the requirement that the charter be sealed.[172] So did Britton (c. 1290) and Fleta (c. 1290).[173] However, Britton also used the term, '*deed*'[174] while Fleta (following Bracton) used the term writing (*scriptura*) or charter (*carta*).[175]
- ***Prerequisite of a Deed***. Over time, the word '*deed*' was appropriated to refer to a writing that was sealed and delivered.[176] Doubtless, the change related to the delivery of a document - as opposed to a sod of earth or twig (in the case of land) or the chattel itself. Exactly when the courts defined a '*deed*', in law, as comprising a document which was sealed and delivered is uncertain.[177] However, counsel were pleading this by 1383[178] and the court was referring to it by 1430 at the latest.[179]

The upshot of the increase in writing (as well as an increase in the use of personal seals)[180] was that, while - in the case of a gift of chattels - livery of seisin was required in early times[181] - by the 14th century - a gift of a chattel

[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 the 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 '*fet*', 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] Glanvill, n 93, p 127 'when anyone in court puts in as proof of his debt a charter made by the other party or some ancestor of his, the other party either acknowledges the charter or does not. If the debtor does not acknowledge the charter, he may deny or contradict it in two ways: either by admitting in court that the seal is his but denying that the charter was made by, or with the consent of, himself or his ancestor, or by denying completely both seal and charter.'

[171] Bracton, n 99, vol 2, p 108. See also pp 109-10, in respect of the interpretation of royal charters.

[172] 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 testimony 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.'

[173] Britton, 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.

[174] 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.

[175] 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, vol 99, p 169 'when the vouchee wishes to dispute the warranty and the voucher proffers 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 [*cartam*] is valid and to put himself therein on the witnesses named in the charter and upon a jury.'

[176] 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.

[177] 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.

[178]*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.

[179] 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' ('nul fait sera fait sans liverie'). See also McBain, n 1(f), part 1, p 42, ns 203 & 204.

[180] See n 168.

[181] 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 CJCP, 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.[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.[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).[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.[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 wills of land;
- free land from a claim for dower;
- avoid paying various feudal revenues.[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 inone, and the use or right to the rent or profits was in another.[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*.'[188] The Statute of Uses 1536,[189]sought to remedy this by creating a fictional livery of *seisin* by the trustee to the beneficiary (*cestui que use*)[190] which has been called '*marrying the use to the land*.'[191] However, conveyancers then utilized (among other things) a transfer by lease and release to circumvent this,[192] leading to the Statute of Frauds 1677 which provided against conveying any land or hereditament for more

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[182] Ibid, n 18, p 384 'by the end of the fourteenth century a gift of chattels could be effected by deed.' Baker cites *Pynchoun v Geldeford* (1385) YB Hil 8 Ric II (Ames Foundation, 1987), p 215, p 17. A man, by deed, transferred all his chattels to others, reserving a right of use during his life.

[183] Kiralfy, n 66, p 234. As Kiralfy noted, making a gift by deed then allowed the original owner to remain in possession which could lead to fraud, resulting (eventually) in the Bills of Sale Acts 1878-1882.

[184] P & M, n 18,vol 2, p 86 '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 or glove would be.' (*italics supplied*)

[185] Coke, n 84, vol 4, p 115 'Upon the accountant in the exchequer of B Fulham the king's butler, he demanded allowance of certain parcels of wines given by the king to certain persons by word of mouth without writing, and it was disallowed by the rule [order] of the court [of exchequer]'. The case was in 1330. Also 'Upon the account in the exchequer of Richard Bury keeper of the wardrobe [Richard de Bury, 1287-1345, keeper of the wardrobe 1328-9], he demanded allowance for certain vessels ofgold and silver and certain jewels given by the king *ore tenus* [orally] to Isabell Queen of England [Isabella of France, 1295-1358, mother of Edward III, 1327-77] , and others to Philip[pa] Queen of England [Philippa of Hainault, 1314-69, wife of Edward III] consort of the king, *et non allocator*, by the like rule of the court: for the gifts by word in both these cases are void…'. This case was also in 1330.

[186] See generally, Baker, n 18, ch 14. Baker noted, p 251 'By 1502 it could be asserted that the greater part of the land in England was held in use.' For a 15th century medieval use by a woman going abroad, see *Claronbeke v Welles* in AKR Kiralfy, *A Source Book of English Law* (Sweet & Maxwell, 1957), pp 262-3. The plaintiff made a trust of her goods by way of a deed of gift on condition that, if she died abroad, they should sell the same to pay her debts and give the remainder for charity 'and if she came home again in good health and prosperity, then to enfeoff her in the said goods and chattels again.' See also Plucknett, n 27, ch 7 and Cruise, n 18, vol 1, title 11.

[187] Cruise, n 18, vol 1, p 331.

[188] Baker, n 18, p 252 'The flexibility made possible by uses was accompanied by two problems. The first was that conveyancing was rendered less certain. The use could be transferred informally, without '*livery of seisin'*, and could even pass by word of mouth.'The second problem, Baker noted, was that it deprived the Crown (and lords) of valuable feudal revenues.' See also Coke, n 84, vo1 1, 272a, note II.

[189] 27 Hen 8 c 10 (rep 1925).

[190] Ibid, p 256. See also Plucknett, n 27, p 586. The Statute of Wills 1540 (32 Hen VIII, c 1) gave testators power to dispose of freeholds by will. This obviated another difficulty for which the use had been employed. See also Baker, n 18, pp 256-7 and Cruise, n 18, vol 6, pp 4-5.

[191] GG Alexander, *Recent Developments in Conveyancing Law* in Cambridge Legal Essays (Heffer & Sons, 1926), p 23. See also Cruise, n 18, vol 1, p 349.

[192] Baker, n 18, pp 305-6. See also Plucknett, n 27, p 613 'a release could be used where the donee was already in possession, and the owner released his rights; under such circumstances livery of seisin was unnecessary.' See also, p 616.See also a detailed note, Coke, n 84, vol 1, s 59, n 3 and Kiralfy, n 66, p 217.

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 messauges, 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),[193] 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.[198] 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.[199] Perkins stated (see 1642 edition):

> all chattels, reals, or personals, may be granted or given without deed,[200] 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.[201] (*wording divided for ease of reference*)

A similar statement was contained in earlier editions of his work.[202] 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 pre-supposed delivery, since it was pre-requisite of a deed that it be delivered) or (b) orally, with delivery. The

[193] C 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.'

[196] Ibid, p 251.

[197] Ibid, pp 252-4.

[198] J Perkins, *Incipit Perutilis Tractatus* (Redman, 1532). It was in Law French. An English edition was published in 1642, *A Profitable Booke treating of the Lawes of Englande* (Tottell, 1567).The last edition was by RJ Greening (reviser), *A Profitable Book, treating of the Laws of England principally as they relate to conveyancing* (15th ed, 1827).

[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 (*livere*) 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 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.' 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.'[203] 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*.[204] 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.[205]

(d) Legal Texts - 17th Century

Bacon had little to say on the law on gift. [206] So did Coke, in his *Institutes of the Laws of England* (1628-41).[207]

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,[208]*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 per hostium et per haspam et annulum vel per fustem vel baculum etc.* …[209] if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it has another operation to take effect as a deed: but if he deliver the deed upon the land in the name of seisin of all the lands contained in the deed, this is a good livery…the deed was delivered in name of seisin of that land.
>
> A livery in law is, when the feoffor says to the feoffee, being in view of the house or land (I give yonder land to you and your heirs, and go enter into the same, and take possession thereof accordingly) and the feoffee does accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* …and livery within the view is good where there is no deed of feoffment…
>
> This ancient manner of conveyance by feoffment and livery of seisin, does for [in] many respects exceed all other conveyances.[210] (*underlining supplied*)

The position with a *gift* of land was the same.[211] 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

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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' autera 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 bemis-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 Hilbert* (1793) 2 Ves 111 (30 ER 548) *per*Loughborugh 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 dower, see Coke, n 84, vol 1, 30b.

[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 civille ley est que un done des biens nest bon sans tradition mes auterment est en nostre le*y.' (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 personalty (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 ofland 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 personalty, 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 any thing, 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 feoffee 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 his own voluntary promise.' See also *Cochrane v Moore* (1890) 25 QBD 57 per Fry LJat p 72.

[217] Ibid, p 552.

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

[219] Kiralfy, n 66, pp 243-6.

[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(c)**), 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 Law 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 feoffment) 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 ceremonyto 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.'

[222] W Sheppard, *The Touchstone of Common Assurances* (1st ed,1648; last ed (8th ed), 1826).

[223] The work may actually have been that of Doderidge J, the mansuscript 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.

[226] Ibid, p 321.

[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.

[230] T Wood, *An Institute of the Laws of England* (1st ed, 1720, last ed, 1772).

[231] Blackstone, n 61.

[232] Ibid, vol 2, p 317 'In common acceptation 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 thanthe 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.[233]

Blackstone noted that *seisin* could be in deed (in fact) [234] or by law.[235] Finally, Blackstone explained how livery of seisin was subverted by employing conveyancing devices such as the: use, bargain and sale, and lease and release.[236] 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.[237]

(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 [238]…
>
> 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

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[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 clod 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 Newnam, *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 feoffer to the feoffee 'Be it remembered that this [10th June 1780] peaceable and quiet possession and seisin of the messauge 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…'. Newham 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 [Newnam cited *Taylor v Horde* (1757) 1 Burr 60 (97 ER 190) at p107 '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 Archaiologicum* (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 wardships *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.'

> sufficient consideration…[239] (*underlining supplied*)

Blackstone noted that a gift of chattels could be '*in writing'*. As authority for this Blackstone cited Perkins (as did Comyns [240] and Newnam).[241] 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 *escrowl* [242] - 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.[243]

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.[244] 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.[245]

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.[246] A seisin in law of the husband was as effectual as one in deed, to render her dowable. [247] 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 veryseldom[248]

and that jointure (marriage settlement) tended to be preferred.[249] 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 Stra 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 (actually 220)], see *Anne Needler v Bishop of Winchester* (1620) Hob 220 (80 ER 367) *per* Hobart CJ at p 230 'the law doth establish free gifts without consideration.' In *Tate v Hilbert* (1793) 2 Ves 111 (30 ER 548) Loughborough LC also seems to have accept that a gift of chattels might be inwriting as opposed to deed, at p 120 'Perhaps [instead of delivery] it might not be difficult to conceive, that it might be by deed or by writing…'.

[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 luy'*). 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.'

[245] Ibid, pp 129-30.

[246] Ibid, p 131.

[247] Ibid.

[248] Ibid, p 136.

[249] Ibid, pp 137-8.

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 …[253]

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 required [255] - 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]
- ofmoney 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 thingitself 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]

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[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.

[261] Ibid, pp 102-3.

[262] Alexander, n 191 , p 24.

[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*[266] 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.[267] (*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.[268] (*italics supplied*)

This was followed by Bracton [269] 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.[270] (*italics supplied*)

Fleta said much the same, '*out of pure generosity and without legal compulsion*.'[271]Thus, a gift occurred when the donor *intended* his act to be a legal act and, yet, was under no *legalobligation* 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) [272] 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),[273] I think that the ordinary primary meaning of '*gift*' is now a voluntary transfer of property made without consideration.[274]

However, this definition is not felicitous, being affected by the Elizabethan concept of consideration, as a pre-requisite for a valid contract.[275]

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[266] Halsbury cited Blackstone 'Gifts then, or grants, which are the eighth method of transferring personal property, and thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent.' See n 238.

[267] Halsbury, *Laws of England* (5th ed), vol 52, para 201.

[268] See n 109.

[269]There is no evidence to suggest this was not also the law in Anglo-Saxon, and early medieval times, prior to Bracton. For the gratuitous nature of gifts in modern legal systems, see Hyland, n 4, pp 130-1. Ibid, 132-8.

[270] Bracton, n 99, vol 2, p 49. See also n 117.

[271] See n 160.

[272] [1980] 3 AE 798.

[273] The judgment does not cite the passage from Sheppard at p 227 However, it is: 'This word [gift], importing no more than the transferring of the property of the thing from one to another.' The definition is defective since it fails to note that a gift is gratuitous, see **8**.

[274] At p 811. Cf Wheatcroft (1st ed, 1953), n 4, p 111 'The word '*gift*' normally denotes a voluntary transfer of property from one person (donor) to another (donee).'

[275] Prior to the 16th century (c.1550), consideration was not a prerequisite for a contract and the giving of money or money's worth or other act was treated as evidentiary, *viz*. that a person intended an act to be a legal act. From the 16th century onwards, a doctrine (prerequisite) of

- '*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.

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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 'Doctrine' 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, tautolagous. 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(c)**.

[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]2 Ch App 760.

[286] 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),[289] 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)

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[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] 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.

[292] 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.'

[293] See n 140. For Britton, see text to n 158 ('union of the wills').

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. Choke 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), variously, 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 that the donee was entitled to help himself. But in these last cases the title was precarious, since the gift was revocable at the donor's will until 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*. is for the benefit of the grantee, *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 immediatelyand 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*

[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 theword '*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] Vaughan J at p 402 'told the jury, that if the father had made an absolute, solemn and irrevocable gift of a watch to his son…and the son had accepted it, the law would not allow the father, without the consent of his son, afterwards to reclaim the gift.'

[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.

> *cannot give me his goods against my will.*[313] *(italics supplied)*

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,[314] as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee 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.[315]

The legal adequacy of this - of touching or pointing to the deed - is reasonable since livery of seisin of land could be effectedby 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 obligee, nay before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it.[316]

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[317] or sees the donor execute it and is aware of the contents- there is acceptance.

(c) <u>Gift - Deed - Not Contemporaneous</u>

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)*,[318] 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:

- ***<u>Butler & Baker's Case</u>* <u>(1591)</u>**.[319] This has already been discussed in the context of an oral gift with delivery (see **(a)**);

[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 obligee 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 McBain, 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, *per se*, 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)**.[320] 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.[321] It is to be noted that the deed was delivered;
- ***Smith v Wheeler* (1691)**.[322]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.[323] 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;[324]
- ***Stirling v Vaughan* (1809)**.[325] This has already been discussed in the context of an oral gift with delivery (see **(a)**);
- ***Small v Marwood* (1829)**.[326] 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;[327]
- ***Siggers v Evans* (1855)**.[328] 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…*[329] 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;[330] (*italics supplied*)
- ***Cook v Lister* (1863).**[331] 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

[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 ER518).

[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;[332]

- ***New, Prance and Garrard's Trustee v Hunting* (1897).**[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 certificatesremained 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).**[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*.[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.'[336]

It may be noted that most of the above involved deeds.[337] They also involved a *use* (trust). The presumption of acceptance by the donee, therefore, was the concommitent 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.[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)[339] the National Debt Act 1870 provided that stock (shares) in public funds could be transferred by the transferor (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.[340]More recently, a gift can also be presumed pursuant to the Consumer Protection (Distance Selling)

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[332] At p 595.

[333] [1897] 2 QB 19.

[334] [1955] AC 431.

[335] At p 440 (no gift because no assent).

[336] At p 540.

[337] See also *Standing v Bowring* (1885) 31 ChD 282*per* Lindley LJ at p 290 'I take it now to be settled, that although a donee may dissent from and thereby render null a gift to him, yet that a gift to him of property, whether real or personal, *by deed*, vests the property in him subject to his dissent.' (*italics supplied*).

[338] See also Halsbury, n 267, vol 52, para 249. In *James v Lock* (1865) 1 Ch App 25 *per* Cranworth LC at p 28 'there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary…if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration.'

[339] 31 ChD 282.The case held that a transfer of property (consols by a woman to her godson) without his knowledge - if made in the proper form - vested it in him at once, subject to his right to repudiate it when informed of the transfer. Since legislation provided that such a transfer did not need the transferee to accept to the transfer of this stock, the legal estate passed by virtue of legislation.

[340]Ibid, pp 287-8 *per* Cotton LJ 'the transfer of stock in the public funds is regulated by Act of Parliament, and the statutory mode of transfer is by an instrument in the books of the Bank of England to be signed by the transferor. That was done here, and although the National Debt Act

Regulations 2000.[341] The donee does not have to accept such a gift for it to be valid.

(f) Conclusion

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 bywitnesses. The donor offered the sod of land (or chattel) to the donee, with words of giving. And the doneeaccepted (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.*[342] Statements to this effect may be found in *Thompson v Leach* (1690),[343]*Townson v Tickel* (1819),[344]*Re Stratton's Deed of Disclaimer, Stratton v IRC* (1957) [345] and *Re Gulbenkian's Settlement Trusts (No 2),Stephens v Maun* (1970); [346]
- ***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, theissue 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;

1870, recognises an acceptance by the transferee, yet it does not make that acceptance necessary, or essential, for sect 22 provides that the person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof.' See also Lindley LJ, at p 289 'Formal acceptance by the transferee of the transfer to him is not necessary to complete his legal title (sec 22).'

[341] These provide that, if unsolicited goods are sent to a person with a view to his acquiring them and he has no reasonable cause to believe that they were sent with a view to being acquired by him for the purpose of a business – and he has neither agreed to acquire them or to return them - he might, as between himself and the sender - use, deal with or dispose of such goods as if they were an unconditional gift to him and the rights of the sender were extinguished. See Halsbury, n 267, vol 52, para 202. See also SI 2000/2334, reg 24(1)-(3).

[342]*Standing v Bowring* (1885) 31 ChD 282 at p 286 *per* Halsbury LC 'You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation.' However, this sentence exposes the fallacy. The gift '*vests*' (i.e. is valid) *subject* to disclaimer. Thus, the law, clearly, is making a person accept the gift, at first.

[343] 2 Vent 198 (80 ER 391) *per* Ventris,JCP at p 206 'a man cannot have an estate put into him in spight [spite] of his teeth.'

[344] 3 B & Ald 31 (106 ER 575) *per* Abbott CJ at p 36 'The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that however he is the best judge, and if it turns out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift.'

[345] [1957] 2 AE 594.

[346] [1970] Ch 408.

[347] Halsbury, n 267, vol 52, para 249. Halsbury cites *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535 at p 542 *per* Lindley LJ 'The presumption of acceptance in such cases is artificial, but it is founded on human nature; a man may be fairly presumed to assent to that which he in all probability would assent to if the opportunity of assenting were given him.' Cf. *Hill v Wilson* (1873) 8 Ch App 888 at p 896, see n 360.

- ***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 shouldbe no distinct requirement of acceptance/consent/notice, as such;
- ***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;
- ***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.[349] This would be subject to any legislative requirements;
- ***Trust.*** A gift should vest when the trust is completely constituted, subject to a power of revocation/disclaimer.

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 assertedthat therehad 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:

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[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).

[352] Ibid. Halsbury cites *Smith v Smith* [2001] 3 AE 552.

[353] Ibid.Halsbury cites *Jones v Jones* (1874) 31 LT 535 and *Mallott v Wilson* [1903] 2 Ch 494.

[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.

[356] [1975] 2 AE 728.

[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…'.

- ***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.[359] 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)[360] 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.[361]

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,[362] 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.[363]

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.[364]

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;[365]
>
> (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.[366] Making a gift by way of (1)-(3) is now considered.[367]

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[359] See n 358.

[360] 8 Ch App 888. See also Halsbury, n 267, vol 52, para 249, n 2.

[361] Ibid, p 896.

[362] Halsbury referred to Britton, see n 155.

[363] Halsbury, n 267, vol 52, para 201.

[364] See **15(b).**

[365]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, 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*'.

[366] See n 341.

[367] 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**.[368] This is provided for by the Law of Property Act 1925, s 52(1).[369] 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 (or other) consideration;[370]
- ***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.[371] 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);[372]
- ***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; [373]
- ***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.[374] 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) [375]- 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**;[376]
    - ***Companies Act 1985*.** A transfer of shares must be: (a) in the manner provided in the articles of association;[377] 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;[378]
- ***Life Insurance Proceeds***. An assignment of the same must be by an instrument in **writing**.[379] To perfect the donee's title to the money assured by the policy, notice of the assignment must be given to the insurance office.[380] The actual policy document is a piece of paper which can be transferred by delivery, like other chattels (see above).[381]

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[368] Halsbury, n 267, vol 52, para 231.

[369] (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. (2)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 dwelling-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] (1) 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.(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

[372] Halsbury, n 267, vol 52, para 231.

[373] Ibid, para 232.

[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] These could specify that a deed is required. However, generally, writing would be sufficient.

[378] Ibid.

[379] Ibid, para 233. See also Policies of Assurance Act 1867, ss 3,5 (notice and mode of assignment) and Halsbury, n 220, vol 19(1).

[380] Ibid, para 234. A memorandum indorsed on the policy authorising a person to draw the money is inoperative: *Re Williams, Williams v Ball* [1917] 1 Ch 1.

[381] *Rummens v Hare* (1876) 1 ExD 169 per Cairns LC at p 171'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 Deposits***. 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 £5000;[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. [386] 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;[387]
- ***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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consideration for it, yet it was a valid gift…'See also *Re Crankshaw* (1934) 78 Sol Jo 438. Also, *Barton v Gainer* (1858) 3 H & N 387 (157 ER 520),where it was held that a gift of a document securing a debt was good, although the debt itself did not pass.

[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;[392] (d) attestation.[393] 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[394] and simply calling a document a '*deed*' does not, *per se*, add anything;
    - Attestation[395] 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.[396] 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.[397] 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 [398] 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.[399] Doubtless, there is a good public policy reason behind this. People often get carried away and offer to give something which they later regret.[400] 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.[401]

In terms of cases, Halsbury refers to:

- ***Shower v Pilck* (1849)**.[402] 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; [403]
- ***Trimmer v Danby* (1856)**.[404] 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

[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. SeeMcBain, n1(f), part 1, p 30.

[396]*Shah v Shah* [2002] QB 35.See McBain, n1(f), part 2, p 12.

[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 ebuluence 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 *Otway 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 Swinburne, 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***. Ifthe 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 552.

[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 effective 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 *Wuergatsch 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 effectual 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] e.g. in the case of the legal estate of land or shares under the Companies Clauses Consolidation Act 1845, see **13(b).**

[420] The exception, as Halsbury notes, is when a power or revocation is expressly reserved.

[421] Halsbury, n 267, vol 52, para 240.

[422] Ibid. Halsbury refers to *Tate v Leithead* (1854) Kay 658 (69 ER 279). Also, to *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19 affirmed *Sharp v Jackson* [1899] AC 419.

[423] 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.

[424] *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.

[425] Halsbury, n 267, vol 50, para 240. See also Tyler, n 4, pp 311-3.

[426] See Law of Property Act 1925, s 53(1)(b).

[427] See *M'Fadden v Jenkyns* (1842), see n 418.

[428] Halsbury, n 267, para 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

(c) Resulting Trust ('RT')

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

- ***Purchase in Name of Another***. If a person buysproperty (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 personalty 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 notimplied 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, anysurplus - 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]

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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 exist 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.[437] 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.[438] 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.[439] 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.[440]

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;[441]
- ***Business Relationship***. The business relationship of the parties may rebut of the presumption of a gift (e.g. a son was solicitor to his father); [442]
- ***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.[443]

In the case of *cummulative* 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.[444]

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

[437] 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.

[438] 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.'

[439] Ibid, para 246.

[440] Ibid.

[441] Ibid, para 247.

[442] Ibid.

[443] Ibid. Halsbury cites *Stock v McAvoy* (1872) LR 15 Eq 55.

[444] Halsbury, n 276, vol 52, para 248. In the case of the mortgage instalment, Halsbury refers to *Moate v Moate* [1948] 2 AE 486. In the case of the annuity, Halsbury refers to *Palmer v Newell* (1856) 8 De GM & G 74 (44 ER 317).

delivery, whether in possession or reversion, and howsoever circumstanced.[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;[446]
- ***Alien***. Like a British citizen, an alien can dispose of realand personal, property apart from a British ship;[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;[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;[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;[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;[451]
- ***Minors***. Such gifts are voidable. This becomes final when the minor reaches full age, when he might affirm it or not;[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;[453]
- ***Intoxicated person.*** A gift by an intoxicated person not *compos mentis* is void. Also, if not so intoxicated, if the donee took unfair advantage of his state; [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;[455]

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[445] Ibid, para 204. Halsbury cited *Kekewich v Manning* (1851) 1 De GM & G 176 (42 ER 519) at 187-8 *per* Knight Bruce LJ 'it is, on legal and equitable principles, we apprehend, clearthat a person *sui juris,* acting freely, fairly and with sufficient knowledge, ought to have andhas 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 *Hall v Hall* (1873) 8 Ch App 430 at p 437 *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.

[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.'

[447] Ibid, para 206.

[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.'

[449] Ibid, para 218.

[450] Ibid, para 208.

[451] Ibid, para 208.

[452] Ibid, para 211.

[453] Ibid, para 212.

[454] Ibid, para 213.

[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:

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[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*'.

[460] Ibid, para 209. Halsbury referred to *Re Seymour* [1913] 1 Ch 475. Halsbury also considered lasting powers of attorney. Ibid, para 210.

[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 bondcan 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 attachedto 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 done 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 done 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[481]and it has been asserted that deeds should now be abolished.[482]

(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.[483]

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.[484]

(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.[485]

A court may also impeach gifts in various circumstances.[486]

(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.[487]

(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.[488]

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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.

[485] Ibid, paras 259 & 260.

[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 intentionof 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 subsequent[489] 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 ofhaving 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). Ifno 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;[492]
- ***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; [493]
- ***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 giftis 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]

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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 estate, or (with the leave of the court) by a victim of the transaction; (2) in a case where a victim of the transaction is bound by a voluntary arrangement, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or (3) in any 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.'

[489] Halsbury, n 267, vol 52, para 251. See also Tyler, n 4, pp 302-5 and N Palmer & E McKendrick, *Interests in Goods* (2nd ed 1998), ch 18 (conditional gifts).

[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, vol52, 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.[495]

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 appropriationunder the law relating to theft.[496]

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. It 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.[497]

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.[498] 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.[499]

(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;[500]
- ***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;[501]

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[495] Ibid, para 256.

[496] Ibid, paras 263-6.

[497] Ibid, para 267.

[498] If the requirement of deed was abolished and replaced with that of writing, matters would also be simpler.

[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, itcan 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]

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[502] Ibid. *Re Whitaker* (1889) 42 ChD 119 at p 124 *per* Cotton LJ.

[503] Many cases on cheques (especially in respect of DMC) relateto 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 doneis 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]

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[508] Halsbury, n 267, vol 52, para 270.

[509] The idea of gifts being '*complete*' or '*incomplete*' and of '*vestment*' came from Bracton, see ns 122 & 134.

[510] See generally, (a) R Yaron, *Gifts in Contemplation of Death in Jewish and Roman law* (1960); (b) MA Dropsie, *The Roman Law of Testaments,Codicils etc* (1892); (c) Borkowski, n 4; (d) JV Baker, *Land as a Donatio Mortis Causa*(1994) 109 LQR 19; (e) WHD Winder, *Delivery of a DonatioMortis Causa* (1940) 3 MLR 310; (f) S Warnock-Smith, '*Donationes Mortis Causa' and the Payment of Debts* [1978] Conv 130-6; (g) A Samuels, *Donatio Mortis Causa of a Share Certificate* (1966) 30 Conv 189; (h) WHD Winder, *Requisites for Transference as Donatio Mortis Causa* (1940) Conv (NS), vol 4, pp 382-416; (i) Tyler, n 4, pp 318-21; (j) P Sparkes, *Death-Bed Gifts of Land*(1992) 43 NILQ 35; (k) Palmer & McKendrick, n 489; (l) G Virgo, *The Principles of Equity and Trusts* (2012), pp 159-60; (m) Williams, Mortimer & Sunnucks*, Executors, Administrators and Probate* (19th ed; 2008) ('**Williams**'), ch 42; (n) M Pawlowski, *Death Bed-Gifts* (1994) 144 NLJ 48; (o) N Roberts, *Donationes Mortis Causa in a Dematerialised World* (2013) Conv, pp 113-28; (p) PH Pettit, *Equity and the Law of Trusts* (12th ed, 2012), pp 122-9.

[511] *Re Beaumont, Beaumont and Ewbank* [1902] 1 Ch 889 at p 892. See also Borkowski, n 4, p 26.

[512] In *Tate v Hilbert* (1793) 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*.'

[513] 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;

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[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 haphazardedly.' 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.

- 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;
- Thirdly, the donor must part with the subject matter of the donation.[522]

- Nourse LJ (in 1991):
  - First the gift must be in contemplation, although not necessarily in expectation, of impending death.
  - 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;
  - Thirdly, there must be a delivery of the subject-matter of the gift, or the essential i*ndicia* 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.[525] 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**);[529]
- gift must be alienable (see **19**);
- gift can be subject to conditions precedent and subsequent (see **20**);[530]

[522] *Re Craven's Estate, Lloyds Bank v Cockburn* [1937] Ch 423 *per* Farwell J at p 426.

[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, Levashoff 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…'.

- gift may be illegal or contrary to public policy (see **20**).

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).[531] 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.[532]

(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 saidto 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 Hilbert* (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 Ch 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 Bli NS 497 (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 92 (36 ER 549) *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, 105-6. 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 Abr 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, para 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.

[541] 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).

[542] Ibid, para 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 modifed, *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

entitled both to the legacy and to the gift. The same principle applies where the legacy was given by a will executed before the gift *mortis causa* was given.' See also Borkowski, n 4, pp 32, 35.

[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, vol 52, paras 278-300 and Borkowski, n 4, pp 11, 33, 110. Cf. Warnock-Smith, n 510.

[544] Halsbury, n 267, vol 52, paras 278-300 .

[545]*Delgoffe v Fader* [1939] 3 AE*per* Luxmore J at p 685 'A [DMC] is one made in contemplation of the death of the donor and is to take effect only 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 acondition, 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 Hilbert* (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, *Harneiss v Public Trustee* (1940) 40 SR (NSW) 414. A person owed rent to his landlady. 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. C*lavering 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,[552] although the actual delivery need not be by the donor himself, but may be by a person directed by him to make it;[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.[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.[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; [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; [557]
- ***Constructive Delivery***. Complete dominion over the subject matter of the gift must be intended to pass to the donee. Ifthe 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; [558]
- ***Insufficient Delivery***. Delivery of something merely as a symbol of the subject matter of the intended gift isinsufficient.[559] So, too, the giving of a power of attorney;[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.[561]

In*Wasserburg* (1915),[562] the court adopted a more relaxed concept of constructive delivery in the case of a DMC as opposed to a gift *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 *inter vivos* and by DMC (and, indeed, under the law of pledge)[563] should be the same; [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 hasresulted 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 -

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[552] Halsbury cites *Sen v Headley* [1991] Ch 425, see n 611. Also, *Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserburg* [1915] 1 Ch 195. For a summary of cases on delivery, see Borkowski, n 4, ch 6.

[553] Halsbury cites *Miller v Miller* (1735) 3 P Wms 356 (24 ER 1099)(servant of donor). Cf. *Hutchieson's Executrix v Shearer* 1909 SC 15. See also *Nelson v Prudential Assurance Co* [1929] NI 113.

[554] Halsbury, n 267, vol 52 para 271 and Snell, n 300, para 24-020.

[555]*Blount v Burrow* (1792) 4 Bro 72 (29 ER 784). See also *Hills v Hills* (1841) 8 M & W 401 (151 ER 1095)(donor desired the donee to use the gift to pay for her funeral). See also *Bouts v Ellis* (1853) 17 Beav 121 (51 ER 978)(in trust for T's wife). See also Borkowski, n 4, pp 19, 28. He notes, p 19, thatcases such as *Hills v Hills* 'seem to stretch the doctrine of donation to the furthest possible limits since in essence they appear to be attempts to make nuncupative wills.'

[556]*Dunne v Boyd* (1874) IR 8 Eq 609.

[557] Halsbury, n 267, vol 52, para 273. This is also so in respect of gifts *inter vivos*, see n 408.

[558] Ibid. Halsbury notes that the intention of handing over a key must be to make a gift 'The key must be handed over with a view to a gift, and not merely to open a box which contains directions as to how the contents are to be distributed. The donor must part with dominion over the key.' See also Tyler, n 4, p 320;Winder, n 510(h), pp 389-95 and Williams, n 510, para 42-11. For the handing over of car keys as sufficient constructive delivery for a DMC, see *Woodward v Woodward* [1995] 3 AE 980 ('You can keep the keys, I won't be driving it any more.').

[559] Halsbury cites *Ward v Turner* (1752) 2 Ves Sen 431 (28 ER 275) at p 442 where Hardwicke CJ indicated a similar rule prevailed with gifts *inter vivos*. Cf. *Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserburg* [1915] 1 Ch 195.

[560] Halsbury cites *Re Craven's Estate, Lloyds Bank v Cockburn* [1937] Ch 423, *per* Farwell J at p 428 'The position of the donee of a power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it, and in my judgment a mere giving of a power of attorney to the donee is not such a parting with dominion as is required to constitute a valid [DMC].' See also Tyler, n 4, p 320.

[561]*Birch v Treasury Solicitor* [1951] Ch 298. See alsoWinder, n 510(h), pp 395.

[562]*Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserburg* [1915] 1 Ch 195 (delivery of a key to a wife transferring a partial dominion over, or part of the means of getting at, the bonds, although not sufficient delivery to support a gift *inter vivos*, was, under the circumstances, a sufficient delivery for a DMC). See also Borkowski, n 4, pp 20, 64, 84.For criticism of this case see Sheller, *Donatio Mortis Causa: The Problem of Delivery* (1960) 33 ALJ 387.

[563] See McBain, n 1(d).

[564] Cf. *Cain v Moon* [1896] 2 QB 283 *per* Wills J at p 289 'the necessity for delivery [for gifts *inter vivos* and DMC] is the same.'

> complex inits application. [565]

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 sub-define '*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* or evidence 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

[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 someresults 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.

[567] *Woodward v Woodward* [1995] 3 AE 980.

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

[569] He cited *Duffield v Elwes* (1827) 1 Bli NS 497 (4 ER 959).

[570] Tyler, n 4, pp 318-9. He cited *Birch v Treasury Solicitor* [1951] Ch 298.

> 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.[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)(**see 14(b)**). The following, Halsbury notes, were held good (or, where indicated, bad) for the purposes of a valid DMC:[572]

- ***Bank Notes***. (i) bank notes.[573] A bank note is a negotiable instrument. More particularly, it is a promissory note payable on demand without the need for indorsement.[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) c*heque handed to a bank official in the donor'shouse (obsolete)*; (iii)cheque payable to donor or order, though not indorsed.[575] ***But not*** (i) cheque drawn by donor, not paid in his lifetime; (ii) cheque for part of the money on a deposit account.[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;[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.[578] The latter removes its negotiability; it makes it merely a mandate (payment instruction) to the bank to pay the payee.[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

[571] 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.

[572] See generally, Winder, n 510(h), p 388.

[573] *Ashton v Dawson & Vincent* (1725) 2 Coll 363n (63 ER 772). See also *Miller v Miller* (1735) 3 P Wms 356 (24 ER 1099) and *Hill v Chapman* (1789) 2 Bro CC 612 (29 ER 337). See also Borkowski, n 4, pp 95-6.

[574] TE Scrutton, *The Elements of Mercantile Law* (1891), p 34 'bank notes have acquired a superior position to promissory notes. They are payable to any holder who may present them without the necessity of his indorsing them.'

[575] *Clement v Cheesman* (1884) 27 ChD631. This case was prior to cheques being crossed and marked '*account payee'*.

[576] Halsbury, n 267, vol 52, paras 275 & 276and Borkwoski, n 4, pp 91-3.

[577] *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at p 894, *per* Buckley J 'the cheque is a revocable order which is revoked by the donor's death.' Ibid, p 895 'His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates.' See also n 501. Williams, n 510, para 42-19 'Mere delivery to the donee of a cheque drawn by the donor himself is not enough to constitute a good [DMC]. There must be in addition to such delivery either actual payment of the cheque by the drawee, or due presentation to him for payment, or a negotiation made for value to a third party, before the donor's death; in the case of negotiation, it is sufficient if the value is received immediately after the donor's death and before the person giving value was appraised of the death. Furthermore, the giving of a cheque does not operate as an appropriation *inter vivos* in favour of the donee.'

[578] 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 cross 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.

[579] 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 cheque forms 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.'

> 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 holderof the bond* (*obsolete*);[591]

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[580] The Bills of Exchange Act 18882, 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 Cheesman* (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]*Holliday v Atkinson* (1826) 5 B & C 501 (108 ER 187) *per* Abbott CJ at p 503 'a promissory note is not good as a [DMC].' *Re Leaper, Blythe v Atkinson* [1916] 1 Ch 579 *per* Sargant J at p 582 'If the donor is giving somebody else's promissory note he is then handing over the *indicia* of title to a species of property belonging to the donor. If he is handing over his own promissory note or cheque - particularly in the former case – he seems to me to be doing something quite different. The note, while in the donor's hands, is not property. And, by handing it to the donee, he is not transferring or attempting to transfer property, but is merely making an attempt - in itself imperfect - to create a general liability against himself, or rather against his estate.'

[587] Halsbury, n 267, vol 52, para 276 and Borkowski, n 4, pp 98-9. Also, Guest, n 578, para 15-017. Scrutton, n 574, p 86 'an IOU…is evidence of an account stated, not necessarily of money lent; and it may be used for the purposes for which an account stated can be used, but it is not a negotiable instrument.'

[588] These comprised: a (a) Post Office Savings book; (b) London Trustee Savings Bank book; (c) Barclays Bank deposit book; (d) Westminster Bank deposit account book.They were held to be indicative of title and it was not necessary that each book set out the terms of the contract between the donor and particular bank.

[589]*Birch 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, pp 15-6 and Tyler, n 4, p 319.

[590] 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).

- A bond is evidence of a debt. Delivery of the bond (in equity) passes the right to the debt (preventing recovery of the same by the donor).[592]In the case of a bearer bond, delivery of the bond would transfer title. However, this would apply to a gift *inter vivos* as well as to a DMC;[593]
- 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 *indicium* of title;

- ***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]
  - Legislation or the rules of the relevant institution, now govern such matters (see **14(b)**). Further, most banks, the Post Office, building societies *etc* no longer use pass books (or are phasing them out).[595] Instead, plastic cards are given to access savings accounts;
  - Building societies *etc* still with passbooks for their savings accounts only permit persons other than the account holder to withdraw sums if the account holder has signed a '*Third Party Withdrawl*' form. [596]A third party can then withdraw sums subject to conditions.[597] Since signing such a form is easy, it is asserted courts would be unlikely to permit other than this for a valid DMC, today; [598]
- ***Investment (Savings) Certificates***. (i) War Savings certificates; (ii) National Savings certificates; ***But not***(i) investment certificates *re* Government stock;[599] (ii) receipts for Government stock; (iii) Post Office savings certificates of the former Irish Free State.[600]
  - Today, such certificates are not '*certificates*' as such. They, often, comprise a letter or online confirmation of the investment and cannot be treated as *indicia* 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 *indicia* of title and one would suggest there is no good reason for being so treated today;

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[591] Ibid, paras 275 & 276. See also *Re Richards, Jones v Rebbeck* [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 Andrew*s [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 275 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 withdrawl. 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 withdrawl 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 coutesy call will then be made to the customer to inform them a third party withdrawl has been requested, if we cannot contact the customer the withdrawl 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 withdrawls 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 directly. Under no circumstances would we allow the third party to take the passbook back following a withdrawl.'

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

[599]*Re Andrews, Andrews v Andrews* [1902] 2 Ch 394 criticised in *Re Lee, Treasury Solicitor v Parrott* [1918] 2 Ch 320.

[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.[602] Legislation or the articles of the institution issuing shares now govern such matters (see **14(b)**);
    - Share certificates are not documents of title as such, but only evidence of the same.[603] 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.[604] 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;[605] (ii) mortgage deed, without a covenant to pay.[606] 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.[607] 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).[608]
    - Today, private mortgages (those given by individuals) are rare and *unregistered* land is diminishing rapidly.[609] In the case of *registered* land, since October 2013, the Land Registry has not issued land charge certificates.[610] 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),[611] was that there was a valid DMC by way of a constructive trust which did not have to be in writing.[612]*Sen* was followed in *Vallee v Birchwood* (2014) [613] and in *King v Dubrey & Oths* (2014)[614] The following may be noted:
    - ***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.[615] 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 a i*ndicium* of title;
    - ***Oral Wills***. The difficulty witb cases such as *Sen i*s 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

[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 Bli NS 497 (4 ER 959). See also*Richards v Syms* (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 Bli 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.

[615] Roberts, n 510, pp 116-7.

be sufficient constructive delivery of the house, if accompanied by an oral statement? Suppose this was done up to 6 years prior to death ? [616] 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) [617] raises the prospect of, for example, a private jet or a helicopter being transferred by simply handing over a bill of sale [618] (or the transfer (or release) of a mortgage by handing over the mortgage deed).[619] This would not seem wise - given the potential for fraud or for mis-construing a dying man's statement.[620]

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. [621] There is no need for added leniency in the case of a DMC; [622]
- ***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.[623] 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.[624] 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);[625]
    - ***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.[626]

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[616] 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.'

[617] See n 558.

[618] 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).

[619] Aircraft mortgages do not have to be registered in the UK Aircraft Register (though they lose priority). See McBain, n 618.

[620]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'.

[621] It may also be noted that the last case of a successfulDMC 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).

[622] 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.

[623] 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) dematerialisation; (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).

[624] In respect of intellectual property see Williams, n 510, para 42-27.

[625] See n 369.

[626] 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 DMCneed not involve a person *in extremis* or, even, dying,[627] - to prevent the subversion of the law of wills and of *inter vivos* transfers - DMC should be treatedthe same asgifts *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 ofproperty 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).[628]

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.***Themodern 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;

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many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these death bed donations, that there is always a danger of having an entirely fabricated case set up. And, without any imputation of a fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in a moral illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.'

[627] Borkowski, n 4, ch 4. For criticism of theconcept 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.

[628] Cf. JWA Thornley, *Laying Lord Eldon's Ghost - Donatio Mortis Causa of Land* (1991) Cambridge LJ 404, 406. See also Borkowski, n 4, p 104.

[629] OED, n 281 (*vest*) 1. 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 judgeto determine on the evidence in the circumstances of the case[630] - as opposeda legal formulation, onebound 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**).

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Appendix A

1.Gift is Gratuitous. A gift arises if the donor has no legal obligation to give.[631]

2. **Types**. A gift may be made:

(a) between living persons (*inter vivos*);

(b) in contemplation of death (*mortis causa*).[632]

3. **Valid Gift**. A gift is valid if the:

(a) donor has capacity;

(b) donee has capacity;

(c) donor intends to make a gift;[633]

(d) subject of gift is alienable;[634]

(e) gift is made:

(i) in writing;[635] or

(ii) orally (in the case of a declaration of trust);[636] or

(iii) orally with delivery (in the case of a movable); [637]

(iv) orally with delivery (in the case of a chose in action where title passes by delivery);[638]

(f) gift is not otherwise contrary to law.[639]

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

[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 ER478) 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*etc*, for the validity of a transfer (Bills of Sale Act *etc*), would have to be met or else the gift will notsatisfy (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*etc*, for the validity of a transfer (Bills of Sale Act *etc*), would have to be met or else the gift will notsatisfy (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] This reflects the present, common law, position for both *inter vivos* gifts and DMC.For example, a bearer bond, a promissory note or BOE payable to bearer *etc*.

[639] 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.

[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.