The present decision demonstrates even more conclusively than previous cases the wide scope which the legislatures have in regulating economic matters. So far as due process is concerned, the field is entirely clear for the lower federal courts to uphold any and all economic regulatory statutes. It would seem advisable and entirely proper for them to do exactly that. If the elusive limit of legislative power in this area exists at all, it is known only to the Supreme Court. Unless and until the Court gives substance, in the form of decided cases, to the theory that a limit exists, the lower federal courts may very well operate upon the assumption that no economic regulation violates the Fourteenth Amendment.[40]

STATUTE OF FRAUDS

NECESSITY OF DELIVERY OF MEMORANDUM

Gall filed a complaint relying on an agreement by the Brashiers to lease certain Oklahoma oil land to him for five years. He alleged that the Brashiers were to complete the oil and gas lease on a form furnished by him and to forward the lease to a bank with draft attached for the lease price, payable at a specified date. The Brashiers filled out the lease in the office of their attorney, but the following day

40. So far as the due process clause of the Fourteenth Amendment is concerned, the same observation applies with equal force to state courts. But state courts of a mind to invalidate economic regulation have held that the due process clause (or some other provision) of their respective state constitutions places a greater limitation upon legislative power than does the Fourteenth Amendment. *Compare* Boomer v. Olsen, 143 Neb. 579, 10 N. W.2d 507 (1943), and State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N. E.2d (1942), *with* Olsen v. Nebraska, 313 U. S. 236 (1941), and Nebbia v. New York, 291 U. S. 502 (1934). *Compare* Illinois C. R. R. v. Illinois Commerce Comm., 387 Ill. 256, 56 N. E.2d 432 (1944), *with* Federal Power Comm. v. Hope Natural Gas Co., 315 U. S. 575 (1942). *Compare* Cincinnati v. Correll, 141 Ohio 535, 49 N. E.2d 412 (1943), *with* West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). See also the recent case of Kirtley v. State, 84 N. E.2d 712 (Ind. 1949), discussed note 8 *supra*.

In view of the holdings of the state courts in the cases compared above, it is possible that the petitioning insurance company in the present case may yet prevail if it should choose to carry its fight to the state courts. Montana and Kentucky have declared similar statutes unconstitutional under their state constitutions. Montana v. Gateway Mortuaries, 87 Mont. 225, 287 Pac. 156 (1930); Kenton & Campbell Benevolent Burial Association v. Goodpaster, 304 Ky. 233, 200 S. W.2d 120 (1946). And the issue of constitutionality under the state constitution is clearly not *res judicata*. Boomer v. Olsen, *supra*.

they instructed him not to deliver it to the bank and negotiated for a lease with another party. Gall sued without delay for specific performance of the contract, and the case was removed to the federal district court in Oklahoma. That court sustained the Brashiers' motion to dismiss on the ground that the Oklahoma Statute of Frauds[1] had not been satisfied since the lease instrument, without being delivered, could not be a memorandum within the requirements of the statute. The Court of Appeals for the Tenth Circuit reversed,[2] holding that the undelivered lease could be a satisfactory memorandum.[3] *Gall v. Brashier,* 169 F.2d 704 (10th Cir. 1948).

Neither the original Statute of Frauds nor its modern American counterparts mention delivery of the memorandum as necessary to its effectiveness.[4] Thus, whether delivery is requisite depends not upon construction of specific statutory terminology but upon the necessity of importing into the statute some element without which the legislative purpose must fail. It has been said that the object and meaning of the statute is to "reduce contracts to a certainty in order to avoid perjury on the one hand and fraud on the other."[5] The problem is whether delivery of the memorandum containing the evidence of the agreement is indispensable to fulfilling that object.

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1. The Statute of Frauds stipulates that contracts for lease for longer than one year are "invalid" unless some note or memorandum of the contract be in writing and subscribed by the party to be charged. OKLA. STAT., tit. 15, § 136 (1941).

2. It was assumed by the Court of Appeals that the motion to dismiss put in issue the sufficiency of the undelivered lease to satisfy the Statute of Frauds. There was a dissent on the ground that a motion to dismiss should be sustained when the complaint in an action for specific performance of a contract names certain defendants, and not all of them have signed the memorandum offered to satisfy the Statute of Frauds. This problem is not treated here.

3. The federal court concluded that the Oklahoma courts would not require delivery of the memorandum, because the Oklahoma cases of Hopkins v. Walker, 144 Okla. 254, 291 Pac. 70 (1929); Schuerer v. Crockett, 108 Okla. 218, 236 Pac. 30 (1925); Akers v. Brooks, 103 Okla. 98, 229 Pac. 544 (1924) had cited with approval the Kansas case of Arnett v. Wescott, 107 Kan. 693, 193 Pac. 377 (1920) and the Alabama case of Jenkins v. Harrison, 66 Ala. 345 (1880) which held undelivered deeds to be effective as memoranda. The analogy to these cases seems to be quite proper since an oil and gas lease has often been held to be in the nature of a conveyance of an interest in land. Heller v. Dailey, 28 Ind. App. 532, 77 N. E. 368 (1906); 2 SUMMERS, OIL AND GAS § 227 (1938).

4. *E.g.,* IND. STAT. ANN. (Burns 1933) § 33-101; *see* 2 WILLISTON, CONTRACTS § 579A (rev. ed. 1936).

5. Note, 11 BOSTON L. REV. 440 (1931); *see* Drury v. Young, 58 Md. 546, 551 (1882).

Although the problem has at best been one productive of diverse views,[6] some of the confusion in the area has arisen from failure to recognize the questions decided by the cases. Often cited for the proposition that delivery is necessary are cases which never reached that issue but decided simply that the instruments in question were insufficiently complete to constitute memoranda.[7] A second group of cases, usually involving instruments purporting to convey interests in land, turns on the question whether there was a contract at all, and relies upon lack of delivery as evidence that no agreement had been reached.[8] In still other cases the courts have become so intent upon the necessity of delivery of a deed to pass title that they have failed to consider whether the undelivered deed might nevertheless serve as a memorandum of a contract to convey.[9]

In deciding that delivery of the memorandum was unnecessary the court in the *Gall* case reasoned that the evil of oral evidence to prove a contract is sufficiently guarded against by the production of the writing, whoever may have had custody of it.[10] If it be admitted that the memorandum

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6. In the *Gall* case it is admitted that the majority view requires delivery; many authorities believe this to be the majority view. *See e.g.*, Harris v. Dacus, 209 Ark. 1031, 193 S. W.2d 1006 (1946); Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779 (1913); Weir v. Batdorf, 24 Neb. 83, 38 N. W. 22 (1888); 2 WILLISTON, CONTRACTS § 579A (rev. ed. 1936); 1 REED, STATUTE OF FRAUDS § 388 (1884); Note, 100 A. L. R. 196 (1934). One editor takes the position that in cases where the undelivered writing is not a deed or lease the majority view does not require delivery. Note, 145 A. L. R. 1024 (1943). There is considerable authority for this position. *E.g.*, Alpha Phi of Sigma Kappa v. Kincaid, 180 Ore. 568, 178 P.2d 156 (1947); Allen v. Mowry, 278 Pa. 64, 122 Atl. 168 (1923).

7. Louther v. Potter, 197 Fed. 196 (E. D. Ky. 1912); Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069 (1916); Johnson v. Wallden, 342 Ill. 201, 173 N. E. 790 (1930); Nugent v. Humpich, 231 Ky. 122, 21 S. W.2d 153 (1929); Carr v. Mazon Estate, 26 N. M. 308, 191 Pac. 137 (1920); Axe v. Potts, 349 Pa. 345, 37 A.2d 572 (1944). This problem of sufficiency of the memorandum as an integrated expression of a prior oral agreement should be carefully distinguished from the problem of necessity for delivery of an otherwise sufficient memorandum. If a contract has been found to be unenforceable because the memorandum was incomplete, the fact that the writing in that case was undelivered does not mean that the case is authority for the proposition that an undelivered writing complete in terms would also be ineffective.

8. Steel v. Fife, 48 Iowa 99 (1878); Johnson v. Brooks, 31 Miss. 17 (1856); see Note, 20 TENN. L. REV. 201 (1948).

9. Pulse v. Miller, 81 Ind. 190 (1881); Freeland v. Charnley, 80 Ind. 132 (1881); Logsdon v. Newton, 54 Iowa 448, 6 N. W. 715 (1880); Parker v. Parker, 1 Gray (67 Mass.) 409 (1854); Comer v. Baldwin, 16 Minn. 172 (1870); Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779 (1913); Weir v. Batdorf, 24 Neb. 83, 38 N. W. 22 (1888).

10. Gall v. Brashier, 169 F.2d 704, 708 (10th Cir. 1948).

is in all other respects unobjectionable, the circumstance of who possesses it seems altogether irrelevant.[11] That it serves its purpose and provides evidence of those terms of the contract contained in the writing is beyond dispute.[12] On this point the many jurisdictions, among them Indiana,[13] which require delivery occupy a logically indefensible position.

Careful scrutiny reveals, however, that courts requiring delivery do not assume that the memorandum is unobjectionable and then pass upon the delivery point as a matter of logic. The assumption is instead that perhaps no contract has been formed, or that the memorandum may not be sufficiently expressive of its terms.[14] It is probably the theory of these courts that while the writing is undelivered, it can-

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11. Arnett v. Wescott, 107 Kan. 693, 193 Pac. 377 (1920); Drury v. Young, 58 Md. 546 (1882); Vinson v. Pugh, 173 N. C. 189, 91 S. E. 838 (1917); see also Note, 100 A. L. R. 196 (1934).

12. *See* Austin v. McCollum, 210 N. C. 817, 818, 188 S. E. 646, 647 (1936); Black v. Black, 185 Tenn. 23, 32, 202 S. W.2d 659, 663 (1947); Radiophone Broadcasting Station v. Imboden, 183 Tenn. 215, 219, 191 S. W.2d 535, 537 (1946); Boston v. De Jarnette, 153 Va. 591, 600, 151 S. E. 146, 148 (1930); Chiles v. Bowyer, 127 Va. 249, 259, 103 S. E. 619, 622 (1920); Atkins v. Sayer, 95 W. Va. 403, 405, 121 S. E. 283, 284 (1924).

13. Authority on the necessity for delivery of the memorandum is rather limited in Indiana, and there are no recent cases in point. In all those cases where an undelivered deed was offered as a memorandum it was held ineffective. An early Indiana case held that "it is unquestionably the law that a deed is destitute of force until delivered, and it can not be made available for any purpose." Freeland v. Charnley, 80 Ind. 132, 134 (1881). Another case decided the same year agreed in result and went on to state confusingly that "a paper of any kind, although it contains all the terms of a contract, is not operative as a contract until delivered with the intention of giving it effect." Pulse v. Miller, 81 Ind. 190, 192 (1881). In 1910 the Indiana Appellate Court in a dictum seemed to depart from the previous theory by stating that a memorandum of an oral contract to convey land is evidence of the contract only, and whether it remains in the hands of one party or the other it fulfills the purpose of the statute and renders the contract enforceable. *See* Ames v. Ames, 46 Ind. App. 597, 604, 91 N. E. 509, 512 (1910). It should be noted that in the *Ames* case it was not an undelivered deed which was presented, but another writing incapable of being a conveyance if delivered. In a 1919 case decided in the main upon a finding that the plaintiff had taken unfair advantage of the defendant, the court again stated that an undelivered writing of any kind could not satisfy the Statute of Frauds, thus reverting to the position taken in the early cases. Harter v. Morris, 72 Ind. App. 189, 123 N. E. 23 (1919). Thus, Indiana authority is rather conclusive that an undelivered deed or lease can not be effective to satisfy the Statute of Frauds, and a similar result would probably be reached where the writing is not a deed or lease, notwithstanding the contrary dictum of the *Ames* case.

14. *See* Steel v. Fife, 48 Iowa 99, 101 (1878); Johnson v. Brooks, 31 Miss. 17, 19 (1856); Note, 20 TENN. L. REV. 201 (1948).

not be assumed that there has been a final oral agreement, and that the defendant should not be called upon to establish that no contract was formed.[15] It also seems to be assumed that a writing while undelivered is unlikely to be a full expression of whatever oral agreement was reached.[16] On these assumptions oral evidence would be necessary to prove that the writing represents a completed contract and that it is a full memorandum. It is arguable that this calls for the use of the very oral evidence which the Statute of Frauds seeks to eliminate as a precaution against perjury and fraud.[17] Courts adopting this view thus do not require delivery for its own sake but simply to avoid the evidentiary difficulties which lack of delivery seems to them to pose.

But it is doubtful that the rule of the *Gall* case, which allows a party to prove by parol that there was a contract and that the memorandum offered is a sufficient notation of it, will defeat the purpose of the Statute of Frauds any more than will the rule[18] which allows parol proof of the contents of a memorandum which has been lost or destroyed, or the rule[19] that holds it non-essential that there have been intent that the writing should constitute a memorandum. Further, a requirement of delivery makes the Statute of Frauds prescribe more than its framers intended.[20] While the fact of delivery may be relevant evidence in arriving at answers to the true questions, *viz.*, the formation of the contract and

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15. See cases cited note 8 *supra.*

16. See cases cited note 7 *supra.*

17. This assumption may very well be correct in cases where the writing is an undelivered deed rather than some other instrument. A deed in practice seldom contains the essential terms of an oral contract to convey. For example, the consideration is often recited as one dollar in the deed though the agreed figure is something very much different.

18. Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056 (1907); J. A. B. Holding Co. v. Nathan, 120 N. J. Eq. 340, 184 Atl. 829 (Ct. Err. & App. 1936); RESTATEMENT, CONTRACTS § 216 (1932).

19. Straesser-Arnold Co. v. Franklin Sugar Ref. Co., 8 F.2d 601 (7th Cir. 1925); Morris Furniture Co. v. Braverman, 210 Iowa 946, 230 N. W. 356 (1930); Knobel v. Cortell-Markson Co., 122 Me. 511, 120 Atl. 721 (1923); Kahn v. Schoen Silk Corp., 147 Md. 516, 128 Atl. 359 (1925); RESTATEMENT, CONTRACTS § 209 (1932); 2 WILLISTON, CONTRACTS § 579 (rev. ed. 1936).

20. It has been argued that the Statute of Frauds is in derogation of the common law and thus is subject to the rule of strict construction: "the requirement of delivery of the memorandum would be beyond its terms, and for that reason beyond its spirit and purpose." Ely v. Phillips, 89 W. Va. 580, 581, 109 S. E. 808, 809 (1921); Note, 11 BOSTON U. L. REV. 440 (1931).

the sufficiency of the memorandum, there is neither logic nor utility in requiring delivery of the memorandum as a matter of law.[21]

TRUSTS

EQUITABLE DEVIATION IN INDIANA

The will of William E. English directed that certain real property on Monument Circle in Indianapolis be placed in charitable trust, and that the trustees erect a new building thereon to serve as headquarters for charities of the city. Sale of the property was expressly forbidden by the will. The trustees, however, petitioned the Marion County Probate Court for an order authorizing sale of the land. It was shown that the existing structure had become too antiquated to be used for the trust purpose; that an insufficiency in trust assets—the result of changed conditions—had rendered impracticable the erection of a new building; and that sale of the property would provide funds with which a building could be erected elsewhere, thereby fulfilling the purpose of the trust. These facts moved the court to apply the doctrine of equitable deviation and order sale of the land. On appeal the order was affirmed. *Foust v. William E. English Foundation*, 80 N. E.2d 303 (Ind. App. 1948).

This decision, the first in Indiana to sanction the sale of trust property despite the settlor's express prohibition, was apparently[1] decided on the basis of equitable deviation,

21. The trend among the later cases seems to be toward the rule that delivery is not required. Tennessee, Virginia, and Pennsylvania have within the last quarter century subscribed to this view. Black v. Black, 185 Tenn. 23, 202 S. W.2d 659 (1947); Radiophone Broadcasting Station v. Imboden, 183 Tenn. 215, 191 S. W.2d 535 (1946); Boston v. De Jarnette, 153 Va. 591, 151 S. E. 146 (1930); Chiles v. Bowyer, 127 Va. 249, 103 S. E. 619 (1920); Peoples Trust Co. v. Consumers Ice & Coal Co., 283 Pa. 76, 128 Atl. 723 (1925); Allen v. Mowry, 278 Pa. 64, 122 Atl. 168 (1923).

1. The Appellate Court's grounds of decision are obscure. In the Marion County Probate Court the parties had argued the applicability of an Indiana statute which empowers circuit or superior courts to authorize sales of trust property if one of the following is shown: the trust real property is subject to waste or depreciation; taxes and costs of repair exceed the income of the property; the sale of the property would be advantageous to the beneficiaries and fulfill the trust purposes. IND. STAT. ANN. (Burns Repl. 1943) § 56-621. The decree of the Marion County Probate Court evidently was based not on the statute, but upon the court's "equitable powers in the administration