

YALE LAW JOURNAL

VOL XL.

NOVEMBER, 1930

No. 1

GIFTS OF RIGHTS UNDER CONTRACTS IN WRITING BY DELIVERY OF THE WRITING

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MR. PAUL BRUTON in a recent number of the YALE LAW JOURNAL¹ criticises a rule of the *Restatement of Contracts*² which states that a gratuitous assignment is revocable except in three classes of cases, one of which is where the "assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement, and this token or writing is delivered to the assignee." It is contended by Mr. Bruton that this rule is too restricted, and that delivery to an assignee of any written contract between the obligor and the assignor is a sufficient formality to make a gift irrevocable.

As the draftsman of the rule criticized, and, though acting with advisers, as the person primarily responsible, I should like to set forth the reasons supporting it.

The rule of which a portion has just been quoted states three possible ways of making an irrevocable assignment of a contract right without consideration, namely:

- (1) by such a writing as would transfer ownership of a chattel without delivery;
- (2) by the delivery of the kind of token or writing specified in the words quoted above;
- (3) by any oral or written assignment if the owner should reasonably expect action of a definite and substantial character to be induced thereby, and such action is induced.

The first of these methods is obviously always a possible means of transferring any contractual right that is capable of

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¹(1930) 39 YALE L. J. 837.

²RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1928) § 158.

transfer. The kind of writing which is necessary in order to transfer a chattel without delivery may differ in the various states. At common law presumably a sealed instrument was necessary,³ but doubtless, at least in states where seals have been abolished, and very likely in many other states, a formal unsealed writing, or perhaps even an informal writing, would be sufficient. There is undoubtedly considerable advantage in putting written transfers of choses in action and of tangible property upon the same footing. The third method follows the analogy of a rule stated in Section 90 of the *Restatement of Contracts* to the effect that a promise becomes binding under similar circumstances. It is the propriety of the limitation in the second method that Mr. Bruton criticises.

At the outset of any discussion of the matter it should be observed that the *Restatement* deals only with the assignment of contractual rights and has no application to the transfer of equitable choses in action or of property rights. But in regard to contractual rights the rule is stated as applicable to all gifts whether made *inter vivos* or *causa mortis*.

Mr. Bruton bases his conclusion upon a considerable examination of the decisions, and also upon the assertion, made without much argument, that the rule he suggests conforms to wise policy. I shall discuss only briefly the English decisions that Mr. Bruton has collected. Certainly, however, they afford little countenance to those who deem the rule of the *Restatement* too closely restricted.

Since an assignment of a chose in action prior to the Judicature Act of 1873 could in no event transfer more than an equitable right, according to the conception of the English courts, the maxim that equity will not aid a volunteer was a stumbling block in the way of donees and, so far as concerns gifts *inter vivos* of choses in action, probably an insurmountable one.

In 1900 Edward Jenks wrote an article in the *Law Quarterly Review* controverting the assertion of Sir William R. Anson in his treatise on contracts that consideration is an invariable requisite of an irrevocable assignment *inter vivos*.⁴ Mr. Jenks admits at the outset: "Snell propounds the rule with almost equal breadth. (Equity, 12th ed. p. 85). Leake, though he confines himself to equitable assignments, apparently commits himself to a similar doctrine. (Law of Contracts, 3d. ed. p. 997)." Mr. Jenks himself does not contend for more than this, that consideration is not essential unless the assignment is "imperfect." In that case he deems consideration necessary, and further admits that "voluntary assignees of choses in action

³ *Cochrane v. Moore*, 25 Q. B. D. 57 (1890).

⁴ Jenks, *Consideration and the Assignment of Choses in Action* (1900) 16 L. Q. REV. 241.

may be postponed (at any rate where their titles are not protected by the Judicature Act) to subsequent acquirers with a better claim." Sir William R. Anson, replying in the following year to this article, persisted in his assertion that aside from the Judicature Act, and probably even in cases under the Judicature Act, consideration is always necessary in order to render an assignment *inter vivos* irrevocable.⁵ His chief reliance was upon *Edwards v. Jones*,⁶ where the delivery of a bond indorsed with words of assignment by the payee was held insufficient to give the donee title against the executor of the donor.

In 1911 Professor George P. Costigan wrote in the same review a more elaborate article entitled *Gifts Inter Vivos of Choses in Action*.⁷ His conclusion was:

"*Edwards v. Jones*⁸ does stand unreversed, however, and is in fact reinforced by *Milroy v. Lord*.⁹ Probably, therefore, prior to the Judicature Act of 1873, an assignment of a *legal chose* in action was not valid unless the assignee gave consideration for it or reduced the *chose* to possession prior to a revocation of authority, or unless the assignment was made by way of gift *causa mortis*."¹⁰

The English courts have been more lenient in regard to gifts *causa mortis* than in regard to gifts *inter vivos*, apparently on the ground that in the former case the donor, being dead, can no longer do anything further to validate an intended gift. If the subject matter of an attempted gift *causa mortis* is a document of the right kind, equity makes an exception to its rule that it will not aid a volunteer. The distinction between gifts *inter vivos* and gifts *causa mortis* is not made in the American cases so far as concerns the essentials necessary to complete a gift, and, as Professor Costigan remarks of the reason given above for the distinction, "while that may explain the difference in the rule as to gifts *causa mortis* from that as to gifts *inter vivos*, it does not justify that difference."¹¹ It may be added that in the great majority of absolute gifts that come in question, the donor likewise is dead when the controversy arises, and frequently is dying when the gift is made or attempted. There is, however, a satisfactory reason for the allowance by the English courts of gifts *causa mortis* to the extent that they have gone. The refusal to admit a power to make gifts *inter vivos* by the delivery of documents of the character by which effective gifts *causa mortis* have been made, on the technical

⁵ Anson, *Assignment of Choses in Action* (1901) 17 L. Q. Rev. 90.

⁶ 1 Myl. & C. 226 (1836).

⁷ 27 L. Q. Rev. 326.

⁸ *Supra* note 6.

⁹ 4 De G. F. & J. 264 (1862).

¹⁰ 27 L. Q. Rev. at 334.

¹¹ *Ibid.* 331, n. 3.

ground that equity will not aid a volunteer, is objectionable and has rightly not been followed by the American courts.

The Judicature Act of 1873 provides that an absolute assignment in writing of a debt or other legal chose in action, of which express notice in writing is given to the debtor, shall be effectual in law to transfer the legal right to the debt or chose in action, subject, however, to all equities which would previously have been entitled to priority. Sir William R. Anson contended that as this Statute said nothing about consideration, it did not affect the rule in that respect. Professor Costigan was of the opinion that "while Sir W. R. Anson appears to have had the better of the argument on the cases prior to the Judicature Act, Professor Jenks appears to have had the better of the argument so far as the effect of that Act was concerned."¹² This conclusion, so far as concerns the effectiveness of a gratuitous written assignment of an existing right, is borne out by later decisions of the English court holding such an assignment effective.¹³ The Judicature Act leaves unaffected, however, the problem of whether a valid gift of a right under a written contract may be made by delivery of the writing, without the assignment itself being in writing. Probably this is still impossible.¹⁴

Assuming, as I am willing to do, that the closely restricted English law as to assignments *inter vivos* is neither actual nor desirable law in the United States, the effect of the English decisions on gifts *causa mortis* may be considered.

One of the earliest cases on the subject, and the leading one, is *Ward v. Turner*,¹⁵ holding a gift *causa mortis* of receipts for South Sea annuities in the hands of a third person ineffective to transfer a right to the annuities. Of this decision Mr. Bruton rightly says:

"(1) It held that delivery, in the sense of transfer of control, was as necessary in gifts of choses in action as it was in gifts of tangible property. Proof of donative intent alone was as ineffectual in one type of case as in the other. (2) Since the delivery required was transfer of control, the case determined the kind of a delivery which would satisfy this test as applied to a chose in action. Only the transfer of a document which

¹² *Ibid.* 339.

¹³ *Hambleton v. Brown*, [1917] 2 K. B. 93; *In re Westerton*, [1919] 2 Ch. 104. An assignment of a future right is revocable unless supported by consideration. *Tailby v. Official Receiver*, 13 App. Cas. 523 (1888).

¹⁴ Though *Edwards v. Jones*, *supra* note 6, on its exact facts would presumably not be followed since the Judicature Act of 1873, inasmuch as an assignment was written on the back of the bond which was the subject of the gift (see *In re Patrick*, [1891] 1 Ch. 82; *Lee v. Magrath*, L. R. 10 Ir. 313 (1882)), apart from this feature it seems that the attempted gift of the bond would still be held invalid.

¹⁵ 2 Ves. Sr. 431 (1752).

would deprive the donor of the means of enforcing the chose would satisfy the test. For this purpose delivery of a specialty would do, but not the transfer of a simple writing, however strikingly that writing might evidence the chose."¹⁶

Mr. Bruton endeavors to rest the decision on the requirement of profert, and says that shortly after this decision "the whole basis of it was swept away," because the rule requiring profert was abolished. Here, I think, is Mr. Bruton's error. Lord Hardwicke indeed refers to profert as one reason for distinguishing invalid gifts of such choses in action as he was considering from a gift of a bond which he had previously upheld.¹⁷ He added, however, with reference to such a gift:

"Another thing made it amount to a delivery, that the law allows it a locality; and therefore a bond is *bona notabilia* so as to require a prerogative administration, where a bond is in one diocese, and goods in another."¹⁸

He might have said more to show that profert was only one incident of a quality distinguishing sealed instruments from informal contracts; and this distinguishing quality, so far from being swept away since Lord Hardwicke's time, still persists and has been recognized as existing in other documents than contracts under seal.

Mr. Bruton correctly says that "The framers of the *Restatement* admit [he might have said, assert] that an obligation evidenced by a non-negotiable bond, a life insurance policy, or a certificate of stock, may be irrevocably assigned by the delivery of the document." He adds, however, "Just how these instruments differ from the ordinary written contract is not made clear."¹⁹ The function of the *Restatement* is to state the law, not to explain why certain rules exist. Anomalies do exist sometimes; but in this instance there is no anomaly.

The difference between instruments that are dealt with not only by the law but by business custom as chattels having intrinsic value and not value merely as evidence of intangible rights is old, and cuts deeply into the law not only in its earlier stages but at the present time. It takes little reading of the common law to discover the importance attached to the instrument itself if under seal, for other reasons than the requirement of profert. Negotiable instruments were later recognized as having similar incidents, and even non-negotiable bills of exchange and promissory notes share the same character. Policies of insurance are generally under seal and in any event

¹⁶ 39 YALE L. J. at 842, 843.

¹⁷ Baily v. Snelgrove (1744), stated in the opinion of Ward v. Turner, *supra* note 15.

¹⁸ Ward v. Turner, *supra* note 15.

¹⁹ 39 YALE L. J. at 838, n. 7.

partake of the nature of specialties.²⁰ The same principle obviously applies to certificates of stock. The failure of the English Court to recognize this is unfortunate, but the American cases in doing so are clearly right, judged both by legal analogy and by business custom.

A demand upon a debtor under an ordinary written contract to perform his duty will not ordinarily be met by a request to produce and surrender the writing; and such a request, if made, it is submitted, need not be complied with. The creditor's right is not conditional upon compliance with the request. It is otherwise with the documents of which the rule of the *Restatement* permits gifts by mere delivery. Possession of the document, therefore, controls the enforcement of the right. Such documents are for this reason proper symbols of the intangible rights that they evidence.

Mr. Bruton says that "nothing has been more confusing in the law of gifts than this question-begging, mind-befogging, dominion concept."²¹ The application of the adjective "question-begging" I find difficult to comprehend. It is an objuratory epithet but seems otherwise meaningless in this connection. The concept is "mind-befogging" if one attempts to find dominion where there is none, as possibly a few cases have done, but it is clarifying if one makes no such attempt. Mr. Bruton, indeed, virtually seeks to use the test himself in his argument that since any written contract is "best evidence" and must be produced or accounted for in any litigation against the debtor, all written contracts stand on the same plane as bonds, of which profert was formerly necessary, but which now when made the subject of litigation are only "best evidence," as is the case with informal contracts. His error is in looking only at the procedure in litigation to determine the kind of document that controls the intangible right.

Mr. Bruton leans heavily upon the case of *Moore v. Darton*,²² as establishing a wider rule than that of *Ward v. Turner*.²³ *Moore v. Darton*, as Mr. Bruton himself says, was not a case of assignment. The document in question was given to an agent of the debtor for the purpose of discharging the debt. On any view, however, the case is decided correctly since the document was not simply a receipt; it was a non-negotiable promissory note.²⁴ The reasoning of Vice-Chancellor Knight Bruce is brief

²⁰ LANGDELL, SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880) § 49.

²¹ 39 YALE L. J. at 857.

²² 4 DeG. & S. 517 (1851).

²³ *Supra* note 15.

²⁴ Mr. Bruton states, 39 YALE L. J. at 848, that the rule in *Moore v. Darton* is the logical basis for holding that a gift of a promissory note may be made by delivery, but that the courts have never explained the theory of their decisions on this subject.

and does not purport to lay down any general rule. He certainly says as part of his reasoning that "proof of the writing, if possible, was essential to recovery." If, however, Mr. Bruton means to intimate that the single judge who decided the case meant to establish or did establish for the English courts a rule that any written contract which must be proved in litigation by its production, if that is possible, may by its delivery with donative intent be the subject of an effective gift, the suggestion is a bold one. On its facts the case is within the rule of the *Restatement* that is criticised.

Nor has any subsequent English or Irish decision gone further. Gifts of unindorsed negotiable paper,²⁵ bankers' deposit notes²⁶ (which, in the United States, are called certificates of deposit, and are in fact non-negotiable promissory notes), of savings bank books,²⁷ have been upheld; but, as said by the Irish court,²⁸ "In all the cases which have been cited where the gift has been upheld the document or deed was essential to the recovery of the debt." And though these words might in themselves seem wide enough to cover any document that must be produced if the claim is litigated, for example the most abbreviated memorandum of a contract within the Statute of Frauds, I believe the meaning of the Court was the same as that of Byrne, J., in a later case who, in support of his decision that a savings bank book might be the subject of a gift *causa mortis*, said, "It must as stated on the face of it be produced whenever any money is drawn or deposited."²⁹

The recent decision in the Irish Free State of *In re McWey*³⁰ is directly opposed to the rule that Mr. Bruton believes may be drawn from the English cases. The document in question in that case was a receipt for money received for India stock. The receipt stated fully the terms of the contract, but it also stated not only that the receipt was not negotiable but that the "stockholders to protect themselves from fraud can accept by themselves or their attorneys all transfers made to them." Counsel in arguing that the attempted gift failed said:

"These are not documents of title, but mere proofs of payment of consideration. They are not to be delivered upon a transfer;

²⁵ *In re Mead*, 15 Ch. D. 651 (1880); *Clement v. Cheesman*, 27 Ch. D. 631 (1884).

²⁶ *Amis v. Witt*, 33 Beav. 619 (1863); *In re Taylor*, 56 L. J. 597 (1887); *In re Farnam*, 57 L. J. 637 (1887); *Cassidy v. Belfast Banking Co.*, 22 L. R. Ir. 68 (1887); *In re Dillon*, 44 Ch. D. 76 (1890); *Porter v. Walsh*, [1895] 1 Ir. R. 284; *Cáin v. Moon*, [1896] 2 Q. B. 283.

²⁷ *In re Weston*, [1902] 1 Ch. 680.

²⁸ *Duckworth v. Lee*, [1899] 1 Ir. R. 405, 407 (holding the gift of an I. O. U. ineffectual to transfer a right).

²⁹ *In re Weston*, *supra* note 27.

³⁰ [1928] Ir. R. 486.

and there may be any number of persons (the previous holders) in possession of receipts given in respect of the holdings. Thus the deceased in parting with the receipts did not part with the possession of, or dominion over, the stock. Neither would one who had legally effected a transfer and retained a receipt have retained a document of title or anything which would leave in him dominion over the property. The donor must part with the possession of, and the dominion over, the property."³¹

This argument was sustained, the court saying:

"To hold that [the gift] is sufficient would, in my opinion, be to hold that the case of *Ward v. Turner*³² is no longer good law. But the authority of that case was recognized by the House of Lords in *Duffield v. Elwes*,³³ and was followed in *Moore v. Moore*,³⁴ and, as was held in the last-mentioned case, so I hold in this, that the receipts in question here do not differ substantially from the receipts for the South Sea Annuities, which were the subject-matter in *Ward v. Turner*. *In re Andrews*³⁵ belongs to the same line of authorities."³⁶

In the United States with general consistency it has been held that bonds, unindorsed bills and promissory notes, certificates of deposits, policies of insurance, savings bank books, and unindorsed certificates of stock, delivered with donative intent, give the donee a perfect right.³⁷ The general *ratio decidendi* of the cases is that the possession of the document gives control of the intangible right, and that this control or dominion is essential. On the other hand gifts of checking account pass rights to the accounts.³⁸ In these latter cases the intent to give is found as a fact and the delivery of the pass-book might seem to conform to the vague rule sometimes suggested that the donor must make "such delivery as the nature of the case admits." Nevertheless the gift is held incomplete; the cases books have almost uniformly been held ineffectual to transfer

³¹ *Ibid.* 489.

³² *Supra* note 15.

³³ 1 Bli. (N. S.) 497, 536, 540 (1827).

³⁴ L. R. 18 Eq. 474, 483 (1874).

³⁵ [1902] 2 Ch. 394.

³⁶ [1928] Ir. R. at 491.

³⁷ The cases are collected by Mr. Bruton, 39 YALE L. J. at 852, 853.

³⁸ *Jones v. Weakley*, 99 Ala. 441, 12 So. 420 (1892); *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389 (1892); *Dinley v. McCullagh*, 92 Hun 454, 36 N. Y. Supp. 1007 (1895); *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325 (1898); *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45 (1899); *Williams' Est.*, 11 Pa. D. & C. 636 (1902). See also *McGonnell v. Murray, Jr.* R. 3 Eq. 460 (1869); *Pace v. Pace*, 107 Miss. 292, 293, 65 So. 273, 274 (1914); *Provident Institution v. Sisters of the Poor*, 87 N. J. Eq. 424, 431, 100 Atl. 894, 897 (1916), *aff'd*, 88 N. J. Eq. 349, 102 Atl. 1053 (1917).

The decisions in Kentucky are otherwise. *Stephenson v. King*, 81 Ky. 425 (1883); see *McCoy's Administrator v. McCoy*, 126 Ky. 783, 788, 104 S. W. 1031, 1032 (1907).

distinguish the gift of a savings bank book in some such language as that used by the Maryland court:

“Possession of a deposit-book in such a bank does not give a dominion or control over the fund, and hence cannot operate, by a delivery to transfer ownership of the money deposited.”³⁹

More generally, the United States Supreme Court has said, after an elaborate examination of authorities:

“The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*.”⁴⁰

What authority has Mr. Bruton to show that the courts in stressing the requirement of control or dominion do not give a correct reason for their decisions, a reason that they will habitually apply? Sometimes, no doubt what courts do is so clearly at variance with what they say that we are compelled to seek a *ratio decidendi* that is inconsistent with that given in the judicial opinions. But the variance between facts and stated grounds of decision should be clear and should exist in more than occasional decisions in order to justify the conclusion that while courts decide correctly, they do not know why they are correct.

Perhaps Mr. Bruton places his chief reliance upon several cases holding that a gift of a “receipt” is effective. As in the case of *Moore v. Darton*,⁴¹ however, the receipts in question were neither mere receipts nor ordinary written contracts. They acknowledged the receipt either of money or of property, and promised either to hold the money as a trust or to repay it as a debt or to return the property. If there is a trust, the chose in action is an equitable one and not within the rules of the *Restatement*.⁴² If there is a promise to repay money as a debt, as in *Moore v. Darton*, the instrument is a promissory note.

³⁹ Whalen v. Milholland, *supra* note 38.

⁴⁰ Basket v. Hassell, 107 U. S. 602, 614, 2 Sup. Ct. 415, 422 (1882).

⁴¹ *Supra* note 22.

⁴² Such was the case of *Champney v. Blanchard*, 39 N. Y. 111 (1868) where the gifts were by the beneficiary to the trustee. In *Stephenson's Estate v. King*, 81 Ky. 425 (1883), also, the donor though called an agent seems to have been in fact a trustee of the securities payable to bearer which were the subject of the gift. More clearly in *Clayton v. Pierson*, 55 W. Va. 167, 46 S. E. 935 (1904), where the document recited the receipt of \$1100 “for safe keeping” there was a trust. It is evident the money delivered was not to be kept in specie, and yet was not to be dealt with as an ordinary debt.

The other cases of receipts that Mr. Bruton cites were evidence of bailments, and the gifts were of the bailed property.⁴³ More perhaps can be said in favor of allowing a receipt of this nature to give a donee an irrevocable right to bailed property than can be said for allowing gifts of contract rights generally to be made by delivery of a written contract. Demand of the surrender of such receipts is usually made when return is requested of the property deposited, and frequently the receipts contain an express requirement to this effect. The analogy to bills of lading and warehouse receipts readily suggests itself. There has been great confusion in the law as to whether a "straight" bill of lading or warehouse receipt, *i.e.* one not in terms negotiable, should be treated as a document of title, delivery of which is equivalent to delivery of the goods themselves.⁴⁴ I think it better to confine this attribute to documents where the delivery is to be made to order, and recent statutes have generally brought about this result so far as sales of chattels are concerned; but in view of the dispute on this point and the fact that the gifts attempted in these cases are of property, such an analogy deserves little weight in the consideration of methods of assigning contractual rights.⁴⁵ Especially is this so in view of the fact that *In re McWey*⁴⁶ decided that where the receipt contained a provision that it need not be presented in order to secure performance of the signer's duty, an irrevocable gift could not be made by delivery of the receipt.

⁴³ Kaufmann v. Parmele, 99 Neb. 622, 157 N. W. 342 (1916); Lipson v. Evans, 133 Md. 370, 105 Atl. 312 (1918); Goldsworthy v. Johnson, 45 Nev. 355, 204 Pac. 505 (1922), are of this character. Of the Maryland and Nevada cases Mr. Bruton says: "An indorsement and written assignment appeared on the back of the receipts but the courts lay no emphasis on this fact." The facts seem otherwise. In both cases the assignment was formal and relied upon by the Court. In the Maryland case the assignment was under seal and the court states in its reasons for upholding the gift that "the assignment was apparently under the hand and seal of Evans and so written on the receipt." In the Nevada case the court said of the donor's act: "It was physically impossible for her to deliver the bonds. She did the next best thing; she gave an order to the bank, written on the back of the receipt which it had given her for the money paid for the bonds, for their delivery to the donee, and simultaneously executed and delivered to the donee the writing wherein she said: 'It is my wish that D. S. Johnson have the liberty bonds.'"

⁴⁴ See WILLISTON, SALES (2d ed. 1924) § 413.

⁴⁵ It is true that in the cases referred to *supra* note 43 the property in question was bonds or certificates of stock which are themselves choses in action, but it was the bonds or certificates which the receipts referred to, and which were professed to be given, not the intangible rights that they represented which were against other persons than the signers of the receipts. The gifts were not merely of the donors' contract rights against the bailees for the redelivery of the documents, but were gifts of the documents themselves as chattels.

⁴⁶ *Supra* note 30.

Nothing further that can be deemed to support Mr. Bruton's theory is cited by him except the case of *In re Huggins' Estate*,⁴⁷ where delivery by the donor, with proper intent, of a written contract to convey certain coal rights for \$1800 was held to effect an irrevocable gift of the right to the money.⁴⁸

I think it advisable in considering the question under discussion to make a somewhat wider synthesis of cognate rules of law than Mr. Bruton attempts, and also to make a fuller consideration of reasons of policy.

The distinction in the common law between "things that lie in grant and things that lie in livery" is an old one. Ordinary choses in action (when the limitations on the assignment of such property imposed by the early common law disappear) fall naturally in the class of things that lie in grant; that is, they are appropriately transferred by deed or contract.

The rights of which the *Restatement* stated that gifts can be made by delivery are subjected to the same rule as that governing gifts of chattels. The tangible instruments represent the intangible rights in common speech and in common business usage. The law has wisely recognized this business usage, not only because it is one upon which people act, but because it is one upon which they may safely act, since possession of the document is essential to the collection of the claim. This is not true of written contracts as a class.

The English Statute of Frauds requires for the enforceability of a sale of goods, or of a contract to sell them, if they are of the price of ten pounds or more, that there shall be a memorandum in writing of the bargain signed by the parties to be charged unless there shall be acceptance and actual receipt of all or part of the goods, or either full or partial payment for them. This section is substantially re-enacted in most of the

⁴⁷ 204 Pa. 167, 53 Atl. 746 (1902).

⁴⁸ Mr. Bruton states that *Davie v. Davie*, 47 Wash. 231, 91 Pac. 950 (1907) was a similar case. This is an error. In the Washington case the deed of conveyance for which the money was payable was delivered by the donor to the donee. Such a deed obviously is within the rule of the *Restatement*.

Two other cases that were cited in the Reporter's notes to the *Restatement* as opposed to the rule therein laid down are also referred to by Mr. Bruton. One of these, *Murphy v. Bordwell*, 83 Minn. 54, 85 N. W. 915 (1901), is rather unusual on its facts and Mr. Bruton thinks the case may fall within the rule of the *Restatement*. The other, *Jones v. Moore*, 102 Ky. 591, 44 S. W. 126 (1898), upheld a gift of book accounts by delivery of the book. This case is as obnoxious to Mr. Bruton's suggested rule as to that of the *Restatement*. A book of accounts does not state the terms of the contracts with the debtors, and, furthermore, it is written by the creditor, not the debtor. Since Kentucky also sustains, contrary to the great weight of authority, a gift of a checking account made by delivery of the pass book (*McCoy's Administrator v. McCoy*, *supra* note 38), decisions of that state must be disregarded.

United States. In England it is settled that choses in action, though evidenced by tangible documents of the sort covered by the rule of the *Restatement*, are not included under the designation, "goods, wares and merchandise."⁴⁹ In the United States, however, under statutes similar to the English original, certificates of stock, bonds, bills and notes, are held to be within the statute.⁵⁰ In some states choses in action have been included by the express words of the statute, or the wide term "personal property" has been used.⁵¹ The Uniform Sales Act expressly includes choses in action in the section corresponding to the English Statute of Frauds. This Act is now in force in more than thirty jurisdictions. Thus it is generally true that to make an enforceable sale, or a contract for the sale, of a chose in action, either some part of the price must be paid, or there must be acceptance and actual receipt of the chose in action, or there must be a memorandum in writing.

It seems unlikely that the possibility of satisfying the Statute by acceptance and actual receipt can extend beyond any larger class of choses in action than those of which the *Restatement* allows gifts by delivery.⁵² As to others, there must be consideration actually paid or a memorandum in writing evidencing the transfer. If this is true, it would surely be anomalous to allow gifts of choses in action to be made with greater freedom and less formality than the law requires for sales of them.

In discussing the policy of the rule suggested by Mr. Bruton, argument may be directed (1) to the question whether it is desirable to go further than the rule of the *Restatement* goes in making informal gifts of choses in action possible, and (2) whether the particular extension suggested by Mr. Bruton is desirable. On both these questions I think the answer should be in the negative. Choses in action now constitute by far the greatest part of the property of most persons of means. Not only is property intangible in its origin included within the category, but a large part of the tangible property in the country is now subjected to the law governing choses in action by the use of mortgages and corporate shares of stock. Gifts of choses in action therefore involve far more serious questions than gifts of chattels. In view of this, since there is no difficulty in making gifts of choses in action when desired (for unquestionably a formal assignment in writing, and perhaps also an informal written assignment, is enough to effect the purpose),⁵³ it seems to me distinctly undesirable to go further

⁴⁹ WILLISTON, *op. cit. supra* note 44, at § 67.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Chase National Bank v. Sayles, 11 F. (2d) 948 (C. C. A. 1st, 1926), *certiorari* refused, 273 U. S. 708, 47 Sup. Ct. 99 (1926).

and make gifts of choses in action valid with less formality than gifts of land or even of chattels. The necessity of some formality is particularly emphasized because most of the gifts that come into question are made in immediate contemplation of death. Indeed, the problem under consideration rarely arises except in such cases. If a donor is alive and really means to give away his rights, he can and ordinarily will make good any inadequacy in his first attempt. From a practical standpoint the requirements of the law for the transfer of an intangible right may appropriately be compared with those for the transmission of property by will. The law requires elaborate formality for such transmission. This sometimes defeats reasonable and proper intentions of a deceased owner, but the protection against fraud and the certainty given by the required formalities have been thought a sufficient answer to that objection. Is it worth while to increase the number of alleged donees who assert after the death of an owner that a gift has been made, when nobody can contradict the assertion and the donee's evidence must be taken as true? In view of the magnitude of possible interests, I think it is not wise. The cases are common enough where a person in charge of one at the point of death truly or falsely asserts that a gift has been made to him, and produces something easily obtainable to establish the assertion. It seems better to confine protection to cases where the document in question is one that is ordinarily kept in a safe deposit box, and is of the sort that owners regard not simply as evidence, but as the property itself, or its equivalent. I agree with the remarks of Lord Chancellor Ashbourne:

"Speaking for myself, I do not look with any particular favor on these death-bed gifts. The current of authority shows that Courts require claims resting on such gifts to be closely scrutinized, and to be made out clearly and satisfactorily, without extending the class of things which have already been held capable of transmission *mortis causa*."⁵⁴

I find fault not only with any extension of the rule of the *Restatement* but also with the particular rule advocated by Mr. Bruton. First, I object to it because of its uncertainty. Written contracts may be of various degrees of brevity, and, in cases under the Statute of Frauds, very abbreviated writings indeed have been held to fulfil the requirements which Mr. Bruton thinks sufficient.

Further, I do not find that the cases upon which Mr. Bruton relies clearly lay down any such rule. A rule is, indeed, suggested in some cases (and in my opinion this has caused the subject to be more uncertain than it should be) that "if

⁵⁴ Duckworth v. Lee, *supra* note 28.

such delivery is made as the subject matter admits of" the gift will be protected. If carried to its logical limit this means that if the subject matter admits of no delivery, no delivery is necessary. Probably no court would go so far; but how far a court which adopted a rule such as I have quoted would go is left in fog. No doubt this is much worse than what Mr. Bruton suggests, but both rules are open in varying degrees to the same objection.

Furthermore, I emphatically disagree with this statement of Mr. Bruton: "The chief value of the requirement of delivery is the fact that the act of transferring the property is evidence of the donor's intent and, perhaps, what is more important, serves to impress upon the donor the significance of his act." I agree that evidence of the donor's intent is important, without thinking, however, that possession of a written contract is very satisfactory evidence of that intent, especially if, as is usually the case, the donor is dead. But at least one vitally important effect of delivery is omitted and that is the dominion which Lord Hardwicke emphasized and which so frequently has been referred to since. Mr. Bruton points out that in litigation against the debtor any written contract sought to be enforced is as truly best evidence as the documents included in the rule of the *Restatement*. But all assigned claims are not litigated, nor is it desirable that they should be. On the contrary, it is desirable that the possession of the document should carry with it without litigation the implication that the possessor is the person entitled to receive performance, and, what is more important, that nobody without that document is entitled to receive performance.

The suggestion is made that possession is of diminishing importance in the law. I believe this to be a mistake. The early identification of possession or seisin with ownership has of course long since passed away, but it does not follow that possession is not still a vital fact; and in recent years the tendency of legislation has shown a distinct disposition to emphasize the importance of possession as evidence of ownership. Negotiability enlarges the rights which an innocent purchaser of a negotiable instrument acquires by possession from one whose title is defective.* The common law recognized as possible types of negotiable instruments only bills of exchange and promissory notes, though what was vaguely called quasi-negotiability was attributed to warehouse receipts and bills of lading. At the present time in almost all of the United States warehouse receipts running to order are negotiable. The same is true throughout the United States of all interstate bills of lading running to order and, in many states, of similar intrastate bills. Certificates of stock have also been made negotiable by statute

in many states. Under these documents the ownership of an enormous portion of the personal property of the country is now in such form as to be freely negotiable. Factors' Acts and Bulk Sales Acts afford further illustration of the importance attached to possession as indicative of ownership. Similarly statutes requiring the recording of conditional sales, most of which have been enacted in recent years for the protection of creditors and purchasers from a conditional buyer, present still another instance of growing emphasis on the importance of the control or dominion that possession gives.

In spite of occasional inconsistent decisions, there seems no disposition in modern law to limit the necessity of delivery of chattel property in order to create a valid gift. Moreover, not only in regard to gifts but even in the case of sales of such property, the dominion, which possession gives, is vital. It is so important that an actual sale without delivery is in most states presumptively fraudulent, and in a few states conclusively fraudulent. By the provisions of the Sales Act it is provided (and this was probably generally law in the United States aside from statute) that a second innocent buyer with delivery prevails over one to whom the seller has previously sold the goods without delivery. The first buyer may have paid the full price, but the second buyer prevails. This doubtless represents also the early English law, when seisin and title were synonymous; and though subsequently the English court expressed a contrary opinion,⁵⁵ the English Parliament by the Factors' Act of 1889⁵⁶ reverted to the old position.

The provision of the French Code, *en fait de meubles, la possession vaut titre*,⁵⁷ though limited by a provision that one from whom goods have been stolen, or who has lost them, has a right to reclaim for three years, shows that the English and American conception of the importance of possession and of the dominion that possession gives is not peculiar to the Common Law.

It can hardly be denied that the decisions upholding gifts of bonds, deeds, bills and notes, certificates of stock, savings bank books, policies of insurance, have relied mainly on the fact that possession of the documents gives control of the choses in action of which they are evidence. The obligor can and will demand surrender of the document before making payment. Possession of it has the same practical effect as possession of ordinary chattel property.

The question under consideration is important not only as between the donor or his representatives and the donee. Assignors sometimes in fraud of the first assignee make a second

⁵⁵ See *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51 (1866).

⁵⁶ 52 & 53 Vict. c. 45 (1889).

⁵⁷ Art. 2279.

assignment. It is not essential to the effective assignment of a right under an ordinary written contract that the assignee shall possess the writing. The debtor is justified by business usage in paying without production of the contract. Even without any writing the owner of a right may give another person a power to collect a claim and to keep the money if collected. Assume such a gift of a right under an informal contract, and later a gift of the writing, after which the former donee in good faith collects. Can he not keep what he has obtained? I should say that he could. I do not know that Mr. Bruton's rule suggests any answer. Again suppose a first assignment is made by gift of an ordinary written contract, and a second assignment of it is made by a written assignment for value to an innocent purchaser. If the gift is completely effective the first assignee prevails. I should prefer the second. Or assume that the first assignee takes for value but does not get the informal writing embodying the assigned agreement. Does he lose his right when a second assignment is made to a purchaser for value in good faith who does acquire the writing? Such problems as these admit, in my opinion, of no satisfactory answer when attention is focussed merely on the requirement of evidence that the donor intended to make a gift. If that were enough, a statement before witnesses ought to serve as well as delivery. The embarrassment of answering such questions and the possible frauds that the questions suggest are reduced to a minimum if the effectiveness of a gift by mere delivery of a document is admitted only when the document is of a character that is essential according to law or business usage for the collection of the claim.