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GIFTS OF BANK DEPOSITS

HAROLD C. HAVIGHURST*

Although the legal problems in connection with gifts of bank deposits have much in common with those involving gifts of other kinds of property, it would seem that the special characteristics of such deposits and the independent development of devices for their gratuitous transfer justify a separate treatment.

The usual case involves the attempt to make a disposal of the deposit with death in mind. The reasons for making a gift rather than a will are many. The donor suddenly confronted with the possibility of death and without legal advice may take the most obvious course to accomplish his purpose. If he has time for deliberation, he may not wish to have his property pass by will because of a prejudice against wills, courts and lawyers, or a desire to avoid the expenses of administration.¹ He may feel that a will becomes known to the public whereas he desires secrecy in order to avoid the disclosure of questionable relationships with the beneficiary, to prevent dissatisfaction on the part of other aspirants for bounty who receive a small share, or for other reasons.² There is also the possibility that his purpose is to defeat the right of a spouse to a share in the property which cannot be taken away by will because of the election generally given.³ Infrequently, as far as bank deposits are concerned, there is the desire to avoid inheritance taxation.

The recited circumstances show that sometimes it is not improper to characterize such a gift as "the poor man's will". Doubtless the sympathetic currents generated by the idea behind the phrase have had their effect on courts and legislatures and are partially responsible for the disordered state of legal theory in this field. Further difficulty and confusion is also traceable to the fact that, in the words of Sir William Holdsworth, "a branch of the law which comes at the meeting place of

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¹ Cases are very numerous that disclose these purposes. A good example is *Howard v. Dingley*, 122 Me. 5, 118 Atl. 592 (1922), recounting the testimony of a witness, "He had made a will, and then he thought that would have to be administered on, so much red tape gone through: he decided to have them put into bank books."

² See *Williams v. Brooklyn Savings Bank*, 51 App. Div. 332, 64 N. Y. Supp. 1021 (2d Dept. 1900).

³ See *Schmitt v. Schmitt*, 39 Ohio App. 219, 177 N. E. 478 (1928), where the court says, "Having in mind the unhappy relations between himself and his wife, . . . he set his wits to working as to whether or not he could devise some way in which to deprive her of what the law would allow her as his widow."

the law of property and the law of obligation can never be anything but difficult to formulate and apply".⁴

Savings accounts are more frequently the subject of gifts than are checking accounts.⁵ Nevertheless gifts of deposits of the latter type are not unknown and most of the problems involved are common to both. A few distinctions based upon the nature of the deposit will appear in the course of the discussion. Where a specific problem relates to only one type of deposit, that will be pointed out.

It is to be noted that in some instances a transaction partaking of the nature of a gift may not be classed as such, if a consideration for the transfer moving from the claimant is discoverable. Services rendered by the recipient often provides the basis for such a finding.⁶ However it will usually be impossible to invoke the doctrine without more laboring with the facts than a court is willing to undertake.⁷ The claimant must then rely on the theory of an executed gift, a declaration of trust or a contract between the alleged donor and the bank for his benefit.

Whatever the theory, it is necessary to show that the alleged donor intended that the claimant should have the beneficial interest in the deposit. In addition it must appear that legal requirements as to form have been satisfied or for some reason dispensed with. Since the subject of the gift is intangible the usual requirement of delivery of the property itself cannot be complied with. It may be possible, however, to find an equivalent of delivery or to establish a trust or a contract. Finally the statute of wills must be considered.

I. INTENT

The important question of intent must be taken into account at every stage of the discussion, but a few general observations on this subject may be made at the outset.

⁴7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1925) 544.

⁵The following observations of the court in *In re Wilkins' Will*, 131 Misc. 188, 226 N. Y. Supp. 415 (Surr. Ct. 1928), are of interest: "A savings bank is entirely different from a commercial bank in its foundation, its place in the social structure, and in its method of business. A savings bank is an institution for the accumulation of small sums, chiefly the savings of the poorer classes. . . . The chief problem of a savings bank is the safe-keeping of funds. . . . When deposits are made in checking accounts in commercial banks, there is no thought that it is there as the poor man's will."

⁶*Gostina v. Whitham*, 148 Wash. 72, 268 Pac. 132 (1928). In one case the extension of an agreement to marry was deemed a consideration. *Whitehouse v. Whitehouse*, 90 Me. 468, 38 Atl. 374 (1897) (donor and donee had already been engaged for seventeen years). In *Bainbridge v. Hoes*, 163 App. Div. 870, 149 N. Y. Supp. 20 (2d Dept. 1914), the donor sent his fiancée a check just prior to suicide. The court in denying recovery on the theory of a gift suggests that there might be a remedy upon a contract.

⁷Services rendered by wife are regarded as her duty. Consequently it may be impossible to regard a wife's services as consideration. See *Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381 (1910); *Vercher v. Roy*, 171 La. 524, 131 So. 658 (1930).

The intent issue is one of peculiar difficulty due to the fact that it so frequently happens that persons without any design to benefit another often make use of a device having the appearance of a gift to accomplish some other purpose. Thus property may be placed under the ostensible ownership of another to facilitate the securing of expense money for travel,⁸ or during infirmity,⁹ to conceal the fact of ownership from others,¹⁰ to avoid the inconvenience of personal appearance with the bank book to effect a withdrawal,¹¹ to maintain amounts in a single savings bank in excess of the maximum amount permitted by statute or by-laws of the bank,¹² or to obtain a higher rate of interest where the by-laws or statutes provide for interest only on accounts of limited amounts, or which graduate the interest rate inversely to the amount deposited.¹³ The transfer of property for the purpose of defeating creditors would also fall within this classification. These purposes may often be mingled with the intention to make a gift either at once or in the future.

The determination of the issue requires a rather broad consideration of all the circumstances surrounding the transaction. Declarations of the alleged donor may not be testified to by the claimant if the donor is dead, as is usually the case, by virtue of the rule disqualifying a party from testifying against the estate of a deceased person.¹⁴ Such evidence given by third persons is, however, admissible.¹⁵ Important also are the state of affection between donor and claimant, the worthiness of the latter and services performed although under circumstances negating a contractual relationship.¹⁶ The comparative need of the beneficiaries

⁸ *Bradford v. Eastman*, 229 Mass. 499, 118 N. E. 879 (1918).

⁹ *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626 (1892).

¹⁰ *Eaton v. Blood*, 201 Iowa 834, 208 N. W. 508 (1926).

¹¹ *Bender v. Cleveland Trust Co.*, 123 Ohio St. 588, 176 N. E. 452 (1931).

¹² *Schick v. Grote*, 42 N. J. Eq. 352, 7 Atl. 852. (Prerog. Ct. 1886).

¹³ *Cleveland v. Hampden Savings Bank*, 182 Mass. 110, 65 N. E. 27 (1902).

Most of the motives here mentioned are enumerated by Andrews, J., in *Beaver v. Beaver*, 117 N. Y. 421, 430-31, 22 N. E. 940, 942 (1889).

¹⁴ 1 WIGMORE, EVIDENCE (2d. ed. 1923) §488; *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929); *Flanagan v. Nash*, 185 Pa. 41, 39 Atl. 818 (1898). If the donor is living he may testify as to his intent and the claimant may also testify as to his declarations. *Frank v. Heiman*, 302 Mo. 334, 258 S. W. 1000 (1924); *People's Savings Bank v. Webb*, 21 R. I. 218, 42 Atl. 874 (1899); Declarations of the depositor made after the time of the alleged gift are not admissible. 2 WIGMORE, EVIDENCE (2d. ed. 1923) §1085; *Tierney v. Fitzpatrick*, 195 N. Y. 433, 88 N. E. 750 (1909).

¹⁵ Such evidence was relied upon in *Ladner v. Ladner*, 128 Miss. 75, 90 So. 593 (1922) and *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1903). It is sometimes said that intent and delivery must be proved by clear and convincing evidence. *Denigan v. Hibernia Savings & Loan Society*, 127 Cal. 137, 59 Pac. 389 (1899); *First National Bank of Lyndhurst v. Rutherford Trust Co.*, 109 N. J. Eq. 265, 157 Atl. 142 (Ct. Ch. 1931).

¹⁶ *Laing v. Durand*, 84 N. J. Eq. 404, 93 Atl. 884 (Ct. Ch. 1915); *Saba v. Cleveland Trust Co.*, 23 Ohio App. 163, 154 N. E. 799 (1926).

of the estate and the claimant undoubtedly has some bearing on the determination, and is conceivably relevant to the issue apart from its appeal to sympathy.¹⁷

The most valuable evidence to defeat intent is that showing a purpose other than that of benefiting the claimant. In the absence of such evidence if other circumstances indicate that the claimant is undeserving the party seeking to defeat the gift may urge fraud, undue influence or incapacity.¹⁸ Under these issues which are really phases of intent, much of the same evidence is relevant. In addition the mental condition of the alleged donor becomes the subject of inquiry.

The form of the transaction itself affords some indication of intent. This often receives recognition in rules as to *prima facie* evidence and presumption. There is little indication apart from legislation, however, of a policy such as that which lies behind the parol evidence rule that might lead a court to make certain acts conclusive.¹⁹ Although intent may be defeated if the requisite form is lacking, no amount of form can prevent the defeat of the gift if intent is lacking. In other words the issue has been kept on a subjective basis.

II. FORMAL REQUIREMENTS

The acts of the alleged donor which have been relied upon to meet requirements as to form are (1) delivery of a symbol of the deposit, (2) assignment, (3) deposit in the name of claimant, (4) deposit in trust for the claimant, (5) deposit in the name of the alleged donor and claimant.²⁰

Delivery of a Symbol of the Deposit.

Delivery is the time-honored requirement for a complete gift. Based upon a popular conception, it has received judicial approval both because it often serves an administrative purpose and because it gives to a benevolently minded person a *locus penitentiae* to which he is deemed entitled. The first is more important after the donor is dead, the second

¹⁷ Estate of Belgard, 202 Iowa 1356, 212 N. W. 116 (1927). For a complete discussion of the types of evidence admissible to show intention to create a trust, see Bogert, *The Creation of Trusts by Means of Bank Deposits* (1916) 1 CORN. L. Q. 159. Most of the discussion is applicable to the question of intention generally.

¹⁸ Lovejoy v. Hart, 30 Cal. App. 664, 159 Pac. 170 (1916); Walso v. Latterner, 143 Minn. 364, 173 N. W. 711 (1919); Conners v. Murphy, 100 N. J. Eq. 280, 134 Atl. 681 (1926); Lefurgy v. Lefurgy, 183 App. Div. 502, 169 N. Y. Supp. 970 (2d. Dept. 1918).

¹⁹ It has been held, however, that if the depositor and claimant execute an agreement in a formal manner establishing joint ownership, parol evidence of a different intent is inadmissible. Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647 (1915).

²⁰ A hybrid of (4) and (5) is in use in Maryland—a deposit in the name of the depositor, in trust for himself and another jointly. See Milholland v. Whalen, 89 Md. 212, 43 Atl. 43 (1899); Foschia v. Foschia, 158 Md. 69, 148 Atl. 121 (1930). See *infra* note 82.

while he lives. The application of the doctrine and the exceptions to it have been affected by these two basic considerations.²¹

The delivery of a symbol of the deposit is the method used ordinarily in an emergency where the depositor is acting without legal advice. A common instance is the delivery of a pass book of a savings account. Such a pass book provides a presumably accurate statement of the condition of the account; all transactions are entered thereon; savings banks require its presentation for deposits and withdrawals; it is regarded as a valuable instrument and does not readily pass into the hands of another without the owner's knowledge. These are the characteristics that make it a symbol of control over the fund and have led to the general rule that the delivery of such a pass book with the proper intent completes the gift.²²

In dealing with checking accounts, we find that the courts have taken a different view. The delivery of the deposit book for such an account is not sufficient to meet the formal requirements for a gift.²³ This distinction is prompted by the fact that the deposit book for a checking account is not regarded as of value, and care is not ordinarily taken to keep it in a safe place. Although the book is lost or in the possession of another, the depositor's right to withdraw money is not affected. The distinction is thus explainable and based on a sound policy. Naturally it has sometimes served to defeat a worthy claimant and the donor's intention as shown by reliable evidence. In *Goodson v. Liles*²⁴ the donor in the same transaction delivered a savings bank book and a deposit book for a checking account to the claimant, with unquestionably the same intent. The court, nevertheless, upheld the gift of the savings deposit and not the other. Also in *Szabo v. Speckman*²⁵ the claimant

²¹ See Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (1926) 21 ILL. L. REV. 341, 457, 568.

²² 1 WILLISTON, CONTRACTS (1920) §439, and cases cited. A recent case is *Brooks v. Mitchell*, 163 Md. 1, 161 Atl. 261 (1932). The fact that the bank has a by-law requiring a draft or power of attorney in addition to the pass book to accompany withdrawals has generally been held not to affect the validity of a gift by delivery of the pass book alone. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627 (1891). Cf. the question of the effect of the delivery of a negotiable instrument without indorsement, *infra* notes 27 and 28. It may also be noted that symbolic delivery has been extended to include the delivery of a key to the box where the pass book is kept. *Snidow v. Brotherton*, 140 Va. 187, 124 S. E. 182 (1924). A note to this case in 40 A. L. R. 1249 reviews the cases on the subject of gifts of savings accounts by delivery of the pass book.

²³ *Jones v. Weakley*, 99 Ala. 441, 12 So. 420 (1892); *Szabo v. Speckman*, 73 Fla. 374, 74 So. 411 (1917); *Simpkins v. Old Colony Trust Co.*, 254 Mass. 576, 151 N. E. 87 (1926); *Pace v. Pace*, 107 Miss. 292, 65 So. 273 (1914); *Appeal of Walsh*, 122 Pa. 177, 15 Atl. 470 (1888); *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389 (1892).

²⁴ 209 Ala. 335, 96 So. 262 (1923).

²⁵ 73 Fla. 374, 74 So. 411 (1917), cited note 23, *supra*.

to whom the deposit book had been delivered had a good reason to expect a gratuity because of the donor's affection and the services rendered during his illness. The intent was clear, yet twenty-seven distant relatives were allowed to divide the property.

The delivery of a certificate of deposit, if properly indorsed, of course completes the gift.²⁶ Even if there is no indorsement the decisions are quite uniform to the effect that such delivery is sufficient.²⁷ This is in accord with the general rule applicable to negotiable instruments.²⁸

When the donor gives his own check a more difficult problem is presented. From the standpoint of guarding against fraud the delivery of a check is fully as satisfactory as the other methods of symbolic delivery mentioned. Indeed a check payable to the donee and signed by the donor affords a far greater assurance of the fact that the donor intended to make a gift.²⁹ To uphold it would be perfectly in accord with lay notions, and there are numerous cases where this method has been used. Here again we are dealing with checking accounts. But this fact can hardly account for the view generally held that a valid gift cannot be made by the mere delivery of a check.³⁰ This is almost entirely the result of the operation of the "legal mind".³¹ The requirement of consideration provides a defense against an action on a promissory note delivered as a gift. Since payment on a check may be refused by the bank and the payee's sole recourse is against the drawer, it may appear to be indistinguishable. That it should seem like the delivery of some-

²⁶ Cases are collected in Note (1926) 40 A. L. R. 508, 509.

²⁷ *Mellor v. Bank of Willows*, 173 Cal. 454, 160 Pac. 567 (1916); *Nelson v. Olson*, 108 Minn. 109, 121 N. W. 609 (1909); *Rosenau v. Merchants' National Bank*, 56 N. D. 123, 216 N. W. 335 (1927). See also *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500 (1883).

²⁸ *Paris v. Stone*, 14 Pick. 198 (Mass. 1833); *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157 (Ct. Ch. 1892). Section 49 of the Negotiable Instruments Law does not cover this question, being applicable by its terms only to transfers for value. A very few cases hold that under this section a gratuitous transferee secures no rights. See BRANNAN, NEGOTIABLE INSTRUMENT LAW ANNOTATED (5th ed. 1932) 472-473, where the position is taken that this is erroneous, citing for the correct view in accord with the cases cited above, *Cosmopolitan Trust Co. v. Leonard Watch Co.*, 249 Mass. 14, 143 N. E. 827 (1924). It is generally held, however, that mere proof of possession of the undorsed instrument does not make out a *prima facie* case for the gift. See *Rothwell v. Taylor*, 303 Ill. 226, 135 N. E. 419 (1922).

²⁹ Cf. the language of the court in *Campbell's Estate*, 274 Pa. 546, 552, 118 Atl. 547, 548 (1922), where the court, after speaking of a gift by the indorsement of a check, says, "A stronger presumption arises from the drawing of a check to the order of one who sets up a gift of it."

³⁰ *In re Knapp*, 197 Iowa 166, 197 N. W. 22 (1924); *Guild v. Eastern Trust & Banking Co.*, 122 Me. 514, 121 Atl. 13 (1923); *In re Swinburne*, [1926] 1 Ch. 38. Other cases are collected in Notes (1922) 20 A. L. R. 177, and (1926) 44 A. L. R. 625.

³¹ For a very penetrating discourse on this sort of operation see Amos, *The Legal Mind* (1933) 49 L. Q. Rev. 27.

thing more substantial is due to the existence of the account with the bank on which the check is drawn. But if no rights are created in the drawer's claim against the bank, this is theoretically immaterial. For general commercial purposes it has seemed desirable that no such rights should be created and the Negotiable Instruments Law so provides.³² Thus policies having no relation to the question of gifts have served to bring about the result that the gift is not upheld. That the delivery of the check should operate as an assignment of the chose in action or a part of it where it is intended as a gift has been the view of a few courts that have broken away from the shackles of a theory developed for another purpose.³³ That a right should be created in the chose in action for some purposes and not for others is perhaps not unthinkable.

When the gift is made in immediate expectation of death it is said to be *causa mortis*. There is of course a striking difference in the effect of such a gift and one *inter vivos*, if the donor recovers. Most cases that are litigated, however, are those where the donor has died and the issues are not materially different in the two situations.³⁴ It may be noted that occasionally the requirements are more strict where the gift is found to be *causa mortis*. A statute in New Hampshire requires two witnesses to the gift.³⁵ In *Drew v. Hagerty*³⁶ the court indicates that it might allow a gift *inter vivos* to stand on facts that would not support a gift *causa mortis*, since long acquiescence in the donee's possession gives greater assurance of a bona fide transaction.³⁷

³² §189, applied in this situation in *Burrows v. Burrows*, 240 Mass. 485, 137 N. E. 923 (1922).

³³ *Carter v. Greenway*, 152 Ark. 339, 238 S. W. 65 (1922); *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913); *May v. Jones*, 87 Iowa, 188, 54 N. W. 231 (1893); *Wagatt v. First National Bank*, 117 Minn. 9, 134 N. W. 224 (1912); *Phinney v. State*, 36 Wash. 236, 78 Pac. 927 (1904). In *Wagatt v. First National Bank*, *supra*, the court also uses the language of a contract for the benefit of a third person, the idea being apparently that the promise of the bank to the donor to pay checks drawn by him could be enforced by the donee. This rationalization is advocated in a Note (1926) 26 COL. L. REV. 459. Some courts have held that a check for the entire amount of the deposit could be enforced. *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269 (1907) (question of the effect of check for part is left open); *Taylor's Estate*, 154 Pa. 183, 25 Atl. 1061 (1893). The distinction between a check for the entire deposit and one for part of it does not seem sound. It has been rejected in a number of cases. *Burrows v. Burrows*, 240 Mass. 485, 137 N. E. 923 (1922); *Simmons v. Cincinnati Savings Society*, 31 Ohio St. 457 (1877). In a Pennsylvania case later than *Taylor's Estate*, *supra*, the court in upholding a gift by means of a check on a savings account for the entire balance did not stress this fact as important. *Campbell's Estate*, 274 Pa. 546, 118 Atl. 547 (1922).

Of course in any jurisdiction if the check is cashed the gift is complete.

³⁴ See *Mechem*, *supra* note 21, at 357.

³⁵ N. H. Pub. Laws (1926) c. 297, §17.

³⁶ 81 Me. 231, 17 Atl. 63 (1889).

³⁷ The question was whether a declaration by the donor while the pass book was in the donee's possession would satisfy the delivery requirement. The language in *Appeal of Walsh*, 122 Pa. 177, 15 Atl. 470 (1888) and in the dissenting opinion in *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389 (1892) indicates a similar policy. In gen-

If the symbol of the deposit is delivered to a third person for the donee the result is made to depend upon whether such person is regarded as a trustee or as an agent of the donor. The differentiating criteria are, however, somewhat vague, and the general impression created by the case is apt to determine the label chosen.³⁸

In the absence of any delivery, the claimant has a remote chance on the theory of a trust. Where the intent has been clear and the equities strong, a court has been known to hold for the claimant on such a theory, although there were no declarations of intent other than the frequent one that the amount on deposit belonged to the claimant.³⁹ If declarations can be found to the effect that the depositor was holding the symbol of the deposit for the claimant, that would probably be of some help on this theory. In most instances, however, courts have refused to torture an imperfect gift into a declaration of trust.⁴⁰

Oral and Written Assignments

In the case of a savings account where the pass book is the recognized symbol of the deposit, it is obvious that an assignment without delivery could not be effective against a subsequent bona fide purchaser of the account to whom the book was delivered. Nor is it probable that it could make the gift irrevocable any more than a declaration of gift in the case of a chattel, since choses in action represented by symbols are treated as chattels. In jurisdictions where the seal is still recognized an assignment under seal might be regarded as a deed of gift, the delivery of which would make the assignment irrevocable.⁴¹ This could also apply to checking accounts. But no cases have been found where the issue was presented.

It is true that a claim of a gift based on a gratuitous oral assignment presents administrative problems that are more difficult than where there is a delivery of a symbol. They are the same from this standpoint as mere oral expressions of donative intent. That such assignments are

eral, however, the requirements for these two classes of gifts are said to be the same.

³⁸ *Green v. Hynes*, 42 Cal. App. 198, 183 Pac. 568 (1919) (agent); *Spellacy v. Dauterman*, 122 Cal. App. 416, 10 Pac. (2d) 114 (1932) (trustee).

³⁹ *Harris Banking Co. v. Miller*, 190 Mo. 640, 89 S. W. 629 (1905). In *Citizen's National Bank v. McKenna*, 168 Mo. App. 254, 153 S. W. 521 (1913), this case was distinguished on the ground that in the *Miller Case* there was expressed the intention that the amount on deposit belonged to the claimant, whereas in the *McKenna Case* the intention was that the claimant should have it on depositor's death. This may be the distinction between testamentary and non-testamentary intent, but not the distinction between a gift and a trust. Although the word "trust" need not necessarily be used, presumably there ought to be the intent shown to act in a fiduciary capacity.

⁴⁰ *Eschen v. Steers*, 10 F. (2d) 739 (C. C. A. 8th, 1926), and cases there cited; *Pennell v. Ennis*, 126 Mo. App. 355, 103 S. W. 147 (1907) (check delivered).

⁴¹ See 1 WILLISTON, CONTRACTS (1920) §440.

revocable has been the general rule, death constituting revocation.⁴² Presumably if the bank received notice and agreed, a novation might be found.⁴³

A power of attorney to draw on the account, although in theory in the same class as assignments⁴⁴ is more obviously no gift, as ordinarily the depositor would expect to have the right to revoke. Generally such a power of attorney is of course revocable⁴⁵ and where this is the arrangement, the intent of the donor to reserve no control would seem to be immaterial. An exception is the case of *Murphy v. Bordwell*.⁴⁶ It appeared there, however, that the cashier, in having the donor sign the power of attorney did not carry out her expressed wish which was to transfer the entire account to the donee. The decision is apparently prompted by equitable considerations arising out of this mistake.

An assignment written and signed, and delivered by the depositor, might well be upheld with little fear of fraud. Yet on strict theory if an assignment is revocable it apparently makes no difference whether it is written or oral. However, it is possible that there is a tendency in the direction of upholding gratuitous assignments in writing.⁴⁷ Gifts of bank deposits by this method are seldom attempted.

Deposit in the Name of Claimant

On its face, a deposit in the name of the claimant would seem to be sufficient to complete the gift so that there could be no question about the validity of the claim whether or not the donee has knowledge of the deposit. The bank by accepting the deposit in this form might be regarded as promising to pay to the person in whose name the account

⁴² This is the rule generally as to choses in action. *Adams v. Merced Stone Co.*, 176 Cal. 415, 178 Pac. 498 (1917); *Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803 (Sup. Ct. 1893); *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325 (1898); *Milroy v. Lord*, 4 D. G. F. & J. 264 (Ch. 1862). In the New Jersey and North Carolina cases individuals seemed to be acting in the capacity of bankers. A case concerned with bank deposits is *In re Sieracki's Estate*, 132 Misc. 407, 229 N. Y. Supp. 247 (Surr. Ct. 1928).

⁴³ In *Ogdon v. Washington National Bank*, 82 Ind. App. 187, 145 N. E. 514 (1924), the court says that a direction by the donor to the debtor to pay to the donee, assented to by the debtor, constitutes "delivery."

⁴⁴ In view of the historical development of assignments as powers of attorney. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1925) 515-544.

⁴⁵ See *O'Shea v. Sicotte*, 52 Cal. App. 331, 198 Pac. 812 (1921).

⁴⁶ 83 Minn. 54, 85 N. W. 915 (1901).

⁴⁷ The A. L. I. Restatement of the Law of Contracts, §158 (1) (a), provides that an irrevocable assignment of a right may be made by "a writing either under seal or of such a nature as to be capable of transferring title to a chattel without delivery thereof and without consideration". In the explanatory notes to the official draft of this restatement two cases are cited suggesting the view that a written assignment is sufficient. *Shepard v. Shepard*, 164 Mich. 183, 200, 129 N. W. 201 (1910); *Parker v. Mott*, 181 N. C. 435, 107 S. E. 500 (1921). See also *Adams v. Merced Stone Co.*, 176 Cal. 415, 178 Pac. 498 (1917); *Mardis v. Steen*, 293 Pa. 13, 141 Atl. 629 (1928). In England gratuitous assignments in writing are irrevocable under the Judicature Act. See *In re Westerton* [1919] 2 Ch. 104.

appears, so that the transaction could be upheld as a contract for the benefit of a third person. Such, however, is not the view ordinarily taken.⁴⁸ The name seems to be thought of as a mere form, the chose in action represented by the account still being the property of the depositor. In order to effect its transfer the requisites of a valid gift must appear.

Moreover there are several reasons why the problem is not so simple. Very frequently such deposits are for the purpose of circumventing bank rules as to maximum deposits and others above referred to. In many instances the intention of the depositor is to retain control over the deposit. In *Beaver v. Beaver*⁴⁹ the court says, "To infer a gift from the form of the deposit alone, would in a great majority of cases and especially when the deposit was of any considerable amount impute an intention which never existed and defeat the real purpose of the depositor."

These considerations could readily have been taken care of, it would seem, by placing the burden on the claimant to show a donative intent apart from the form of the deposit. There are some holdings to this effect.⁵⁰ Without delivery of the pass book the gift has been upheld either on the ground that the deposit in the claimant's name dispenses with the requirement⁵¹ or that it is indicative of a trust.⁵² But most courts have not been content with this. They have chosen to regard the deposit alone as insufficient to complete the gift even if accompanied by the proper intent.⁵³ That such a deposit should not dispense with the

⁴⁸ In *Howard v. Windham County Savings Bank*, 40 Vt. 597 (1868), there is a suggestion of this doctrine in the words at 599, "The transaction (between donor and bank) constituted an agreement, a legal privity between the bank and . . . (donee), by force of which the bank became accountable to her."

⁴⁹ 117 N. Y. 421, 431, 22 N. E. 940, 942 (1889).

⁵⁰ See *Fernald v. Fernald*, 80 N. H. 75, 113 Atl. 223 (1921), where it is said, "A bank deposit, evidenced by a deposit book in the possession and control of the depositor during his life, does not pass after his death to one in whose name it was deposited, as a gift or trust, unless it is found that such was the intention of the depositor." An earlier New Hampshire case had held that although there might be a resulting trust for the depositor, this could be rebutted. *Blasdel v. Locke*, 52 N. H. 238 (1872). See also as to the resulting trust doctrine, *Northrop v. Hale*, 73 Me. 66 (1881).

⁵¹ *D. M. Read Co. v. American Bank & Trust Co.*, 110 Conn. 461, 148 Atl. 130 (1930); *McKinnen v. First National Bank*, 77 Fla. 777, 82 So. 748 (1919); *Succession of Zacharie*, 119 La. 150, 43 So. 988 (1907); *Gardner v. Merritt*, 32 Md. 78 (1870); *Supple v. Suffolk Savings Bank*, 198 Mass. 393, 84 N. E. 432 (1908); *Howard v. Windham County Savings Bank*, 40 Vt. 597 (1868).

⁵² *Smith v. Ossipee Savings Bank*, 64 N. H. 228, 9 Atl. 792 (1887); *Boyle v. Dinsdale*, 45 Utah 112, 143 Pac. 136 (1914).

⁵³ The holding to this effect is more clear-cut in the second report of *Beaver v. Beaver*, 137 N. Y. 59, 32 N. E. 998 (1893). Among the cases supporting this view are *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119 (1892); *Getchell v. Biddeford Savings Bank*, 94 Me. 452, 47 Atl. 895 (1900); *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545 (1886); *Sawyer v. Mabus*, 107 S. C. 369, 92 S. E. 1029 (1917). In the *Branch Case* there is a suggestion that if the donor died without revoking, the gift might be good. The discussion in *Walso v. Latterner*, 140 Minn. 455, 168 N. W. 353 (1918), indicates that a doctrine similar to that of the tentative trust

delivery requirement is difficult to understand. Certainly it seems to give fully as much assurance that the alleged donee has not built his case on perjured testimony, as delivery of a bank book or certificate of deposit. Indeed, testimony as to the delivery of a bank book is much more readily fabricated since it is even possible to prove delivery when death finds the donor in possession.⁵⁴ But since, when the book remains in the donor's hands, he is permitted under banking rules to draw on the fund, or at least may prevent the donee from drawing, the "control and dominion" idea points to incompleteness. In seeking the explanation of legal rules, moreover, we should not neglect the fortuitous. The apparent force of the words, "dominion and control," to which we have alluded, may be due to the chance circumstances of the case where a court first was presented with the question. *Beaver v. Beaver*,⁵⁵ a very influential case in the establishment of the rule, happened to be one where the alleged donee predeceased the donor, his father, leaving a childless widow. The court may not have considered her an object of the donor's bounty, in competition with those of his own blood.

Some courts that do not require delivery of the pass book, have established the independent requirement that the donee must know of the deposit and accept it.⁵⁶ This would not be a requirement if the doctrine of a contract for the benefit of a third person were used, nor in the case of a gift by delivery to a third person is knowledge by the donee necessary, since it is usually said that acceptance is presumed. The fact of notice is, however, very material in determining the depositor's actual purpose. It is not surprising to find that it is sometimes raised to the dignity of an indispensable requirement.

It is to be noted that the rule requiring delivery of the pass book has some exceptions when applied to deposits in the name of the claimant. It has been held that if the donee is an infant, delivery is

(see *infra* note 66) might be applied in Minnesota to deposits in the name of another. In *Peters v. Peters*, 224 Ky. 493, 6 S. W. (2d) 499 (1928), the court held that the establishment of a commercial account in the name of the donor was not sufficient, although there was no symbol of the deposit to deliver. For other cases see Note (1929) 59 A. L. R. 975.

⁵⁴ "Redelivery to the donor for safe-keeping does not destroy the validity of the gift." *McKenna v. McKenna*, 260 Mass. 481, 157 N. E. 517 (1927). See also *Sanders v. Jarvis*, 221 Ill. App. 550 (1921).

⁵⁵ *Supra* notes 49 and 53.

⁵⁶ *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925 (1885); *Supple v. Suffolk Savings Bank*, 198 Mass. 393, 84 N. E. 432 (1908); *Smith v. Ossipee Savings Bank*, 64 N. H. 228, 9 Atl. 792 (1887). See also *Meriden Trust & Safe Deposit Co. v. Miller*, 88 Conn. 157, 90 Atl. 228 (1914). In the case of an infant donee acceptance has been held unnecessary; although it is indicated that otherwise it would be required. *McKinnon v. First National Bank*, 77 Fla. 777, 82 So. 748 (1919).

unnecessary.⁵⁷ Or delivery may not be required if the donor can be said to hold the book as trustee for the donee.⁵⁸

Deposit in Trust for Claimant

As a matter of substance there seems no reason to distinguish between a deposit in the name of another and one in trust for another. Some courts treat the two forms the same. In general this is true in jurisdictions where delivery of a symbol is not required if the deposit is in the name of another.⁵⁹ In Massachusetts in both instances notice to the beneficiary is made the test.⁶⁰

But if there is no difference in fact between the two forms of deposit there is a difference from the standpoint of administration. The greater freedom and absence of formal requirements that we find in the case of trusts generally is probably due to the absence of a jury in a chancery court, the normal forum for trust enforcement. Elements of importance such as delivery and notice which a court may raise to the dignity of requirements if there is a jury to be kept within bounds, may safely be regarded only as matters of evidence bearing on the issue of intent where there is no jury and the appellate court has greater freedom in reviewing issues of fact. This in the situation under discussion may explain why courts that are strict in requiring delivery for the completion of a gift by deposit in the name of another, are content to dispense with it if the question is one of the establishment of a trust.⁶¹ It is sometimes reasoned that the retention of the symbol of the deposit is consistent with the depositor's position as trustee.⁶²

It is thus apparent that, with the exception of occasional extra requirements such as notice, there is unanimity in permitting such a deposit to create a trust if the necessary intent is shown. Differences are to be found, however, in the matter of what are usually called presumptions. Sometimes the term "*prima facie* evidence" is used without any discernible difference in meaning. Thus some courts hold that if

⁵⁷ *Collins v. Collins*, 242 Ky. 5, 45 S. W. (2d) 811 (1931). Accounts in the name of another are frequently established by a parent for his child.

⁵⁸ *Barker v. Frye*, 75 Me. 29 (1883). In one case the donor was labelled a custodian. *Kelly v. Huplits*, 103 Pa. Sup. 430, 157 Atl. 704 (1931).

⁵⁹ *Minor v. Rogers*, 40 Conn. 512 (1873); *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899); *Connecticut River Savings Bank v. Albee*, 64 Vt. 571, 25 Atl. 487 (1892). It is probable also that in Minnesota both forms are regarded as creating revocable gifts. See *supra* note 53.

⁶⁰ *Scrivens v. North Easton Savings Bank*, 166 Mass. 255, 44 N. E. 251 (1896); *Bailey v. New Bedford Institution*, 192 Mass. 564, 78 N. E. 648 (1906); *McCaffrey v. North Adams Savings Bank*, 244 Mass. 396, 138 N. E. 393 (1923).

⁶¹ *Miller v. Clark*, 40 Fed. 15 (C. C. D. Conn. 1889); *Cazallis v. Ingraham*, 119 Me. 240, 110 Atl. 359 (1920); *Martin v. Funk*, 75 N. Y. 134 (1878); *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748 (1904); *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1903); *People's Savings Bank v. Webb*, 21 R. I. 218, 42 Atl. 874 (1899).

⁶² *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1903).

there is no evidence of intent other than the form of the deposit there is no issue for the trier of facts, since there is a presumption that a trust was intended.⁶³ Others take the view that evidence of intent apart from the form of the deposit is necessary to establish a trust.⁶⁴ None goes so far as to make the form of the deposit conclusive.⁶⁵

A few courts hold that the form of the deposit apart from a showing of a contrary intent creates a revocable trust. This is the famous "tentative trust" doctrine enunciated in *Matter of Totten*.⁶⁶ It is there stated as follows:

"A deposit by one person of his own money as trustee for another standing alone does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance."⁶⁷

However, evidence may be admitted to show that no trust at all was intended.⁶⁸ A sufficiently strong declaration by the donor would apparently make it possible to create an irrevocable trust without delivery of the pass book or notice to the beneficiary. On the question whether such acts give rise to a presumption of an intention that the trust should be irrevocable, the inferior courts of New York have been divided.⁶⁹ The Court of Appeals at first used language tending to support the view that other evidence of intent was necessary or at least that delivery or notice was only evidence.⁷⁰ A different view is indicated, however, by

⁶³ *Cazallis v. Ingraham*, 119 Me. 240, 110 Atl. 359 (1920); *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899); *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1903).

⁶⁴ *Walker v. Welsh*, 11 N. E. 727 (Mass. 1887); *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (Ct. Ch. 1905), *aff'd*, 71 N. J. Eq. 777, 71 Atl. 1135 (1907); *People's Savings Bank v. Webb*, 21 R. I. 218, 42 Atl. 874 (1899).

⁶⁵ There is a suggestion of this policy in *Martin v. Funk*, 75 N. Y. 134 (1878).

⁶⁶ *Supra* note 61. The way was paved for this doctrine in *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412 (1895), where it appeared that the donee predeceased the donor. The tentative trust doctrine is also followed in Minnesota. See *Walso v. Lattner*, 140 Minn. 455, 168 N. W. 353 (1918).

⁶⁷ 179 N. Y. at 125-126, 71 N. E. at 752. *Shepherd's Citations* show that *Matter of Totten* has been cited more than 150 times. In most cases the passage here set forth is quoted. It is treated much as if it were a statute.

⁶⁸ *Morris v. Sheehan*, 234 N. Y. 366, 138 N. E. 23 (1922).

⁶⁹ That such acts give rise to a presumption of such intent: *Matter of Davis*, 119 App. Div. 35, 103 N. Y. Supp. 946 (2d Dept. 1907); *Stockert v. Dry Dock Savings Inst.*, 155 App. Div. 123, 139 N. Y. Supp. 986 (1st Dept. 1913). That they do not: *In re Halligan's Estate*, 82 Misc. 30, 143 N. Y. Supp. 676 (Surr. Ct. 1913) (tax proceeding); *In re Reed's Estate*, 89 Misc. 632, 154 N. Y. Supp. 247 (Surr. Ct. 1915).

⁷⁰ *Hemmerich v. Union Dime Savings Inst.*, 205 N. Y. 366, 98 N. E. 499 (1912); *Matthews v. Brooklyn Savings Bank*, 208 N. Y. 508, 102 N. E. 520 (1913).

the affirmance of two recent Appellate Division decisions holding that such acts create a presumption of an irrevocable trust.⁷¹

New Jersey has adopted the same view as New York on the question of the effect of the deposit in the matter of intent. But the result is quite different, since in New Jersey the intent that the trust should be revocable makes it testamentary.⁷² Additional evidence to show that an irrevocable trust was intended is consequently necessary if the claimant is to succeed, although no revocation has been attempted.

If the revocable trust is upheld, however, a problem of some difficulty has arisen as to what constitutes revocation. *Matter of Totten* states that the test is whether there has been "a decisive act of disaffirmance". A subsequent declaration in connection with a will drawn up after a deposit in trust has been regarded as such a decisive act.⁷³ A will executed subsequent to the establishment of the trust which would require utilization of the bank deposit has likewise been so regarded.⁷⁴ Other cases hold that a will is not a decisive act of disaffirmance unless it makes specific reference to the bank deposit.⁷⁵ These cases have been distinguished on the ground that the former cases are concerned with express dispositions of money, which could not be effectuated unless the bank deposit was exhausted, while the latter involve dispositions under residuary clauses.⁷⁶ A mere writing creating another trust of property is not a decisive act of disaffirmance, even though it would involve the money in the bank deposit for its realization, as long as it fails specifically to mention the deposit.⁷⁷ Withdrawal of

⁷¹ *Davlin v. Title Guarantee & Trust Co.*, 229 App. Div. 269, 241 N. Y. Supp. 712 (1st Dept. 1930); *aff'd*, 255 N. Y. 559, 175 N. E. 312 (1930); *Hanigan v. Wright*, 233 App. Div. 82, 251 N. Y. Supp. 651 (3d Dept. 1931), *aff'd*, 257 N. Y. 602, 178 N. E. 813 (1931). In the former case the early Court of Appeals cases were distinguished on the ground that they dealt solely with the right of the bank to resist a demand for payment. It can hardly be denied, however, that the earlier opinions seem to be considering the question as to who is beneficially entitled. A better explanation is that the earlier language merely means that such acts are not conclusive.

⁷² *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (Ct. Ch. 1905), *aff'd*, 71 N. J. Eq. 777, 71 Atl. 1135 (1907); *Jefferson Trust Co. v. The Hoboken Trust Co.*, 107 N. J. Eq. 310, 152 Atl. 374 (Ct. Ch. 1930).

⁷³ *In re Richardson's Estate*, 134 Misc. 174, 235 N. Y. Supp. 747 (Surr. Ct. 1929).

⁷⁴ *Walsh v. Emigrant Industrial Savings Bank*, 106 Misc. 628, 176 N. Y. Supp. 418 (Sup. Ct. 1919), *aff'd*, 192 App. Div. 908, 182 N. Y. Supp. 956 (1st Dept. 1920), *aff'd*, 233 N. Y. 512, 135 N. E. 897 (1922); *Matter of Beagan's Estate*, 112 Misc. 292, 183 N. Y. Supp. 941 (Surr. Ct. 1920).

⁷⁵ *Meehan v. Emigrant Industrial Savings Bank*, 213 App. Div. 807, 208 N. Y. Supp. 325 (1st Dept. 1925), *aff'd*, 241 N. Y. 564, 150 N. E. 556 (1925); *Wait v. Society for Political Study of New York City*, 68 Misc. 245, 123 N. Y. Supp. 637 (Sup. Ct. 1910).

⁷⁶ *In re Richardson's Estate*, 134 Misc. 174, 235 N. Y. Supp. 747 (Surr. Ct. 1929).

⁷⁷ *In re Schiffer's Estate*, 142 Misc. 518, 254 N. Y. Supp. 871 (Surr. Ct. 1931).

the entire deposit constitutes a revocation.⁷⁸ The death of the beneficiary before the depositor likewise terminates the trust.⁷⁹

Perhaps the tentative trust doctrine does not in practice reach results that are greatly different from those arrived at in other jurisdictions. As we have already seen, the prior death of the claimant has proved a strong factor in defeating the gift. The donor has been allowed quite freely to revoke through a holding that no valid trust was created. The facts regarded as indicating an irrevocable trust, such as delivery of the pass book or notice to the donee have been used by other courts as evidentiary facts bearing on the question of intent. The result reached by means of a tentative trust may be achieved, if the depositor dies, by holding the trust valid; and if he lives and revokes or if the alleged donee predeceases him, by holding no sufficient intent has been shown.

Deposit in the Name of Alleged Donor and Claimant

The joint deposit with express provision for survivorship is probably the most common method used to make a gift of a bank deposit. It may be noted in passing that a distinction is to be made between a gift of the entire account and a gift of a joint interest. The former, if effective, would completely and immediately divest the original depositor of all control and give the sole ownership to the donee just as in the case of the assignment of an account in the name of the depositor alone. Obviously on no view could the creation of the joint account dispense with any necessary formalities for the completion of the gift. Rules as to delivery and assignment, already discussed, will govern.⁸⁰

In the case of the gift of a joint interest with the right of survivorship, however, the arrangement by its terms leaves to the depositor the right to draw on the account while he lives. The donee may draw on the account, qualified in the case of the savings account by the necessity of having access to the pass book. Such joint accounts are used quite frequently for convenience, especially checking accounts; but there are many instances where they are only for the purpose of making a gift, it being understood that no withdrawals will be made by the donee before the death of the depositor.

⁷⁸ *Matthews v. Brooklyn Savings Bank*, 208 N. Y. 508, 102 N. E. 520 (1913).

⁷⁹ *Matter of U. S. Trust Co.*, 117 App. Div. 178, 102 N. Y. Supp. 271 (1st Dept. 1907), *aff'd*, 189 N. Y. 500, 81 N. E. 1177 (1907); *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412 (1895).

⁸⁰ *Bediran v. Zorian*, 287 Mass. 191, 191 N. E. 448 (1934). It should be noted that the mere fact that a person other than the depositor is given a power of attorney to draw on the account does not create a joint ownership of the deposit. It has been held that the giving of a certificate of deposit reciting a deposit by one person and payable to depositor or alleged donee gives to the alleged donee only such a power of attorney. *Jones v. Fullbright*, 197 N. C. 274, 148 S. E. 229 (1929). See also *Nannie v. Pollard*, 205 N. C. 362, 171 S. E. (1933) (joint deposit). Such a power of attorney would be revoked by the depositor's death. But see *Murphy v. Bordwell*, 83 Minn. 54, 85 N. W. 915 (1901).

There is no theoretical reason why such a deposit should be treated differently from the deposit in the name of one person alone, so far as its effect in dispensing with the requirement of delivery or creating a contract right in the claimant is concerned. There is the practical difference that the joint deposit is not so suitable for the use of the name of a dummy. This may help to account for the fact that the similarity between the two situations is seldom recognized. Courts that hold deposits in the name of another insufficient to complete the gift join with the rest in holding that in the case of a joint deposit no delivery is necessary.⁸¹ A few unfortunately hold to the requirement of delivery of the pass book.⁸²

⁸¹ First National Bank v. Mulich, 83 Colo. 518, 266 Pac. 1110 (1928); Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647 (1915); Negaunee National Bank v. LeBeau, 195 Mich. 502, 161 N. W. 974 (1917); McLeod v. Hennepin County Savings Bank, 145 Minn. 299, 176 N. W. 987 (1920); Dyste v. Farmers' & Mechanics' Savings Bank, 179 Minn. 430, 229 N. W. 865 (1930); Burns v. Nolette, 83 N. H. 489, 144 Atl. 848 (1929); Kelly v. Beers, 194 N. Y. 49, 86 N. E. 980 (1909). In *Mardis v. Steen*, 293 Pa. 13, 141 Atl. 629 (1928), the gift is upheld, stress being placed upon the signing and delivery of the signature card. Early cases, refusing to recognize the joint deposit are distinguished on the ground that there was no writing. As to the Pennsylvania law, see also *infra* notes 82 and 83. Cases on the subject of gifts by means of joint deposits are collected in Notes (1927) 48 A. L. R. 189 and (1930) 66 A. L. R. 881.

Apart from statute it is usually the view of courts that follow the gift theory that evidence of intent other than the form of the deposit is necessary. See *Kelly v. Beers, supra*.

⁸² *Pearre v. Grossnickle*, 139 Md. 274, 115 Atl. 49 (1921); *Rice v. Bennington County Savings Bank*, 93 Vt. 493, 108 Atl. 708 (1919); *Meyers v. Albert*, 76 Wash. 218, 135 Pac. 1003 (1913); *Daly v. Pacific Savings & Loan Association*, 154 Wash. 249, 282 Pac. 60 (1929).

After the decision in *Rice v. Bennington County Savings Bank, supra*, the Vermont statute was amended. See *infra* note 136.

In Maryland deposits in the name of the depositor and claimant in trust for depositor and claimant are upheld. *Sturgis v. Citizens National Bank*, 152 Md. 654, 137 Atl. 378 (1927). Although the practice in Maryland of using the trust form is due to banking by-laws, which were probably framed for the protection of banks, [see *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899)] it has nevertheless had the effect of circumventing the rule requiring delivery to complete the gift in the case of joint deposits. It would seem that this form of deposit might be used effectively in jurisdictions which recognize the deposit in trust as sufficient to complete the gift without delivery but refuse to give effect to a gift by means of a joint deposit.

Although in *Blick v. Cockins*, 252 Pa. 56, 97 Atl. 125 (1916) the gift was upheld, the later case of *Grady v. Sheehan*, 256 Pa. 377, 100 Atl. 950 (1917) held delivery to be a requirement. See also *Flanagan v. Nash*, 185 Pa. 41, 39 Atl. 818 (1898). Subsequently, following closely the suggestions contained in the language of *Grady v. Sheehan*, the banks succeeded in devising a system that satisfied the court by having the depositor and donee sign and seal an elaborate form on the signature card. See *Mardis v. Steen*, 293 Pa. 13, 141 Atl. 629 (1928), referred to in note 81.

Thomas v. Houston, 181 N. C. 91, 106 S. E. 466 (1921) was concerned with a certificate of deposit payable to depositor or plaintiff. Since it is not indicated that it should be payable to the survivor, and since the parol evidence rule would operate here to exclude evidence showing such intent, it would seem proper to treat the case as the court does, as one of gift by delivery. A later North Carolina case has construed a certificate of deposit in the form in which this one appeared as creating only a power of attorney in a person other than the depositor. See *supra* note 80.

The most interesting development, however, is that in the case of the joint deposit the name in which the deposit appears is looked upon by a large number of courts as more than a mere form. The bank by accepting it in the name of the depositor and another is regarded as undertaking an obligation to the persons named. Thus a contract for the benefit of a third person is established.⁸³ The depositor is both promisee and one of the beneficiaries of the contract. The donee is of course the other beneficiary. If the claimant is a party to the transaction changing the account from one in the name of a single depositor to a joint account, so that the promise is made to depositor and claimant jointly, a novation is established.⁸⁴ The Massachusetts court does not appear to recognize that in holding for the claimant on a contract theory in the absence of evidence showing the claimant was a party to a novation, it is departing from its supposed view that contracts may not be enforced by one who is not a party. It is true that, following the view held for other types of deposits, notice to the claimant is required,⁸⁵ but that is not the equivalent of a promise by the bank to him, since notice may be, and usually is, received apart from any purpose on the part of the bank to communicate it.

On this theory, also, the question of intention is involved as on the theory of a gift. It is probably permissible to show that the depositor did not intend that the bank should make any payment to the claimant.⁸⁶ At least the circumstances and oral statements of the depositor at the time of the deposit would be material. And if the objective theory of contracts were not adhered to, there might also be a broad inquiry into the depositor's state of mind such as is permitted under the gift theory.

⁸³ *First National Bank v. Mulich*, 83 Colo. 518, 226 Pac. 1110 (1928); *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926 (1918); *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923); *Perry v. Leveroni*, 252 Mass. 390, 147 N. E. 826 (1925); *McKenna v. McKenna*, 260 Mass. 481, 157 N. E. 517 (1927); *New Jersey Title Guarantee & Trust Co. v. Archibald*, 91 N. J. Eq. 82, 108 Atl. 434 (1919); *Commercial Trust Co. v. White*, 99 N. J. Eq. 119, 132 Atl. 761 (Ct. Ch. 1926); *Cleveland Trust Co. v. Scobie*, 114 Ohio St. 241, 151 N. E. 373 (1926); *Deal's Adm'r. v. Merchants' & Mechanics' Savings Bank*, 120 Va. 297, 91 S. E. 135 (1917); *Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802 (1918). In *Mardis v. Steen*, 293 Pa. 13, 141 Atl. 629 (1928), cited *supra* notes 47, 81 and 82, an alternative ground of decision was that the signature card for the joint deposit signed and sealed, constituted a contract, the seal importing consideration. However, in *Reap v. Wyoming Valley Trust Co.*, 300 Pa. 156, 150 Atl. 465 (1930), the court adopts the contract theory as it is usually spelled out. There was no seal and there is no emphasis on delivery of the writing to the bank. Thus, after many vicissitudes, the Pennsylvania law seems finally to have reached the widely accepted contract theory. This theory is supported in a Note (1924) 38 HARV. L. REV. 243.

⁸⁴ *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N. E. 371 (1916). See RESTATEMENT, CONTRACTS (1932) §425.

⁸⁵ *Noyes v. Newburyport*, 164 Mass. 583, 42 N. E. 103 (1895); *Perry v. Leveroni*, 252 Mass. 390, 147 N. E. 826 (1925).

⁸⁶ See *Commercial Trust Co. v. White*, 99 N. J. Eq. 119, 132 Atl. 761 (Ct. Ch. 1926), and *Reeves v. Reeves*, 102 N. J. Eq. 436, 141 Atl. 175 (Ct. Ch. 1928).

It is to be noted that this is not the question of the purpose of the promisee frequently raised in connection with contracts for the benefit of third persons.⁸⁷ That does not go to the terms of the contract, but only to the question as to who may enforce it. Here once it is established that the intent was that the bank should pay the claimant, there would be little question that the purpose was to benefit him.

It may thus be seen that in the great majority of states either on the view that the form of the deposit serves in lieu of delivery or on the view that it creates a contract, the claimant prevails.

A more unusual theory is that of a trust.⁸⁸ Some of the cases announcing this doctrine fail to indicate the mechanics of the application; what is the *res* and who is the trustee? It must be that either the depositor, still the owner of the chose in action, in this manner declares himself trustee for the claimant, or the bank is the trustee.⁸⁹ It has been pointed out that in any case this is a strained application.⁹⁰ The bank as debtor cannot be trustee and in any event the intent to create a trust is hard to find.⁹¹ To be sure courts have never been too insistent upon spelling out the application when the magic of the word "trust" can be used to help out a difficult doctrinal situation, but in this case there seem to be other plausible alternatives offering a way out.

In the great majority of jurisdictions the law of joint tenancies applicable to property has never been regarded as raising any problems. Apparently the view has been that this learning is a relic of the feudal system and has no application to joint contract rights. Clearly this is sound. The word "joint" in connection with choses in action has led in some instances to confusion. The analogies of the property law are undoubtedly responsible for the entirely unnecessary and troublesome rule of survivorship for joint obligations. But even here the effect of

⁸⁷ See RESTATEMENT, CONTRACTS (1932) §133.

⁸⁸ Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370 (1898); Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922). The California court, however, subsequently upheld the gift without reference to the trust theory, where it appeared that both depositor and claimant executed the agreement establishing the joint deposit. See Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647 (1915). Although New Jersey follows the contract theory there are some suggestions of the trust theory in this jurisdiction. See Hoboken Bank for Savings v. Schwoon, 62 N. J. Eq. 503, 50 Atl. 490 (Ct. Ch. 1901); New Jersey Title Guarantee & Trust Co. v. Archibald, 91 N. J. Eq. 82, 108 Atl. 434 (1919). This theory is not to be confused with the trust as used in Maryland, where the deposit is stated to be in trust for the parties jointly. See *supra* notes 20 and 82.

⁸⁹ In Booth v. Oakland, 122 Cal. 19, 54 Pac. 370 (1898), cited *supra* note 88, the bank is regarded as the trustee. In Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922), cited *supra* note 88, the depositor is apparently considered as having declared himself trustee.

⁹⁰ Note (1924) 38 HARV. L. REV. 243.

⁹¹ In McGillivray v. First National Bank, 56 N. D. 152, 217 N. W. 150 (1927), the trust theory is carefully considered and rejected on the ground that the bank as debtor cannot be trustee.

the rule is for the most part confined to the relations between the debtor and the obligees. The rules does not necessarily affect the rights of obligees among themselves as it does in the case of joint tenants of property.⁹² And in every other respect the relations of obligees and third persons other than the obligor are comparable to those of tenants in common in property law rather than to those of joint tenants. The interests need not be equal, and the interest of each joint obligee is assignable. The unities of joint tenancies have no place whatever here, nor is there a need for any separate conception of choses in action held in common as distinguished from those held jointly.

In spite of these considerations, however, several courts have had to struggle to prevent the word "joint" from letting loose the learning as to joint tenancies of property and in at least one jurisdiction it has broken through with unfortunate results. The difficulty has sometimes been taken care of by recognizing that such a deposit does not create a technical joint tenancy in the common law sense.⁹³ But the Supreme Judicial Court of Maine in the case of *Appeal of Garland*⁹⁴ reached the result that there could be no survivorship in the case of a joint deposit, although expressly provided for, on the perverted reasoning that the absence of the essential unities prevented the creation of a joint tenancy. The court intimates that a tenancy in common might exist in the deposit in the name of two persons to the extent that each contributed to the deposit from his own funds, but the view was that the attempt to create a joint tenancy was ineffective; no interest could therefore presently pass, and the provision for survivorship was testamentary. This decision led to legislative correction, but the statute enacted, as will subsequently be pointed out, is rather narrow in scope.⁹⁵

A questionable result has also been reached in a few cases on the ground that the words used in making the deposit were inapt to create a joint tenancy with the result that no interest passed and the gift was defeated. Thus the use of the word "or" connecting the names of the joint obligees was regarded as insufficient although it is indicated that if the conjunction "and" had been used, a joint tenancy would have been

⁹² *Jepson v. Killian*, 151 Mass. 593, 24 N. E. 856 (1890). See RESTATEMENT, CONTRACTS (1932) §132, comment A.

⁹³ *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923); *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929); *New Jersey Title Guarantee & Trust Co. v. Archibald*, 91 N. J. Eq. 82, 108 Atl. 434 (1919). This has been recognized also in tax cases. *Blodgett Union and New Haven Trust Company*, 111 Conn. 165, 149 Atl. 790 (1930); *Marble v. Treasurer & Receiver General*, 245 Mass. 504, 139 N. E. 442 (1923).

⁹⁴ 126 Me. 84, 136 Atl. 459 (1927). See also *Thompson, J.*, dissenting in *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923).

⁹⁵ See *infra* note 133.

created.⁹⁶ Apart from the artificiality of the construction, these decisions are open to the objection that the alternative to a joint tenancy would be a tenancy in common, and the distinction in the case of obligations should be immaterial.

Indeed the whole issue in the law of property has been between joint tenancies and tenancies in common. Limitations on joint tenancies by reason of statutes,⁹⁷ the requirement of the unities and the use of proper words for their creation have all been concerned with this issue. And in any case where words providing for survivorship have been used, the issue as to the form of the tenancy has become irrelevant, since to give effect to the intention of the parties, it has been easy, where for some reason the joint tenancy failed, to construe the provisions as creating life estates with contingent remainders or more properly, tenancies in common in fee with executory limitations.⁹⁸ Thus even if the property law were applicable to joint bank deposits, it ought not to affect the usual case where survivorship is provided for.

If a joint deposit is made without express survivorship provision, it seems that rights in the deposit would depend upon the intention of the depositor under either the gift or the contract theory. Even if a joint obligation is created, although the survivor is legally entitled, the beneficial interest should depend upon the arrangements between the parties. Since apart from statute the gift or the beneficiary's contract right is subject to defeat by showing that the requisite intent is lacking, the presence or absence of survivorship language would appear to go only to the matter of proof.⁹⁹

The tendency to give effect to a gift by means of a joint deposit without delivery of any symbol of the deposit is due in large part to

⁹⁶ *Morristown Trust Co. v. Capstick*, 90 N. J. Eq. 22, 106 Atl. 391 (Ct. Ch. 1919), *aff'd s.n.*, *Morristown Trust Co. v. Safford*, 91 N. J. Eq. 152, 108 Atl. 926 (1919); *Commercial Trust Co. v. White*, 99 N. J. Eq. 119, 132 Atl. 761 (Ct. Ch. 1926). See also *Reeves v. Reeves*, 102 N. J. Eq. 436, 141 Atl. 175 (Ct. Ch. 1928).

⁹⁷ Some courts have discussed the effect of statutes abolishing the incident of survivorship or making joint tenancies tenancies in common, but such statutes have not been regarded as preventing survivorship if that was the intent of the depositor. *Malone v. Sullivan*, 136 Kan. 193, 14 P. (2d) 647 (1932); *Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802 (1918). Cases are collected in Note (1933) 85 A. L. R. 282.

⁹⁸ TIFFANY, REAL PROPERTY (2d ed. 1920) 365. See *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929).

⁹⁹ *Engelbrecht v. Engelbrecht*, 323 Ill. 208, 153 N. E. 827 (1926); *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626 (1892); *Corcoran v. Hotaling*, 164 App. Div. 75, 148 N. Y. Supp. 302 (1st Dept. 1914); *Deal's Admr. v. Merchants' & Mechanics' Savings Bank*, 120 Va. 297, 91 S. E. 135 (1917). In *Wayne County Savings Bank v. Smith*, 194 Mich. 151, 160 N. W. 472 (1916), the deposit appeared in the name of a wife, but the husband's name appeared on the signature book. It was held that the evidence did not show an intention that the account should be joint with the right of survivorship.

In *In re Reed's Estate*, 89 Misc. 632, 154 N. Y. Supp. 247 (Surr. Ct. 1915), it is said that where there are no words of survivorship and no intention is shown apart from the form of a deposit there is a tenancy in common.

practical demands. The doctrine of *Beaver v. Beaver*¹⁰⁰ made useless the deposit in the name of the donee to accomplish such a purpose in some jurisdictions. The joint deposit with its clear recognition of the right of withdrawal in the depositor combined with the survivorship feature seemed on its face to be ideally suited to the needs of a depositor for disposing of his property on death in a simple and informal fashion. The semi-publicity of the transaction and the indisputable character of bank records have constituted safeguards against false claims. Submerged and treacherous legal obstacles have tended to crumble in the face of these considerations.

III. THE STATUTE OF WILLS

There are many shades of intent. It is doubtful if donors as a rule are careful to distinguish in their own minds between a present gift in contemplation of death and one effective on death. In nearly all gifts apart from weddings, Christmas and birthdays, the thought of death is a factor. Certainly this is true if the amount is substantial. Nearly always, also, there must be the thought that the property in question should be available to the donor in case of necessity. If the statute of wills were so popular with the judges that they yearned to apply it to defeat a clearly revealed intent and a worthy claimant, most gifts would probably fail. For no matter how well the formal requirements are satisfied, whether by delivery of a proper symbol or by the other means suggested, a testamentary intent will defeat the gift. Actually few fail on this ground. It is practically impossible to show a testamentary intent by evidence of oral declarations when there has been delivery of a symbol. But written directions that the claimant should have the money on the depositor's death are not easily sidestepped, and courts may find it necessary to refuse to uphold the gift when such appear.¹⁰¹ Nevertheless, in *Union Trust & Savings Bank v. Tyler*,¹⁰² although the written direction on the books of the bank and on the pass book provided for payment to claimant in the event of donor's death, very meager evidence at the time of delivery of the pass book was regarded as indicating a change of intent at that time. In *Eaton v. Blood*,¹⁰³ it appeared that the donor had delivered the pass book to a third person with written directions to make delivery to the claimant "in case anything happened (to donor) without going to law". Other evidence showed a purpose to control the account for her own use during her lifetime. It was said

¹⁰⁰ *Supra* notes 49 and 53.

¹⁰¹ *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091 (1903); *Grady v. Sheehan*, 256 Pa. 377, 100 Atl. 950 (1917); *Steffen v. Davis*, 52 S. D. 283, 217 N. W. 221 (1927).

¹⁰² 161 Mich. 561, 126 N. W. 713 (1910).

¹⁰³ 201 Iowa 834, 208 N. W. 508 (1926).

that "it is not essential to the validity of the gift that the donor relinquish all authority or even all interest in the subject of it." The result might be explained as a present gift of the principal with enjoyment postponed until death.

Moreover, the reservation of a right to revoke the gift does not necessarily have the effect of making it testamentary. This is illustrated by gifts *causa mortis*. Such gifts must be in immediate expectation of death, are ineffective if the donor fails to die from the cause at that time foreseen, and in any event are revocable before death. They do not, however, constitute exceptions to the statute of wills. There is the highly artificial distinction between the intent to make a gift effective on death and the intent presently to confer title subject to a power to revoke. The former is testamentary. Any donor who on his death bed had such a distinction in his mind could be said to have lived and died a confirmed legalist. Yet cases have turned on the distinction.¹⁰⁴ Actually of course such cases have involved the construction of certain declarations in writing.

Gifts by deposit in the name of another, when recognized, and by deposits in trust also present problems under the statute of wills. The reservation of the right to interest on the deposit during the donor's life is not inconsistent with the passing of a present interest in the principal to take effect in possession upon the donor's death,¹⁰⁵ but such reservation may be some evidence of a testamentary intent.¹⁰⁶

In the case of a trust we have seen that it is a matter of intent whether there is an irrevocable trust, a revocable trust or no trust at all.¹⁰⁷ Likewise deposits in the name of another, where recognized, fall into the same classes. The problem under the statute of wills arises of course in the case of an intent of the second type. A similar question is involved when the right to withdraw sums on deposit is retained by the depositor, since this amounts to a right to revoke by a specific method. Although as we have previously noted the right to revoke alone is not usually regarded as necessarily making the disposition testamentary, nevertheless when coupled with a life interest, the power to modify, and complete control in the depositor during his lifetime, or-

¹⁰⁴ *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500 (1883); *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091 (1903); *Steffen v. Davis*, 52 S. D. 283, 217 N. W. 221 (1927). *Eaton v. Blood* seems to be a case of a gift *inter vivos* where the distinction might well be made but the language is rather vague.

¹⁰⁵ *Candee v. Connecticut Savings Bank*, 81 Conn. 372, 71 Atl. 551 (1908); *Smith v. Ossipee Savings Bank*, 64 N. H. 228, 9 Atl. 792 (1887); *Boyle v. Dinsdale*, 45 Utah 112, 143 Pac. 136 (1914).

¹⁰⁶ *Sherman v. New Bedford Savings Bank*, 138 Mass. 581 (1885).

¹⁰⁷ *Supra* notes 62-67.

thodox views would seem to require that the gift be held invalid.¹⁰⁸ The problem is of greatest importance in jurisdictions where the *prima facie* effect of a deposit in trust is to create a revocable trust. In the leading case of *Matter of Totten*¹⁰⁹ the problem was not raised by the facts. The question related to the depositor's right to revoke during his lifetime and it was held that he had this right. The elaborate *dictum*,¹¹⁰ however, which is the basis of the New York and Minnesota law on the subject, assumes that such a disposition is valid. It solves the problem of the statute of wills by ignoring it.¹¹¹ In New Jersey the more orthodox view is accepted.¹¹² In other states the problem is of less importance due to the fact that such a trust is not regarded as revocable unless there is a direction to the bank or evidence of intent that it should be revocable apart from the form of the deposit. When the question has arisen, either because of such evidence or an express reservation of the right of withdrawal, the courts have divided.¹¹³ There is little discussion of the point, however.

Gifts by means of joint deposits are regarded as testamentary if there is no intention that the claimant should have a present interest on the date of the deposit. Here also liberality is the rule. Although it is true that in the case of a joint deposit, both persons in whose names the deposit appears have the right to make withdrawals as between such persons and the bank; yet it would seem that the beneficial interest in the proceeds should depend upon the agreement the depositors have among themselves. In the case of a gift the beneficial interest would depend upon the intention of the donor at the time of establishing the deposit. If this should be found to be, as it usually is, that what remains in the account upon his own death should be at the disposal of

¹⁰⁸ See Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 529-530.

¹⁰⁹ *Supra* note 61.

¹¹⁰ Quoted *supra*, see note 67.

¹¹¹ The doctrine of *Matter of Totten* as far as it is concerned with the question of testamentary dispositions, is discussed by Scott, *supra* note 108, at 540, *et seq.* See also *Dyste v. Farmers' & Mechanics' Savings Bank*, 179 Minn. 430, 229 N. W. 865 (1930).

¹¹² *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (Ct. Ch. 1905), *aff'd*, 71 N. J. Eq. 777, 71 Atl. 1135 (1907); *Jefferson Trust Co. v. The Hoboken Trust Co.*, 107 N. J. Eq. 310, 152 Atl. 374 (Ct. Ch. 1930).

¹¹³ *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50, 87 N. E. 465 (1909) (revocable trust held testamentary). *Littig v. Mt. Calvary Church*, 101 Md. 494, 61 Atl. 635 (1905) (revocable trust held not testamentary). In the following cases involving the right of withdrawal, deposits in the name of another were held not to be testamentary: *Lehman v. Broyles*, 155 Ark. 593, 245 S. W. 24 (1922) (donor reserved right to check on the account); *Appeal of Buckingham*, 60 Conn. 143, 22 Atl. 509 (1891) ("Only donor has power to draw"); *Eastman v. Woronoco Savings Bank*, 136 Mass. 208 (1884) ("Subject to the order of donor"). Nor does the delivery by the donee to the donor of signed withdrawal orders have that effect. *Meriden Trust & Safe Deposit Co. v. Miller*, 88 Conn. 157, 90 Atl. 228 (1914).

the donee, that in the meantime he should have the right to withdraw for his own use such sums as he pleased and that the donee should not make any withdrawals until his death, it is undeniable that some testamentary elements are present. It is held by some courts that the gift may be defeated on such a showing.¹¹⁴ If further, the account happens to be in a savings bank and control is retained by possession of the pass book, the bare right to withdraw if possession of the pass book should be secured is the only present interest discernible. The testamentary character of such a disposition is accentuated if the claimant does not even know of the deposit. Doubtless these are elements bearing on the issue of testamentary intent. Occasionally the view is taken that regardless of other elements, the mere reservation of the right to withdraw defeats the gift.¹¹⁵

Most courts, however, have not taken so strict a view. Without much analysis it is assumed that the right to withdraw includes the right to appropriate the sums withdrawn. The establishment of the account creates a joint ownership with equal rights as to withdrawals and thus a present interest passes.¹¹⁶ It has been said that the donor's purpose that the donee should have the benefit of the account upon the former's death and that no withdrawals should be made during his life "would simply go to the expected exercise . . . of legal rights rather than to the existence itself of those rights."¹¹⁷ In *First National Bank v. Mulich*¹¹⁸

¹¹⁴ *Noyes v. Newburyport*, 164 Mass. 583, 42 N. E. 103 (1895); *Battles v. Millbury Savings Bank*, 250 Mass. 180, 145 N. E. 55 (1924); *McGillivray v. First National Bank*, 56 N. D. 152, 217 N. W. 150 (1927). The Massachusetts court, as in the case of other types of deposits, stresses the necessity of notice. In *Grady v. Sheehan*, 256 Pa. 377, 100 Atl. 950 (1917), although withdrawals were permitted by the alleged donee during the depositor's life, a further provision in writing accompanying the deposit to the effect that the survivor should have the entire balance on death to pay debts, funeral expenses and make distribution in a certain way, was held to make the disposition testamentary.

¹¹⁵ *Clark v. Bridges*, 163 Ga. 542, 136 S. E. 444 (1927) (donee did not know of the deposit but the language is broad); *Rose v. Osborne*, 133 Me. 497, 180 Atl. 315 (1935). Where the form of the deposit is to the depositor or in case of death to the claimant, it would seem to be clearly testamentary. *Vercher v. Roy*, 171 La. 524, 131 So. 658 (1930).

¹¹⁶ *Negaunee National Bank v. LeBeau*, 195 Mich. 502, 161 N. W. 974 (1917); *Industrial Trust Co. v. Scanlon*, 26 R. I. 228, 58 Atl. 786 (1904); *McLeod v. Hennepin County Savings Bank*, 145 Minn. 299, 176 N. W. 987 (1920). In *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929), it is said: "The question is whether, admitting another to an equal control, but without retaining a right in the donor to the funds withdrawn by the donee, is such a divesting of the donor's control as satisfies the test before stated. It seems to us that it is. The donee's present right is complete. He can draw from the account so long as funds remain. That right is what was given to him. It might subsequently prove valueless, if the donor withdrew the whole deposit. But for what it was worth it was a completed gift. No further act of the donor was required. No act of hers could defeat the right, although she might render it of no value. On the other hand, he could destroy her reserved right by a like proceeding."

¹¹⁷ *Kelly v. Beers*, 194 N. Y. 49 at 59, 86 N. E. 980 at 984 (1909).

¹¹⁸ 83 Colo. 518, 266 Pac. 1110 (1928).

where the directions to the bank expressly stated that withdrawals were only to be made by the donee in case of the depositor's death, it was said that "the word 'joint' is proof that the transfer of a present interest was intended."

Most courts that have adopted the contract theory previously discussed have usually found no problem under the statute of wills.¹¹⁹ The fact that a contract right is newly created, although conditional, has made it appear that a present interest inevitably arises. It is a contract for the benefit of a third person of the donee-beneficiary type where performance is postponed until the promisor's death, and the power to revoke is reserved. It is apparent that this is descriptive of an insurance policy where there is a right to change the beneficiary. There has never been any suggestion that this is testamentary. Nevertheless the fact that in the case of the joint bank deposit there is a definite sum payable to someone presently as well as upon death of the depositor gives it a different appearance. At any rate the transaction, so analyzed, has sometimes been questioned on this ground.¹²⁰

IV. LEGISLATION

Statutes have been enacted in many jurisdictions for the protection of banks in making payments.¹²¹ These apply to deposits in the name of another,¹²² to deposits in trust,¹²³ and to joint deposits.¹²⁴ They

¹¹⁹ *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926 (1918); *New Jersey Title Guarantee & Trust Co. v. Archibald*, 91 N. J. Eq. 82, 108 Atl. 434 (1919); *Cleveland Trust Co. v. Scobie*, 114 Ohio St. 241, 151 N. E. 373 (1926); *Deal's Adm'r. v. Merchants' & Mechanics' Savings Bank*, 120 Va. 297, 91 S. E. 135 (1917); *Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802 (1918). In *Kaufman v. Edwards*, 92 N. J. Eq. 554, 113 Atl. 598 (Ct. Ch. 1921), however, the Vice-chancellor assumes that after the *Archibald Case* it would still be possible to defeat the gift by showing a testamentary intent. In *First National Bank v. Mulich*, 83 Colo. 518, 266 Pac. 1110 (1928), the court struggles with the statute of wills in discussing the case on the gift theory, but when it turns to the contract theory it is assumed that there is no problem of testamentary intent.

¹²⁰ See *McGillivray v. First National Bank*, 56 N. D. 152, 217 N. W. 150 (1927), where the court takes the position that admitting a contract was made with the bank for the benefit of the claimant the statute of wills would be an objection. In Massachusetts, although the contract theory is accepted, it would apparently be possible to defeat the gift if the intent is testamentary. See *McKenna v. McKenna*, 260 Mass. 481, 157 N. E. 517 (1927).

¹²¹ For an example of the case where a bank was compelled to pay twice see *Smith v. Planters' Savings Bank*, 124 S. C. 100, 117 S. E. 312 (1923).

¹²² The New York statute is typical. "When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor, and free from the control or lien of all other persons, except creditors, and shall be paid together with interest thereon to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank." CONS. LAWS OF N. Y. (Cahill, 1930) c. 3, §148. Many also cover deposits in the name of a married woman. See PA. STAT. (1920) §19761.

¹²³ Such a statute was enacted in New York in 1875, and has since been copied with some variations in many other states. The most common form, which is

have been passed at various times and are not uniform with respect to different types of deposits. Those applying to deposits in the name of another are limited in their operation to deposits for minors or married women and protect payments before the depositor's death as well as those thereafter. Apparently the purpose was to eliminate the difficulties arising from the fact that so many deposits are made for persons under disabilities of infancy or coverture and it would otherwise be unsafe to pay the amount of the deposit to them.

Statutes applying to deposits in trust and most of those applying to joint deposits are also for the protection of banks. The former protect only payments after the death of the trustee. By the New York statute applying to joint deposits protection is expressly withdrawn when the bank has notice not to pay.¹²⁵ Apart from such provision it is arguable that payment could safely be made regardless of contest, but on the advice of general counsel for the American Bankers Association¹²⁶ it is everywhere the practise to resort to interpleader when there are conflicting claims.

None of the statutes of this type has had much effect upon the question as to who is beneficially entitled to the amount on deposit. Those applying to deposits in the name of another are so limited in their application that no results are discernible on this point. In the matter of formal requirements there has never been any question as to the deposit in trust and the jurisdictions where the joint deposit has been regarded as deficient in this respect are so few that the problem does not seem to have arisen. In a few states such statutes have been con-

recommended by the American Bankers' Association, is as follows: "Whenever any deposit shall be made in (specify institutions) by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made." 1 PATON, DIGEST (1926) 310, Opinion 1871. Paton's Digest lists 31 states where such statutes have been enacted up to 1926. See map No. 11 in Vol. 1. For a list of states with citations and variations, see 2 PATON, DIGEST (1926) 1576-1577, Opinion 1871a.

¹²⁴ The form recommended by the American Bankers' Association is as follows: "When a deposit has been made or shall hereafter be made, in any (specify institutions) transacting business in this State in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made." 1 PATON, DIGEST (1926) 301, Opinion 1809.

Paton's Digest lists 39 states and Alaska where such statutes in some form have been enacted up to 1926. See Map No. 3 in Vol. 1. For a list of states with citations and variations see 2 PATON, DIGEST (1926) 1563-1564, Opinion 1809a.

¹²⁵ See CONS. LAWS OF N. Y. (Cahill, 1930) §§148, 249. Most statutes, however, contain no such exception.

¹²⁶ 1 PATON, DIGEST (1926) 303, Opinions 1824 and 1825.

strued to create presumptions of intent that would not otherwise arise from the form of the deposit.¹²⁷ But the majority of courts both in the matter of intent and application of the statute of wills have held that this legislation did not change the existing law as far as the rights of contesting claimants among themselves are concerned.¹²⁸

In the field of joint deposits, statutes have been enacted in a few jurisdictions which may be regarded as going beyond the purpose merely of protecting banks. They describe the persons in whose names the deposit is made as joint tenants and specifically provide for the right of survivorship.¹²⁹ Such a statute would seem to obviate difficulties as to the form of the deposit, but it has never been put to a real test in this respect due to the fact that courts in these jurisdictions have upheld the gift independently of the statute. It has been used, however, as an alternative ground of decision.¹³⁰ And this type of statute has been held to make a deposit in this form presumptive evidence of intent to make a present gift.¹³¹

Three statutes are sufficiently unique to merit independent mention. The amendment to the Maine statute enacted following the decision adverse to the claimant in *Appeal of Garland*¹³² expressly provides that for an account in the name of husband or wife, parent or child, not exceeding \$3000, in the absence of fraud or undue influence, neither the testamentary character of the intent nor the absence of a technical joint tenancy should prevent the survivor from taking.¹³³ This eliminates objections to a gift covered by the statute based on its testamentary character or deficiencies in form. The limitation as to amount indicates the desire to recognize "the poor man's will". The exception as to fraud or undue influence would indicate that the legislature had in mind

¹²⁷ *Kuck v. Ruffery*, 117 Cal. App. 755, 4 Pac. (2d) 552 (1931); *Dyste v. Farmers' & Mechanics' Savings Bank*, 179 Minn. 430, 229 N. W. 865 (1930).

¹²⁸ *Clark v. Bridges*, 163 Ga. 542, 136 S. E. 444 (1927); *Gordon v. Toler*, 83 N. J. Eq. 25, 89 Atl. 1020 (Ct. Ch. 1914); *Reeves v. Reeves*, 102 N. J. Eq. 436, 141 Atl. 175 (Ct. Ch. 1928). See also cases collected in Note (1927) 48 A. L. R. 189, 202.

¹²⁹ Joint tenancies are expressly created by the statutes in California, Colorado, Michigan, Missouri, New York, Washington, Wisconsin and West Virginia. See 2 PATON, DIGEST (1926) 1563-1564.

¹³⁰ *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923). The Illinois statute does not expressly refer to "joint tenants," but much the same effect is reached by including the clause as a proviso to the section dealing with joint tenancies.

¹³¹ *In re Rehfeld's Estate*, 198 Mich. 249, 164 N. W. 372 (1917); *Mississippi Valley Trust Co. v. Smith*, 320 Mo. 989, 9 S. W. (2d) 58 (1928); *Clary v. Fitzgerald*, 155 App. Div. 659, 140 N. Y. Supp. 536 (4th Dept. 1913), *aff'd*, 213 N. Y. 696, 107 N. E. 1075 (1915). It is suggested in *Peoples' State Bank v. Miller's Estate*, 198 Mich. 783, 165 N. W. 608 (1917) that this statute obviates the objection of the statute of wills, but it would seem that the thought was that this is accomplished by the creation of a presumption that a present interest passes.

¹³² *Supra* note 94.

¹³³ ME. REV. STAT. (1930) c. 57, §25 (Laws of Maine 1929, c. 307).

that otherwise the form of the deposit should also be conclusive on the question of intent. The limitation to husband and wife or parent and child has been unfortunate.¹³⁴

Another statute of special interest was enacted in Vermont in 1923 following the decision in *Rice v. Bennington County Savings Bank*.¹³⁵ It was designed primarily to correct the situation created by the holding in the case that, regardless of the depositor's intent, a joint deposit was insufficient to perfect the gift without delivery. The language of the statute is as follows:

"The recital of the words 'payable to either or to the survivor' or words of like effect in the order creating such account and signed by the person or persons who furnish the funds for such deposit shall be conclusive evidence, as between the payees and their legal representatives, of the creation of an absolute joint account: but nothing herein shall prevent the proof of fraud, undue influence, or incapacity, to defeat such joint interests."¹³⁶

It will be noted that this statute does not clearly accomplish its purpose since nothing is said as to the effect of an "absolute joint account". On the other hand if it means that there is a complete irrevocable gift, it goes further than necessary to bring it into line with majority holdings. For on this view it appears to preclude evidence that the depositor's intent was other than donative. Since it contains no language susceptible of the construction that it is limited to cases arising after the death of a depositor, there is a serious question as to what it could mean as applied to a contest while both live. A possible view is that each is entitled to one half of the amount on deposit. A more sensible solution would be that, although the evidence is conclusive as to the joint deposit with the right of survivorship, the "absolute joint deposit" does not preclude a showing of the intent of the depositor as to the beneficial interest in the deposit during the joint lives of the persons in whose names the deposit appears. The court in *Patch v. Squires*¹³⁷ is content to hold that the statute dispenses with the delivery requirement, refusing to enter upon any general discussion of its effect upon existing law.

The other statute to be considered is that of New York. Prior to 1914 the statute applicable to all banks, was in the form indicated in the second group above mentioned describing the persons in whose

¹³⁴ In *Rose v. Osborne*, 133 Me. 497, 180 Atl. 315 (1935), the survivor, a nephew of the depositor, was defeated principally because the intent was testamentary. There is a reference to the lack of unities. It is interesting that a deposit in trust on otherwise the same facts was upheld.

¹³⁵ 93 Vt. 493, 108 Atl. 708 (1919).

¹³⁶ Public Laws of Vermont (1933) §6722.

¹³⁷ 105 Vt. 405, 165 Atl. 919 (1933).

names the joint deposit appears, as joint tenants.¹³⁸ This was regarded as creating a presumption of intent to make a present gift, but would not exclude rebutting evidence to indicate a contrary intent or to show that the intent was testamentary.¹³⁹ In the year mentioned a new section was enacted applicable to savings banks alone. This included in substance the provision of the old section together with a significant addition, as follows:

“The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor.”¹⁴⁰

The construction of this addition was involved in the case of *Moskowitz v. Marrow*.¹⁴¹ The question was whether the survivor's interest was affected by a notice of revocation given to the bank by the depositor prior to her death. It was held that since the survivor was a party, the form of the deposit was conclusive on the point that the deposit, as originally made, established an irrevocable transfer of a present interest in the deposit, including the right of survivorship. It was also stated in the concurring opinion of Cardozo, C. J., that while the persons in whose name the account appeared were living, the presumption of intent to create an irrevocable interest was rebuttable; and there is the further *dictum* that even after the death of one, the form of the deposit would not be conclusive as to amounts withdrawn before death, but only as to amounts on deposit at that time.

It will be seen that the statute itself is ambiguous in several respects. Although inquiry is foreclosed in the designated proceedings as to the intent at the time of the deposit in respect to the beneficial interest of the survivor, the intent might be that such interest should be either revocable or irrevocable and still come within the language of the statute. The reasoning of the majority that to admit a showing of an intent that it should be revocable nullifies the statute can scarcely be supported, since prior thereto, it could be shown that no beneficial interest whatever was intended. Also the view of the concurring judge that the presumption is conclusive only after death involves reading something into the statute, since the bank might be an interpleading party in a pro-

¹³⁸ CONS. LAWS OF N. Y. (Cahill, 1930) c. 3, §148. (Laws of New York 1909, c. 10, §144).

¹³⁹ *Clary v. Fitzgerald*, 155 App. Div. 659, 140 N. Y. Supp. 536 (4th Dept. 1913), *aff'd*, 213 N. Y. 696, 107 N. E. 1075 (1915).

¹⁴⁰ CONS. LAWS OF N. Y. (Cahill, 1930) c. 3, §249. (Laws of New York 1914, c. 369).

¹⁴¹ 251 N. Y. 380, 167 N. E. 506 (1929).

ceeding before death involving the determination of the beneficial interest in the deposit.

Nevertheless judicial molding of awkward legislation has achieved a desirable scheme. If it could be shown that the intent was to give only a revocable interest, the determination of this issue would be troublesome, and it would be necessary to decide how revocation would have to be evidenced, with such attendant difficulties as have been noted in connection with the tentative trust doctrine where the "decisive act" test is employed. Under the court's construction, the administrative difficulties resulting from throwing open the question of intent after death which have repeatedly plagued the courts, are eliminated. Adopting some of the language of Judge Cardozo, "family settlements, made in the informal fashion expected among relatives" are not "opened up for scrutiny after years of acquiescence."¹⁴² The deposit, safeguarded as it is by banking forms and witnessed informally by bank clerks, becomes subject to contest only, as in the case of a will, by the showing of fraud or undue influence.¹⁴³ By reason of practical advice which banks are in a position to give, there will be few instances where intent is defeated. At the same time under the *dictum* of the Chief Judge, conclusiveness is not carried so far as to leave unprovided for the necessities of a depositor while living. Deposits for a purpose other than donative are not wrested from the depositor because he has chosen a form that carries implications he does not intend. Though there may still be a presumption of an intent to pass a present interest in a contest arising while he lives, practically the possibility of rebuttal gives him a power to revoke that will scarcely ever successfully be questioned.¹⁴⁴

CONCLUSION

The law with respect to gifts of bank deposits by the delivery of symbols is of long standing and for the most part satisfactory. The burden on administration arising from obscurities in the intent issue is great but it is one that must be shouldered. Since the middle ages it has been recognized that the implications arising from delivery and the fact of delivery itself are too uncertain to justify exclusive emphasis. The light it throws on the situation is not sufficiently strong to enable a court safely to dispense with all the help it may receive from other

¹⁴² *Id.* at 398, 167 N. E. at 512.

¹⁴³ Although the statute does not expressly so provide there can be no question that the incapacity of the depositor may be shown. Also in *In re Fenelon's Estate*, 262 N. Y. 57, 186 N. E. 201 (1933), it was held that it may be shown that the depositor did not authorize the form of the deposit.

¹⁴⁴ Examples of the rare cases arising while the depositor lives are *Frank V. Heiman*, 302 Mo. 334, 258 S. W. 1000 (1924) and *People's Savings Bank v. Webb*, 21 R. I. 218, 42 Atl. 874 (1899). Both of these cases involved deposits in trust.

sources. It must remain the minimum requirement. But there is need for extending the category of instruments whose delivery will suffice. Checks and written assignments should be added.

In the case of deposits in the name of another, in trust, or joint deposits, the chief need is clarification. As a rule these devices are recognized as satisfying minimum requirements. They should always be so regarded. Apart from statute the view that the form of the deposit is *prima facie* evidence of intent to reserve a power to revoke during life, exemplified in the New York doctrine of tentative trust, combined with a liberal view of the statute of wills, is the most acceptable. It is deficient, however, in that even after death it leaves open the issue of intent. Although during the depositor's life, this is necessary, it is undeniable that after death the interests of administration would be served if the form of deposit were made conclusive, apart from a showing of fraud, undue influence or incapacity. The implications arising from the form of the deposit and the safeguards against fraud are sufficient to justify such a rule. The policies expounded by Cardozo, C. J., in his concurring opinion in *Moskowitz v. Marrow* indicate the need. Doubtless the change made by the depositor's death in the proper approach to the question can not be recognized by courts without the aid of legislation.