



1965

Revocable Gifts of Legal Interests in Land

John L. Garvey
University of Michigan

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Property Law and Real Estate Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Garvey, John L. (1965) "Revocable Gifts of Legal Interests in Land," *Kentucky Law Journal*: Vol. 54 : Iss. 1 , Article 3.
Available at: <https://uknowledge.uky.edu/klj/vol54/iss1/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Revocable Gifts of Legal Interests in Land

By JOHN L. GARVEY*

Chapter I: Introduction

Centuries ago Sir Francis Bacon observed and commented upon the "excess of evils in men's minds, affecting to have the assurance of their estate, and possession to be revocable in their own times, and irrevocable after their own times."¹ Though Bacon might have lamented this proclivity of mankind to "eat his cake, yet have it too," he recognized its influence on the development of the law and thus approved the foundation of our modern law of revocable trusts.

The current popularity of the revocable trust in the United States indicates that human nature has not changed through the centuries. Undoubtedly much impetus was given to the growth of the revocable trust in this country by the lenient manner in which it was treated by the tax laws; but statutory modifications have curtailed most of these advantages,² and the revocable trust continues to enjoy favor as a means of disposing of property, particularly as a means of gratuitously dividing it among family and friends.

There are many reasons for the continued popularity of this method of making gifts. One of the strongest deterrents to everyone's generous impulses is the fear that he might lose what he has and then be embarrassed by the want of the property given away. This deterrent is minimized when donors are permitted to retain a right to recover the property at any time they need or desire it. Undoubtedly another reason why many settlors retain a power of revocation is a desire to influence or exert some control over the subsequent conduct of the cestui. Thus the settlor can

* This article is based on material submitted in partial satisfaction of the requirements for the S.J.D. degree, University of Michigan.

¹ Bacon Law Tracts 316 (Readings on the Statute of Uses).

² See Casner, Estate Planning 87 (2d ed. 1956).

feel more or less secure in, at least, the ostensible affection and loyalty of the cestui if he realizes that the property might be taken away from him if and when he incurs the disfavor of his donor.

That neither of these reasons for seeking an element of revocability in gifts is peculiar to English speaking peoples seems evidenced by the civil law of gifts. In the Code of Justinian³ we find authority for the revocation of gifts because of the ingratitude of the donee "in order that no one may have permission to accept the property of another, and then ridicule his liberality, subject him to loss, and cause him to suffer the injuries above mentioned from the ungrateful beneficiary of his bounty."⁴ Most civil law systems have received this doctrine of ingratitude⁵ and permit donors to revoke gifts on the basis of it.

But probably the principal reason for the popularity of the revocable trust in the United States today lies in the fact that it is a means of making a gift which is largely testamentary in character but which is effective without passing through the uncertainty, delay, and expense of probate. The testamentary flavor of such gifts springs from the fact that the settlor is not seriously impeded in enjoying the property as fully after the gift as he did before the trust was established; he can enjoy the current fruits of the property merely by reserving a life estate; and should he ever desire or need the full beneficial interest, it is quickly and easily recovered by exercising the power of revocation. Yet the law considers these gifts *inter vivos*, and not testamentary dispositions,⁶ and thus yields to these donors many advantages denied to testators.

By making the disposition while in good health, the donor minimizes the possibility of its being upset on the basis of fraud, undue influence, or want of legal capacity. By making the disposition before death, any doubt concerning its validity or construction can be litigated before it is too late for the settlor to amend it. Moreover, though such gifts might at times be held to be subject to the claims of a deceased donor's estate,⁷ yet the

³ Code of Justinian, Book VII, Tit. LVI.

⁴ Translated in 14 Scott, *The Civil Law* 349 (1932).

⁵ See, e.g., French Civil Code (1803 art. 955. The provisions of the Louisiana Civil Code (Revision of 1870) are similar, see art. 1560.

⁶ 1 Scott, *The Law of Trusts*, sec. 57.1 (2d ed., 1956).

⁷ See 1 Scott, *op. cit. supra* note 6, at sec. 330.12.

property is not tied up for the period of administration in the usual case where the estate is clearly sufficient to satisfy all such claims. And finally,⁸ the financial savings resulting from avoiding probate are often material.⁹

Thus it is seen that the revocable trust serves many useful purposes in our society and will probably continue to enjoy favor as a means of making gratuitous dispositions of wealth. The trust, however, is a somewhat expensive and complex institution. Its operation and use are beyond the knowledge of the average layman. Moreover, it is not readily adaptable to all types of property nor to the peculiar circumstances of all cases. The question naturally presents itself: Does the law permit a man to make similar gifts without using the instrumentality of the trust? When making a direct gift to a donee, i.e., one not in trust, can a donor retain an element of control which will enable him to reclaim the property at some future time should he so desire? It is the purpose of this study to explore this area of the law and to determine to what extent such gifts of land¹⁰ are valid.

⁸ Cesner suggests many other advantages derivable from a wise use of the revocable trust. Casner, *op. cit. supra* note 2, at 87-106.

⁹ See King, *Trusts as Substitutes for Wills*, 73 Tr. & Es. 389 (1941), where it is estimated that on the average it costs \$7,400 in fees to transfer a \$150,000 estate by will whereas the same disposition can be implemented by revocable trust for only \$1,400 in fees.

¹⁰ Though the term, gift, is ordinarily applied only to donations of personal property, it is used herein to designate gratuitous transfers of land as well. Though unusual, this is not an incorrect use of the term. See Black's Law Dictionary (4th ed., 1951).

Chapter II: Validity of Clauses of Revocation

The thought of incorporating, in an otherwise absolute deed of land, a clause providing for its revocation at the will of the grantor is likely to be surprising to most American lawyers. Though such provisions are common in trust instruments, they are unusual in other conveyances and are likely to be viewed by the uninitiated with feelings of doubt as an untested novelty. Such misgivings are at least fifty per cent unfounded. For though there might be some justification for considering provisos of revocation in deeds of legal interests as untested, they are by no means novel in Anglo-American law.

It has been said that the policy of the ancient common law rendered any reservation or limitation in a feoffment repugnant and void if it sought to permit the defeasance of the feoffee's estate at the will of the feoffor.¹ The authors of these statements, however, failed to cite any judicial authority to support them and the members of the American Law Institute have expressly refused to take a position one way or the other on the common law validity of conditions and limitations that involve no element other than the exercise of the volition of the conveyor.² Thus it is conceivable that an ingenious feoffor might have accomplished a revocable gift of land in this period by conveying a conditional or determinable estate with the defeating or determining event being an expression of his own will.³ It must be conceded, however, that if such an imaginative feoffor existed, his labors went unnoticed; no case involving the validity of such a condition or limitation has been found.

Though the possibility of accomplishing a revocable gift of a legal interest in land is thus uncertain under the rules of the ancient common law, it is clear that after the Statute of Uses such gifts became frequent. Thus, Lord Coke spoke and approved of

... clauses of provisoes, containing power of revocation, which since Littleton wrote are crept into voluntarie conveyances,

¹ 1 Sugden, Powers 74 (3d A.ed., 1856). When speaking of these and other reservations of a similar nature, Kent said that "all such refinements were repugnant to the plain, direct mode of dealing, natural to simple manners and unlettered ages." 4 Kent, Commentaries on American Law *291.

² See I Restatement, Property, Caveats to secs. 44h and 45g (1936).

³ This possibility is suggested in Simes and Smith, The Law of Future Interests, sec. 285 (2d ed., 1955).

which passe by raising of uses, being executed by the statute of 27 H.S. and are become verie frequent, and the inheritance of many depend thereupon.⁴

Unfortunately American lawyers tend to forget that the Statute of Uses was an integral part of English conveyancing practice for many centuries⁵ and that the English family settlement before 1925 (whose powers of revocation have frequently been observed by American courts) could be made to convey either legal or equitable estates depending on whether the grant read "to X and his heirs to the use of . . ." or "unto and to the use of X and his heirs to the use of. . ."⁶ Failure to perceive this fine distinction in language has caused us to classify as revocable trusts, and hence ignore, many English conveyances that actually were revocable deeds of legal interests. Thus, from the language used in Coke's Reports, it seems clear that such well known cases as *Albany's Case*⁷ and *Digges' Case*⁸ involved conveyances that reserved the power to revoke legal, and not equitable, interests. Indeed such conveyances became so common in England after the Statute of Uses and their validity so well established⁹ that it is difficult to find a case in which this issue was actually litigated.

Before considering the American cases it should be noted that there are several different ways that a prospective donor of land might attempt to retain the power or ability of subsequently revoking his gift. The most obvious and direct method that has been used is the express reservation of a right or power of revocation in the deed itself. This study will be primarily concerned with the effectiveness of such instruments to accomplish the intentions of the parties.

Instead of reserving a power "to revoke" donors frequently seek to accomplish the practical effects of revocability by reserving a power "to sell" or "to mortgage." If the donor is to have the benefit of the proceeds of any such sale or mortgage,¹⁰

⁴ 2 Co. Litt. *237a.

⁵ See Cheshire, *The Modern Law of Real Property* 94 (7th ed., 1954).

⁶ Radcliffe, *Real Property Law* 104-05 (2d ed., 1938). That the majority of these settlements conveyed legal and not equitable interests, see Cheshire, *op. cit. supra* note 5, at 70, 77.

⁷ 1 Co. Rep. 110b, 76 Eng. Rep. 250 (1586).

⁸ 1 Co. Rep. 173, 76 Eng. Rep. 373 (1585-1600).

⁹ See Megarry, *The Law of Real Property* 109 (2d ed., 1955).

¹⁰ Whether the grantor is to have the benefit of such proceeds is largely a matter of construction. In the absence of language showing a contrary intent,

(Continued on next page)

obviously the practical effects of such reservations are the same as a reservation of the power of revocation; for the donor can recover his economic loss and destroy the donee's economic gain that resulted from the gift. Such reservations are merely powers of revocation that must be exercised in a special manner and have often been referred to as such.¹¹ They give rise to the same problems concerning the validity of the reservation to defeat the donee's interest, its effect upon the rights of third persons, and the testamentary and illusory flavor of the gift, as does the power of revocation; therefore, cases involving such reservations will be included throughout this discussion. When the donor is not to have the benefit of the proceeds of the sale or mortgage, the effect of the instrument remains that of an absolute gift; the donor is able to change the identity of the property given, but he cannot recover his economic loss nor destroy the donee's gain. Though such instruments do not raise the same problems as revocable deeds, they might be considered at least persuasive authority on the validity and operation of these reservations in divesting the donee's estate and vesting title to the property in another; a few such cases will be mentioned subsequently in this chapter where this problem is considered.

There are other means that a prospective donor of land might adopt in seeking to make his gift revocable. Thus, he might deliver an absolute deed to the donee but require him to execute in return a separate instrument obliging him to reconvey the land upon request. Unless the separate instrument is recorded with the deed, it seems likely that the donor's interest in the land will be cut off by a sale to a bona fide purchaser without notice;¹² thus an attempt of this nature might be frustrated by the fraudu-

(Footnotes continued from preceding page)

it would seem that the presumption should always be that he is to enjoy such proceeds. *Harman v. Hurst*, 160 Md. 96, 153 Atl. 24 (1931); but see *W. Va. Code* (1961) sec. 3536.

¹¹ *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928); *Goins v. Melton*, 343 Mo. 413, 121 S.W.2d 821 (1938); *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953); *Goins v. Melton*, 343 Mo. 413, 121 S.W.2d 821 (1938); *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928); see also 3 *Tiffany*, *The Law of Real Property*, sec. 681 (3rd ed. 1939).

In *Harman v. Hurst*, 160 Md. 96, 153 Atl. 24 (1931), where the grantor had reserved the right "to mortgage or sell," the court held that the power had been validly exercised by a conveyance to a straw man. The court indicated that under the equitable doctrine of reconversion such powers do not restrict the grantor "to a transfer to another in exchange for money of that other."

¹² This problem is discussed in Chapter IV.

lent act of the donee. However, the effect of such a transaction in a suit between the parties themselves is the same as it would have been if the donor had incorporated the provision in the deed itself. This conclusion was reached by the court in *Strong's Executors v. Brewer*¹³ where the court said:

There can be no doubt but that the deed of 1812, executed by Johnson Strong to his son William, and the bond, executed at the same time by William to his father, must be construed together as parts of the same contract. . . . (I)t is now the settled rule, that several instruments in writing, executed at the same time, between the same parties, in reference to the same subject matter, constitute but one agreement, and from all of them the intention of the parties must be gathered, in giving effect to the contract.

Since between the parties the practical effect of such transactions is the same as a deed with an express provision authorizing its revocation, cases involving these instruments will be considered and discussed throughout this study.

Other prospective donors might seek to accomplish their purpose by delivering a deed in absolute form to a third person with instructions to give it to the donee at the donor's death if it has not been recalled by the donor before then. Though such gifts might have been valid at one time, the majority rule is clearly to the contrary today.¹⁴ In such cases the court views such retention by the grantor of control over the deed as precluding an effective delivery of the instrument and thus concludes that no interest passes to the donee thereby. Though such an attempted gift seems inevitably doomed to failure, these cases do raise the interesting question of the possibility of distinguishing between a condition on delivery and a condition on title. This question and therefore some of these cases will be discussed at length in the next chapter.

¹³ 17 Ala. 706 (1850).

¹⁴ 3 American Law of Property, sec. 12.67 (1952); 4 Tiffany, *The Law of Real Property*, secs. 1050, 1054 (2nd ed., 1939). See also *Lambert v. Lambert*, 77 R.I. 463, 77 A.2d 325 (1950); *Rothney v. Rothney*, 41 Cal. App. 2d 566, 107 P.2d 294 (1940); *Wilson v. Wilson*, 158 Ill. 567, 49 Am. St. Rep. 176 (1895). But see *In re Rynier's Estate*, 347 Pa. 471, 32 A.2d 736 (1943); *In re Hartman's Estate*, 320 Pa. 331, 182 Atl. 232 (1936).

Though the Iowa courts followed a contrary rule for many years, it has recently been repudiated. *Brandt v. Schucha*, 250 Iowa 679, 96 N.W.2d 179 (1959).

Courts often come to a similar result when the donor delivers a deed to the donee but either incorporates a provision therein, or extracts a promise from the grantee thereof, that the instrument shall not be recorded until the grantor's death. In such cases the grantor's purpose might be merely to reserve a life or some other possessory estate in the property; or the grantor might be seeking to make a revocable gift. If the former is his intention—if he intends to lose all control over the deed but stipulates against recording merely to reserve some estate in the land—the modern rule is that the deed is a valid conveyance of a future interest that cannot be defeated by any subsequent act of the grantor.¹⁵ However, if the grantor stipulates against recording so that he might exercise further control over the deed and “revest” title in himself by cancelling or destroying it, these circumstances show a lack of the necessary intent to constitute a valid delivery, and the deed is generally held to be inoperative.¹⁶ Of course the same result is reached when the donor executes a deed in absolute form but retains it among his papers and does nothing to indicate that it is to have present legal effect.¹⁷ Such an instrument clearly has not been delivered, and the intended grantee receives no right to the land unless the instrument can be probated as a valid will.¹⁸

And finally some donors have attempted to accomplish their purposes by delivering an absolute deed to the donee and extracting from him an oral promise that he will reconvey upon request. In such cases there should be no argument about the validity of the instrument to convey the title to the donee. Since

¹⁵ See *Klouda v. Pachousek*, 414 Ill. 75, 110 N.E.2d 258 (1953); *Leach v. Pratt*, 30 Tenn. App. 330, 205 S.W.2d 970 (1947); *Schornick v. Schornick*, 25 Ariz. 563, 220 Pac. 397 (1923). Of course, the recording acts might cut off the donee's interest in the property if the donor makes a subsequent conveyance to one without notice.

¹⁶ *Blachowske v. Blachowski*, 135 N.J. Eq. 425, 39 A.2d 94 (1944); *Klingler v. Ottinger*, 216 Ind. 9, 22 N.E. 805 (1939); *Wilson v. Wilson*, 158 Ill. 567 (1895); 3 American Law of Property, sec. 12.66 (1952); *Ballantine, When Are Deeds Testamentary*, 18 Mich. L. Rev. 470 (1920).

If the stipulation against recording is not incorporated in the deed, some courts might hold that the donee received an absolute title. This conclusion results from the rule, of questionable validity, that every delivery into the hands of the grantee is necessarily absolute. *Tiffany, The Law of Real Property*, sec. 1049 (3rd ed., 1939).

¹⁷ See *Unsell v. Federal Land Bank of Houston*, 138 S.W.2d 305 (Tex. Civ. App., 1940).

¹⁸ 1 Page, *The Law of Wills*, sec. 5.14 (Bowe-Parker Rev. 1960). See also 1 *Scott, The Law of Trusts*, sec. 56.7 (2d ed., 1956); Note, 21 *Harv. L. Rev.* 451 (1908).

the grantor recognized the necessity of a reconveyance to revest title in himself, it is clear that he intended the instrument to have present effect, and thus, that there was a valid delivery.¹⁹ The difficulty with such a transfer, however, is that in the absence of special circumstances that might take the promise out of the Statute of Frauds, the donee is under only a moral obligation to reconvey; there are no legal means of enforcing this obligation.²⁰ Though many gifts are undoubtedly made in this manner²¹ to the satisfaction of all parties concerned, they are beyond the scope of this study.

The first American case found in which a donor of land attempted to achieve the practical effect of a revocable gift is *Strong's Executors v. Brewer*.²² In this case a father deeded realty and personalty to his son absolutely; at the same time the son executed a penal bond to the father conditioned on the father's enjoying the possession of the property for life and on his being able to divide any or all of the property among his other children. Several years later the father deeded to his daughter a slave which had been included in the prior deed. Subsequently the father became indebted to the son, and in satisfaction thereof deeded all of his property including the slave to him. After the death of the father the daughter sued the son in detinue for the slave. The court held in favor of the daughter. Though the court construed the deed and the bond as one instrument, it found no repugnancy between the various provisions and held that effect could be given to the intention of the parties. The court said:

Nor is there such repugnancy between the powers, reserved to the father in the condition of the bond, and the deed, executed by him to his son William, as will render the condition of the bond void. . . . If he [the father] failed to execute that power, upon his death, the property would pass absolutely

¹⁹ In *Huber v. Backus*, 79 S.D. 342, 112 N.W.2d 238 (1961), where a man had conveyed several tracts of land to his sister under her parol agreement to reconvey upon request, the court said: "Under this arrangement his reserved right . . . was to be effectuated by a conveyance from defendant which would seem to confirm rather than deny the delivery of these deeds to her. If he had intended that title was not to vest immediately in the defendant then there would be no reason for their oral understanding."

²⁰ 1 Scott, *The Law of Trusts*, sec. 44 (2d ed., 1956).

²¹ Apparently such a gift was accomplished in *Lindsay v. Christian*, 222 Ark. 169, 257 S.W.2d 935 (1953).

²² 17 Ala. 706 (1850).

and unconditionally to William Strong by the deed; but the execution of the power, reserved to the father, would defeat the title of William.

Thus the court seemed to recognize the validity of the first deed to the son to pass the title of the property involved, but held that the bond effectively reserved to the father the right and ability to defeat that title. The fact that the case involved only the power of the father to defeat the son's title in the personalty, it is submitted, does not detract from the weight of this case as a precedent for revocable gifts of land; since the possibility of dividing the ownership of personal property into successive interests was not generally recognized until recently, the court's reasoning is much more easily applied to realty than personalty.

The earliest American case found involving a deed of a legal interest which contained a reservation of an express power of revocation is *Wall v. Wall*.²³ In this case an instrument conveying realty and personalty provided: "The deed to take effect, as far as regards the handing over of the property, at my death; and I reserve to myself the right to revoke it at any time during my life, by filing in the clerk's office a written revocation under my hand and seal." After the death of the maker his executors had the instrument admitted to probate as a will; the donees sought to have the probate set aside. The court held the instrument to be a deed and not a will and ruled in favor of the donees. The court said:

Upon the whole, we consider that this deed conveyed the present right to the property, to be enjoyed in possession at the donor's death, and subject to his power to annul it in the way limited in the deed.

Thus the court appears to recognize the validity of the reservation and clearly holds that the instrument is effective to convey a title to the donees.

It might be objected that neither of these cases is true precedent sustaining the validity of revocable deeds to accomplish the desired result. The first case merely holds that after executing such a deed, the maker can still convey a valid interest in the property to another; such conclusion could be justified on

²³ 30 Miss. 91, 64 Am. Dec. 147 (1855).

the ground that the instrument of gift was ineffective to convey an interest to the intended donee. The second case, on the other hand, merely holds that the instrument passed a valid title to the donee; this result could be sustained on the theory that the power of revocation contained in the instrument was void and like an illegal condition subsequent could be stricken out of the instrument leaving the donee's estate absolute.²⁴ It must be conceded that there is some merit in each of these objections; the first, because a few early cases²⁵ do seem to hold that a deed with a reserved power of revocation is ineffective to convey any interest to the intended donee; the second, because other cases clearly hold that such a deed conveys an absolute estate to the donee, the reservation being void.²⁶ The simplest answer to this objection is that the language of the decisions demonstrates that such was not the reasoning of the courts; in each case the court infers that the obvious intent of the donor would have been effectuated; that though he could have revoked the gift at any time before he died, the gift would become absolute at that time if the power had not been validly exercised.

It is submitted that cases holding that a valid interest in the property can be created in a third person after an exercise of the reserved power come very close to true precedent for the effectiveness of these instruments to accomplish the desired result. The cases which apparently held deeds reserving a right or power of revocation in the grantor insufficient to convey title to the donee are old, and the effect of most of them has been mitigated by subsequent holdings within the same court.²⁷ The theory of these older decisions was that the reserved power negated the intent required for a valid delivery; but as will be shown later there is no logical justification for holding that such reserved powers, in and of themselves, preclude a valid delivery. There are decisions holding an exercise of the reserved power effective

²⁴ 1 Tiffany, *The Law of Real Property*, sec. 199 (3rd ed., 1939); 2 Bl. Comm. *156.

²⁵ *Ellis v. Pearson*, 104 Tenn. 591, 58 S.W. 318 (1900); *Wren v. Coffey*, 26 S.W. 142 (Tex. Civ. App. 1894); *Roberts v. Coleman*, 37 W.Va. 143, 16 S.E. 482 (1892); *Epperson v. Mills*, 19 Tex. 65 (Tex. Civ. App., 1857).

²⁶ *Yordy v. Yordy*, 167 Kan. 211, 217 Pac. 912 (1950); *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854 (1908).

²⁷ See *Stewart v. Workman*, 85 W. Va. 695, 102 S.E. 474 (1920); *Stamper v. Venable*, 117 Tenn. 557, 97 S.W. 812 1906; *Hamilton v. Jones*, 32 Tex. 598, 75 S.W. 554 (1903).

to defeat the donee's interest²⁸ in Alabama,²⁹ Connecticut,³⁰ Kentucky,³¹ Maryland,³² Rhode Island,³³ and West Virginia.³⁴

Unfortunately the majority of the cases involving revocable deeds of land have arisen after the death of the donor when his heirs have generally brought suit against the donee to recover the property. In such cases, it must be conceded, a holding in favor

²⁸ See also *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917) and *Horn v. Broyles*, 62 S.W. 297 (Tenn. 1900), both of which held an exercise of the reserved power effective to transfer title to the land to a third person; in neither case, however, was the revoking grantor entitled to retain for himself the proceeds derived from exercising the power.

²⁹ *Blackwell v. Harbin*, 186 Ala. 531, 65 So. 35 (1914), where the deed provided: "The grantor may at any time . . . cancel this deed." Grantee brought ejectment against a subsequent purchaser from the donor. Held: For defendant. *Strong's Executor v. Brewer*, 17 Ala. 706 (1850), discussed in text at note 22.

³⁰ *Bouton v. Doty*, 69 Conn. 531, 37 Atl. 1064 (1897). The deed reserved "full power to mortgage." Subsequent mortgagee from the donor sued to foreclose. Held: For plaintiff.

³¹ *Board of Missions of Methodist Episcopal Church, South v. Mayo*, 81 F.2d 449 (6th Cir., 1936), which involved a deed to a private charity with a gift over to a public charity upon occurrence of specified event; the deed reserved the right to change the conveyance with the approval of the private charity. With such approval, grantor make an absolute deed to the private charity. After the named event occurred, the public charity sued for the land. Held: For defendant. *Ricketts v. Louisville, St. L. & T. Ry. Co.*, 91 Ky. 221, 15 S.W. 182 (1891), discussed in text at note 46.

³² *Beranck v. Caccimaice*, 157 Md. 144, 146 Atl. 369 (1929); *Harmon v. Hurst*, 160 Md. 96, 153 Atl. 24 (1931); *Weinbeck v. Dahms*, 134 Md. 464, 107 Atl. 12 (1919). In the *Weinbeck* case the deed reserved "the absolute right to grant, convey, sell, mortgage, limit, or dispose of the herein described property." Donee brought ejectment against a subsequent grantee from the donor. Held: For defendant. In the *Beranck* case the deed reserved the "right and privilege to mortgage, sell or otherwise dispose of or encumber" the land. Grantor subsequently contracted to sell the land to defendant, who defaulted arguing that title was unmarketable. Specific performance was ordered. In the *Herman* case the deed reserved the power "to mortgage or sell." Grantor subsequently conveyed the land to a straw man who immediately conveyed it back. Upon the death of the grantor his devisee sued grantee to remove cloud on title. Held: For devisee.

³³ *Bradish v. Sullivan*, 54 R.I. 34, 173 Atl. 117 (1934), which involved an indenture that purported to "demise and lease" land to a mother for a term "when the title to said property shall vest equally in their children." Donor reserved the right "to make such changes in the terms and conditions of this lease as he may deem desirable." Donor subsequently filed formal paper terminating the indenture and then conveyed the property to the defendant. When the term mentioned in the original instrument expired, one of the children brought ejectment. Held: For defendant.

³⁴ *Steward v. Workman*, 85 W. Va. 695, 102 S.E. 474 (1920); *Totten v. Pochantas Coal & Coke Co.*, 67 W. Va. 639, 68 S.E. 373 (1910). In the *Totten* case the deed conveyed the land to several donees but reserved to donor the right to sell the land with the consent of one of the donees. With the required consent the donor subsequently sold the land to defendant. One of the other donees brought suit for partition. Held: For defendant. In the *Steward* case, the deed reserved the right to revoke if the donee should "become a drunkard or uselessly involved in debt or if he should become cruel or abusive to his mother or father." The donee subsequently deeded the land to the defendant. Donor sued in equity to cancel the deed. The court recognized the defeasible character of the donee's estate but dismissed the bill on the ground that ejectment was the proper form of action.

of the donee is equivocal; the basis of the decision could easily be that the deed conveyed an absolute interest inter vivos and that the power of revocation itself was void. However, language in such decisions in Alabama,³⁵ California,³⁶ Connecticut,³⁷ Indiana,³⁸ Kentucky,³⁹ Massachusetts,⁴⁰ Missouri,⁴¹ and Tennessee⁴² clearly indicates that the courts would have given effect to an exercise of the reserved power. And in *Jones v. Clifton*⁴³ the Supreme Court of the United States recognized the validity of a deed with a reserved power of revocation to convey the title to the grantee, while inferring that an exercise of the power would have been given effect.⁴⁴

A conclusive answer to the objections of the technical analyst exists in the states of Alabama, Connecticut, and Kentucky where separate lines of decisions have held that a deed does convey a title to the donee even though a power of revocation is reserved, and, on the other hand, that an exercise of the reserved power is effective to terminate that title.⁴⁵ Thus in Kentucky, where there has been an unusually long line of cases dealing with the problems involved, the effectiveness of a reserved power to defeat the interest of the donee was established by *Ricketts v. Louisville, St. L. & T. Ry. Co.*,⁴⁶ a decision that has often been cited by the courts of other states. In this case, an elderly woman deeded land to her son; the deed provided: "I hereby reserve to myself the power to revoke and annul this conveyance at any time during my natural life by a deed or other instrument under seal; . . . in

³⁵ *Mays v. Burleson*, 180 Ala. 396, 61 So. 75 (1913).

³⁶ *Lowe v. Ruhlman*, 67 Cal. App. 2d 828, 155 P.2d 671 (1945); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914).

³⁷ *Dennen v. Searle*, 149 Conn. 126, 176 A.2d 561 (1961).

³⁸ *Kokomo Trust Co. v. Hiller*, 67 Ind. App. 611, 116 N.E. 332 (1917).

³⁹ *McCampbell v. McCampbell*, 178 Ky. 816, 250 S.W. 122 (1923).

⁴⁰ *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903).

⁴¹ *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 206, 260 S.W.2d 483 (1953).

⁴² *Stamper v. Venable*, 117 Tenn. 557, 97 S.W. 812 (1906).

⁴³ 101 U.S. 225 (1879). This case involved a deed by a husband to his wife "for her separate use." It is frequently classified as a revocable trust case. But it is in the transitional period of these instruments in this country and it seems arguable that it really involved a revocable deed of a legal interest.

⁴⁴ See also *Towler v. Towler*, 142 N.Y. 371, 36 N.E. 869 (1894); *Harty v. Doyle*, 49 Hun. 410, 3 N.Y.S. 574 (1888), where the court apparently held the reserved power valid in so far as the conveyance was gratuitous but void to the extent that the grantee had given consideration; *Appeal of Du Bois*, 22 Weekly Nts. 236, 121 Pa. St. 368, 15 Atl. 641 (1888).

⁴⁵ See cases cited in notes 29, 30, 31, 35, 37, and 39 *supra*.

⁴⁶ 91 Ky. 221, 15 S.W. 182 (1891).

the event of my exercising the said power of revocation herein reserved, the property and title to said land to reinvest in me as it exists at the time of the execution of this deed, any attempted deed, alienation, or incumbrance thereon by the grantee herein to the contrary notwithstanding." The son subsequently granted a right of way through the land to the defendant railroad company. The mother subsequently exercised her power of revocation in the manner specified in the original deed and then brought suit against the railroad. The court held in favor of the mother, thus sustaining the validity of the power.⁴⁷ The effectiveness of such a deed to convey title to the grantee was established in Kentucky by *Commonwealth v. McCauley's Executors*.⁴⁸ In this case the state adopted its first inheritance tax statute several years after McCauley had executed a deed of land which reserved to himself a life estate and a power of revocation. When McCauley died, he left a will that gave all his property to one Rock, who was also the grantee of the revocable deed. Thus it was clear that Rock had title to the land, but it was necessary to determine *when* he received the title. The court held that no tax could be assessed, for title had passed under the deed before the statute had been adopted.⁴⁹

There is remarkably little discussion of theory in any of the cases that sustain the validity of such revocable gifts. It would seem that the most logical explanation of the operation of these deeds is that they convey a defeasible and not an absolute estate to the grantee; the grantor retains a bare power, one that historically operated under the Statute of Uses.⁵⁰ Upon exercise of the power the grantee's estate is cut short and the estate becomes vested again in the grantor⁵¹ in the same manner that an executory

⁴⁷ Other Kentucky cases recognizing the effectiveness of the power to divest the donee's interest are *Cassady v. Cain*, 311 Ky. 179, 223 S.W.2d 744 (1949), and *Campbell v. Campbell*, 207 Ky. 17, 268 S.W. 588 (1925).

⁴⁸ 166 Ky. 450, 179 S.W. 411 (1915).

⁴⁹ Other Kentucky cases recognizing the effectiveness of such deeds to convey the title to the donee are: *Cassady v. Cain*, 311 Ky. 179, 223 S.W.2d 744 (1949); *Vaughn v. Metcalf*, 274 Ky. 279, 118 S.W.2d 727 (1938); *McCampbell v. McCampbell*, 178 Ky. 816, 250 S.W. 122 (1923); *Continental Nat. Bank of Louisville v. McCampbell*, 184 Ky. 658, 213 S.W. 193 (1919). In view of this line of holdings the seemingly contrary decision in *Douglas v. Snow*, 304 Ky. 805, 202 S.W.2d 629 (1947), should be restricted to its peculiar facts.

⁵⁰ See *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903).

⁵¹ *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 206, 260 S.W.2d 483 (1953); *Kokomo Trust Co. v. Hiller*, 67 Ind. App. 611, 116 N.E. 332 (1917); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914).

interest becomes possessory and that an appointee's expectancy matures into an estate.⁵² Thus it is seen that the power of revocation is clearly analagous to, if not merely a special type of, the common power of appointment. Indeed, if he so desired, it seems clear that the grantor could accomplish his purpose merely by conveying the property to a straw man⁵³ who would then execute a conveyance to the intended donee with a general power of appointment in the donor.

When these transactions are viewed in this light, it will be seen that the language used in many of these instruments and cases to the effect that the reservation is a "power to revoke the deed" is inaccurate. The deed is not and cannot be revoked. The power operates only upon the estate of the grantee and even it is not revoked; it is merely terminated by the act which constitutes an exercise of the power. In the same way, the phrase "revocable gift" is somewhat misleading. Technically the gift is not revoked when the power is exercised. It is still effective according to its original terms. But since the gift encompassed only a defeasible title and since the defeating event has now occurred, the gift no longer has much practical significance to the parties. Though the term is thus somewhat inaccurate, it will continue to be used throughout the rest of this study; for it has become popular and does convey a clear picture of the non-technical effect of these transactions.

It might be well to also point out that it seems perfectly proper for a court to construe an instrument as creating a defeasible estate subject to a power even though very inept language has been used by the grantor. Thus deeds reciting that part of the consideration is "that grantee will deed back . . . when called for so to do"⁵⁴ or "that grantor may at any time or for any cause that he may think proper cancel this deed,"⁵⁵ deeds

⁵² See *Bouton v. Doty*, 69 Conn. 531, 37 Atl. 1064 (1897). Technically it is incorrect to call the revoking grantor's estate an executory interest, as the court did in this case. A grantor cannot limit an executory interest in himself. However, the estate which arises upon exercise of the power is analagous to an executory interest. See Simes and Smith, *The Law of Future Interests*, secs. 224, 226 (2d ed., 1956).

⁵³ This method was actually used in *Mardin v. Leimback*, 115 Md. 208, 80 Atl. 958 (1911). It would seem that the straw man in unnecessary for *reserved* powers of appointment have been recognized as valid. See Simes and Smith, *op. cit. supra* note 52, at sec. 878.

⁵⁴ *Stamper v. Venable*, 117 Tenn. 557, 97 S.W. 812 (1906).

⁵⁵ *Blackwell v. Harbin*, 186 Ala. 531, 65 So. 35 (1914).

purportedly reserving "the right to revoke and annul this conveyance,"⁵⁶ or "the right to change the conveyance in any and all of its terms,"⁵⁷ and deeds "upon condition"⁵⁸ or "provided that I do not sell"⁵⁹ have been construed to create such estates.⁶⁰ This type of power originated in the Court of Chancery which looked at the substance and not the form.⁶¹ As long as the intention of the parties is clear, the court should have little difficulty in effectuating it in this manner; for it is well established that no special words are necessary to create a power.⁶²

Some early cases, however, effectuated attempts at revocable gifts by construing the deeds as conveying estates subject to a condition. Thus in *Blanchard v. Morey*⁶³ the donors reserved a life estate and the deed expressly provided that it "is not to be binding upon us . . . if in any case we should want or need to sell a part of all of said real estate in order to maintain us." Subsequently, the donors mortgaged the land to plaintiff to buy necessities. This was a bill to foreclose the mortgage. The court said:

The right to support and to sell for their necessities was a provision in the nature of a condition of absolute defeasance. If the grantees wished the conveyance to become absolute, they were bound to see that no occasion should arise for the grantors to sell for their necessities.

The court held that the fact that the donors had had to mortgage the land for necessities showed a breach of the condition; since the donors were already in possession, the estate automatically reverted in them without any formal act; and hence, the mortgage was a valid encumbrance on the estate. Since the defeating event in this case was not completely at the will of the donors,

⁵⁶ *Stewart v. Workman*, 85 W. Va. 695, 102 S.E. 474 (1920); *Ricketts v. Louisville, St. L. & T. Ry. Co.*, 91 Ky. 221, 15 S.W. 132 (1891).

⁵⁷ *Board of Missions of Methodist Episcopal Church, South v. Mayo*, 81 F.2d 449 (6th Cir. 1936); *Bradish v. Sullivan*, 54 R.I. 34, 173 Atl. 117 (1934).

⁵⁸ *Vaughn v. Metcalf*, 274 Ky. 279, 118 S.W.2d 727 (1938).

⁵⁹ *Mays v. Burleson*, 180 Ala. 396, 61 So. 75 (1913).

⁶⁰ See also the language used in *Cassady v. Cain*, 311 Ky. 179, 223 S.W.2d 744 (1949); *Weinbeck v. Dahms*, 134 Md. 464, 107 Atl. 12 (1919); *Kokomo Trust Co. v. Hiller*, 67 Ind. App. 611, 116 N.E. 332 (1917).

⁶¹ 2 Pomeroy, *Equity Jurisprudence*, sec. 378 ff. (5th ed., 1941).

⁶² *Simes and Smith, op. cit. supra* note 52, at sec. 892.

⁶³ 56 Vt. 170 (1883).

it is easier to justify this decision than some of the others that speak of the reservation as a condition.⁶⁴

Though no case has been found in which the outcome depended upon a choice between the two theories, viewing these reservations as creating powers rather than conditions has several advantages. In the first place it must be remembered that whether or not the event on which a conditional estate depends can be within the sole will of the grantor is doubtful.⁶⁵ Construing the reservation as a power obviates this problem; for such an event is clearly a proper subject for a power. But the major advantage in this construction is that it makes it clearer that the reservation dies with the donor unless he takes advantage of it during his lifetime. Most powers are personal, and we are accustomed to seeing unexercised powers extinguished at the deaths of their holders.⁶⁶ Thus when the reservation is viewed as a power, we more or less instinctively recognize its personal character and have little difficulty in concluding that, unless the power has been previously exercised, the gift becomes irrevocable and the donee's estate indefeasible upon the donor's death. But if the reservation is viewed as a condition, then the donor has a right of entry rather than a power;⁶⁷ and since rights of entry generally descend upon the deaths of their owners,⁶⁸ it might be thought that a donor's heirs or devisees would succeed upon his death to his unexercised right and could by their own act still terminate the interest of the donee and revoke the gift. Such a holding would almost certainly frustrate the donor's intent for it would inevitably lead to the eventual revocation of the gift—if not by his heirs, then by his heirs' heirs.⁶⁹ Though it is submitted that such a result would not necessarily follow from viewing

⁶⁴ E.g., *Bradish v. Sullivan*, 54 R.I. 34, 173 Atl. 117 (1934); *Ricketts v. Louisville, St. L. & T. Ry. Co.*, 91 Ky. 221, 15 S.W. 182 (1891).

⁶⁵ See text *supra* at note 2.

⁶⁶ *Simes and Smith, op. cit. supra* note 52, at sec. 943.

⁶⁷ See 2 Restatement, Property, sec. 55 (1936).

⁶⁸ 2 Restatement, Property, sec. 164 (1936). For the exceptions to this majority rule, see *Simes and Smith, op. cit. supra* note 52, at sec. 1884.

⁶⁹ Rights of entry are not subject to the rule against perpetuities and thus may encumber the title to property from generation to generation. See *Simes and Smith, op. cit. supra* note 52, at sec. 1238. There are, of course, statutes in some states that limit the duration of rights of entry; see *Current Trends in State Legislation, 1953-1954*, pgs. 589-644.

these reservations as conditions,⁷⁰ the fact that the donee's estate remains defeasible only so long as the donor lives is somewhat easier to establish when the reservation is viewed as creating a power.⁷¹ For these reasons *Stamper v. Venable*,⁷² which expressly held the reservation to create a power rather than a condition, seems sound.

It must not be assumed that the validity of revocable deeds is established in all states. In *Newell v. McMillan*⁷³ a Kansas court, while referring to what it apparently considered to be a power of revocation,⁷⁴ said that it was "so clearly void as not to be a fair subject for debate among competent lawyers." This line of precedent dates back to an early and often cited Georgia case, *Daniel v. Veal*.⁷⁵ This case involved a deed of personalty which expressly reserved to the maker "the right of revoking this deed of gift." After the donor's death, his administrator claimed the property as part of decedent's estate, and the donee brought suit to establish her right. The court came to a sound conclusion by holding in favor of the donee, but the theory of the court was that the deed conveyed an absolute title to the donee when it was executed. The court said:

Our opinion is, that this clause reserving the right of revocation, is inconsistent with the operative portion of the instrument; incompatible with the estate conveyed, and therefore void.

⁷⁰ Even if the reservation creates a right of entry, the conditioning event could be construed to be a revocation by the donor personally. Thus at his death without having revoked the gift, the right would be extinguished for then it would no longer be possible for the conditioning event to occur. See 1 American Law of Property, sec. 4.76 (1952).

⁷¹ Construing the reservation as creating a power also simplifies the resolution of another problem that has occasionally arisen. In *Green v. Votaw*, 192 Okla. 136, 136 P.2d 367 (1943), the court indicated that when property is owned by one spouse individually, the reservation of a power to revoke by the other spouse is void because a reservation cannot be made to a stranger. See also *In re Young*, 11 R.L. 636 (1877). Though this argument has some merit when the reservation is construed as a condition, it is wholly inapplicable when the reservation is construed as creating a power; for powers are not interests in property and no special words of grant are necessary to create them.

⁷² 117 Tenn. 557, 97 S.W. 812 (1906). Other cases indicating that the reservation is a power are: *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 206, 260 S.W.2d 483 (1953); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914); *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903).

⁷³ 139 Kan. 94, 30 P.2d 126 (1934).

⁷⁴ Though the language of the court infers that the case involved simply a revocable gift, a careful reading of the reservations indicates that the grantor was really trying to restrain the power of alienation.

⁷⁵ 32 Ga. 589 (1861).

Since this case arose in a period when the possibility of creating future interests in personalty was none too clear,⁷⁶ it would seem that it might be easily distinguished from cases involving similar deeds of realty. This distinction has not been drawn, and the case has been cited in cases involving deeds of land.⁷⁷ Though several subsequent cases in Georgia⁷⁸ have involved similar revocable deeds, the present rule in this state is doubtful. None of these cases has placed in issue the effectiveness of an exercise of the reserved power to defeat the interest of the donee; all have simply involved the effectiveness of the deed to convey the interest to the donee. They have all come to a fair conclusion by holding the gifts valid, but it is interesting to note that the most recent decision⁷⁹ cites authority which is based on *Ricketts v. Louisville St. L. & T. Ry. Co.*, *supra*, and does not mention *Daniel v. Veal*, *supra*.

Though the status of powers of revocation in deeds of legal interests in land in Georgia is doubtful, their invalidity in Kansas is clear. In *Durand v. Higgins*⁸⁰ a deed of land was held effective to convey title to the grantees under reasoning that inferred that the attempted reservation of a right of revocation was void. In *Lacy v. Comstock*⁸¹ the court seemed to give effect to an exercise of a reserved power to revoke;⁸² but several years later in *Brady v. Fuller*⁸³ the court clearly held that such reserved power was void and that an exercise of it could not create an estate in another in derogation of the estate of the original donee. In this latter case a mother deeded land to her daughter "reserving however to herself an estate for and during her natural life . . . and further

⁷⁶ See Simes and Smith, *op. cit. supra* note 52, at sec. 351 ff.

⁷⁷ *Price v. Gross*, 148 Ga. 137, 96 S.E. 4 (1918); *Hamilton v. Cargily*, 127 Ga. 762, 56 S.E. 1022 (1907).

⁷⁸ *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928); *Simpson v. Powell Co.*, 158 Ga. 516, 123 S.E. 741 (1924); *Price v. Gross*, 148 Ga. 137, 96 S.E. 4 (1918); *Shelton v. Edenfield*, 148 Ga. 128, 96 S.E. 3 (1918); *Hamilton v. Cargily*, 127 Ga. 762, 56 S.E. 1022 (1907); *Dye v. Dye*, 108 Ga. 741, 33 S.E. 848 (1899).

⁷⁹ *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928).

⁸⁰ 67 Kan. 110, 72 Pac. 567 (1903). The deed was absolute upon its face but the grantor took from the grantees a separate written instrument reserving "the right to sell and convey the whole or any part thereof the same as though a deed had never been given."

⁸¹ 55 Kan. 86, 39 Pac. 1024 (1895).

⁸² This decision is equivocal, but its theory must be that the deed conveyed no title to the donee. Else the donor revoked the gift by will though he reserved only the right to revoke by "deed, during his lifetime."

⁸³ 78 Kan. 448, 96 Pac. 859 (1908).

reserving to herself the power to mortgage, incumber, sell, lease, convey or otherwise dispose of said real estate at any time." The mother subsequently deeded the same land to the daughter and another. After the mother's death, the other grantee of the second deed sought partition of the land. The court held that the reservation must be construed as affecting only the life estate of the mother; for if applied to the fee, the reservation "would necessarily fail." The court has recently come to a similar conclusion in *Thom v. Thom*.⁸⁴

The possibility of such revocable gifts has been questioned in one aspect or another in other states also.⁸⁵ Sometimes courts have not been entirely consistent in their approach to such instruments; holding in one case that the instrument is ineffective to convey any estate, and in the next that it conveys an absolute title that cannot be revoked. This appears to have happened in Texas in two cases⁸⁶ less than ten years apart.

In these cases casting doubt upon the validity of such revocable gifts, there is the same absence of discussion of principle that characterizes the cases that sustain their validity. Though a few cases seem to hold that the reserved power prevents the disposition from having any effect, the commoner result is that the reservation is void, and thus, the donee's estate absolute. The explanation often found in the decisions is that the reservation is "repugnant"; but the cases do not always make it clear why the reservation is thought to be repugnant. As pointed out recently by the Supreme Court of Missouri,⁸⁷ certainly it is not repugnant in the same sense that similar conditions were said to be so at common law; the Statute of Uses evidenced a change in the policy that required all transfers of land to be completed by public ceremony, and modern recording acts have removed all the reasons on which the supposed rule was founded.

⁸⁴ 171 Kan. 651, 237 P.2d 250 (1954). In *Yordy v. Yordy*, 169 Kan. 211, 217 P.2d 912 (1950), the court did not pass upon the validity of the reserved power, but was content merely to hold that if valid it had not been properly exercised.

⁸⁵ *Ellis v. Pearson*, 104 Tenn. 591, 58 S.W. 318 (1900); *Roberts v. Coleman*, 37 W.Va. 143, 16 S.E. 482 (1892); *Cunningham v. Davis*, 62 Miss. 366 (1884); *In re Young*, 11 R.I. 636 (1877).

⁸⁶ *Hamilton v. Jones*, 32 Tex. 598, 75 S.W. 554 (1903); and *Wren v. Coffey*, 26 S.W. 142 (Tex. Civ. App., 1894).

⁸⁷ *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 206, 260 S.W.2d 483 (1953).

It would seem that many courts feel that such reservations are repugnant to "the estate conveyed." The fallacy of such doctrines of repugnancy has been pointed out so frequently and so well in other circumstances⁸⁸ that it hardly seems necessary to point out that this reasoning completely begs the issue; no conclusion can be reached under this doctrine unless it is assumed that the "repugnant" incident is a necessary characteristic of the estate conveyed. The cases applying this doctrine wholly fail to recognize that the donee's estate is qualified and not absolute. The power of revocation is merely a special limitation which like any other shifting use takes effect in derogation of the preceding estate. Certainly no court today would hold a shifting use void because of such "repugnancy."

It seems clear that when some courts refer to the doctrine of "repugnancy," they are using the term in a different sense. At common law, a highly artificial rule prevailed in the interpretation of the various parts of a deed; it was often held that an estate specifically limited in the granting clause could not be cut down to a less estate by the language of the habendum.⁸⁹ Under this rule it would be logical to hold a power of revocation void if the language of the granting clause conveyed an absolute estate, i.e., unless some language was incorporated in the granting clause indicating reservations would be subsequently mentioned.⁹⁰ The severity of this rule of construction has been mitigated through the years, and most courts now seek to reconcile apparently repugnant provisions by determining the true intention of the parties.⁹¹ Thus it would seem that regardless of where the reserved power is inserted, its effect in qualifying the estate conveyed should be recognized if the intention of the parties is

⁸⁸ Williams, *Doctrine of Repugnancy, Conditions in Gifts*, 59 *Law Q. Rev.* 343 (1943); Simes and Smith, *The Law of Future Interests*, sec. 1183 (2d ed., 1956).

⁸⁹ 2 *Bl. Comm.* *298; *Throckmorton v. Tracy*, 1 *Plowd.* 145, 75 *Eng. Rep.* 222.

⁹⁰ This is clearly the argument in *Durand v. Higgins*, *supra* note 80. The rule was also recognized in *Tennant v. John Tennant Memorial Home*, 167 *Cal.* 570, 140 *Pac.* 242 (1914), but was held inapplicable "because the granting clause itself, declares that it is 'subject to' the reservations." However, this doctrine does not explain all of the cases; e.g., in *Brady v. Fuller and Thom v. Thom*, *supra* notes 83 and 84, the reservation was mentioned in the granting clause.

⁹¹ 4 *Tiffany*, *The Law of Real Property*, sec. 950 (3d ed., 1939); 3 *American Law of Property*, sec. 12.95 (1952); Healey, *Conflicts Between Granting and Habendum Clauses*, 11 *N.Y.U. Int. L. Rev.* 201 (1956).

clear.⁹² But even this modern rule has not been applied with the same liberality by all courts. Most courts seek to ascertain the intention by considering the instrument as a whole;⁹³ others have gone outside the instrument itself and considered the whole transaction as evidenced by other documents between the parties;⁹⁴ and still others, being swayed by a desire to give some effect to every part of the instrument, have concluded that all inconsistencies must be resolved by considering only the parts in apparent conflict.⁹⁵ This latter method of construction might be the explanation for such holdings as *Brady v. Fuller, supra*, and *Thom v. Thom, supra*, where the donors reserved life estates and the right to convey, and the courts concluded that the power to convey applied only to the reserved life estates. Care in the drafting of revocable deeds should obviate any difficulty with these doctrines of repugnancy.

There is yet another doctrine of "repugnancy" which might be applied to revocable deeds. Courts have often had difficulty with deeds and wills that purport to give a possessory estate to one and limit a future interest to another while at the same time investing the first taker with an absolute power of disposition, e.g., a devise to testator's wife, with express or implied power of disposal, followed by a gift over of "what remains" to testator's heirs. Though some states held such future interests void even when the conveyance expressly limited a life estate to the holder of the power,⁹⁶ most courts held them valid unless a fee was created in such first taker.⁹⁷ Many explanations of the reasons for the rule have been proposed; none of them very convincing.⁹⁸

⁹² "Instead of a life estate, a grantor may reserve . . . a power of sale, or a right to revoke the conveyance during his lifetime, or a life estate coupled with a power of sale.

. . . The matter of repugnancy must be determined from a consideration of the entire instrument. An intention of the grantor to destroy the effect of his own conveyance is so foreign to his probable purpose that a construction of repugnancy will be made only when no other is possible." *American Law of Property*, sec. 12.95 (1952).

⁹³ *Carter Oil Co. v. Weil*, 209 Ark. 653, 192 S.W.2d 215 (1945), noted in 2 Ark. L. Rev. 114 (1947); *Triplett v. Williams*, 194 N.C. 394, 63 S.E. 79 (1908); *Ratliffe v. Marse*, 87 Ky. 26, 7 S.W. 345 (1888).

⁹⁴ *Weir v. Brigham*, 218 Ark. 354, 236 S.W.2d 435 (1951).

⁹⁵ See *Whetstone v. Hunt*, 78 Ark. 230, 93 S.W. 979 (1906).

⁹⁶ Michigan, Tennessee, Virginia, and West Virginia held any interest following a life estate with an unlimited power of disposal void. See Annotations, 36 A.L.R. 1218 (1925), 76 A.L.R. 1166 (1932).

⁹⁷ See cases cited in Annotations, 36 A.L.R. 1177 (1925), 76 A.L.R. 1153 (1932).

⁹⁸ *Simes and Smith, The Law of Future Interests*, sec. 1484 (2d ed., 1956).

But one of the reasons often suggested is that the interest is "repugnant" after such an estate.⁹⁹ It is conceivable that such an argument might be applied to some revocable deeds. In most of the cases that have been considered the donor did not convey a possessory estate to the donee upon execution of the deed. Usually he retained not only a power of revocation but also a life estate. These cases should present no difficulty today, for the few states that held the rule applicable to life tenants with absolute powers of disposition have since repudiated at least this application of it.¹⁰⁰ However, in an attempt to relieve themselves from a possible suit for waste, donors often seek to retain more than a life estate when making a disposition which is to take effect in possession at their deaths; many courts have effectuated this intent by construing such deeds as reserving a defeasible fee in the grantor rather than a mere life estate.¹⁰¹ If the maker of a revocable deed were to use such broad language as to create a defeasible fee in himself, it is conceivable that this same doctrine of repugnancy would be applicable to it;¹⁰² for then the donee's interest would be following a fee estate to which has been added an absolute power of disposition—the power of revocation being analogous to, if not the same as, an absolute power of disposition. Though this rule has been limited by judicial decision¹⁰³ in some states and abrogated by statute¹⁰⁴ in others, it is still applied in some jurisdictions¹⁰⁵ and could be utilized in striking down such revocable deeds.¹⁰⁶

⁹⁹ Even though the courts so hold, there is no apparent reason why such an interest is any more "repugnant" than other shifting uses. See Leflar, *Validity of Future Interests Cutting Short Fee Simple Estates*, 8 Tenn. L. Rev. 73 (1930).

¹⁰⁰ Simes and Smith, *op. cit. supra* note 98, at sec. 1488.

¹⁰¹ See *Dennis v. West*, 248 Ala. 90, 26 So. 2d 263 (1946); *Watts v. Watts*, 198 Miss. 246, 22 So. 2d 625 (1945); *Turner v. Montgomery*, 283 S.W. 815 (Tex. Civ. App. 1927); *Bradley v. Bradley*, 185 Iowa 1272, 171 N.W. 729 (1919); Fritz, *The Texas Law of Conveyancing*, secs. 26, 38, printed in 3 *Vernon's Ann. Rev. Civil Stats. of Texas* (1962).

¹⁰² Apparently this argument was made in *Cassady v. Cain*, 311 Ky. 179, 223 S.W.2d 744 (1949), but the court held the language reserved only a life estate with the power of revocation.

¹⁰³ Simes and Smith, *The Law of Future Interests*, sec. 1487 (2d ed., 1956).

¹⁰⁴ Simes and Smith, *op. cit. supra* note 103, at sec. 1491.

¹⁰⁵ E.g., in *Missouri*. *Vaughn v. Compton*, 361 Mo. 467, 235 S.W.2d 328 (1950); 17 Mo. L. Rev. 177 (1952).

¹⁰⁶ This poses a serious problem for the draftsman who wishes to protect a donor's estate from any possible claim by the donee for waste. Of course there is no fear of such suit during life while the power of revocation is still exercisable. But after the donor's death some donee might seek to press such a claim against his estate. Though no case has been found involving the point, it is suggested

(Continued on next page)

It might be thought that revocable deeds would run afoul of the policy of the law that prohibits undue restraints on alienation. In several recent cases¹⁰⁷ Kansas courts seemed to indicate this line of thought. It is submitted, however, that this problem is not really raised by these instruments. Land which has been conveyed by a deed that reserves a power of revocation remains freely alienable by the grantor at any time he sees fit; all he needs to do is exercise his reserved power. And the donee is also free to alienate his interest to whomever he sees fit and whenever he pleases. The reserved power will of course encumber the estate in the hands of his transferee (except, possibly, in the case of a bonafide purchaser); and this fact will in practice probably curtail his opportunities of alienating the property, for it will be difficult to find any one willing to buy an interest so easily defeated. But such is the nature of most qualified estates. In this respect, a deed containing a power of revocation is very similar to a deed containing an option to repurchase at a nominal price. The grantee of neither deed will probably be able to find any one willing to purchase his interest. Yet such options are clearly valid if limited to the period of the rule against perpetuities;¹⁰⁸ and it is submitted that the same should also be true of such powers of revocation.

There is yet another objection to the effectiveness of these revocable gifts that might be raised. Unlike the objections previously considered this argument would recognize the validity of the reserved power but would automatically terminate the donee's interest at the death of the donor. The basis of this argument is a statement by Lord Coke to the effect that a tenancy at the will of one party is at the will of both.¹⁰⁹ Under this doctrine it has been held that an estate that is terminable at the

(Footnotes continued from preceding page)

that an analogy to the trust cases might be drawn and the donee might be precluded from suing for any act authorized or done by the holder of the power. See *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 51 N.E.2d 674 (1943). Thus, in view of the possibility that the reservation of too large a possessory estate might defeat the whole transaction and in view of this possible defense in the event of such a subsequent suit, it is submitted that it would probably be better to reserve only a life estate with the power to revoke.

¹⁰⁷ If the court did not confuse a power of revocation with a restraint on alienation in *Newell v. McMillan*, 139 Kan. 94, 30 P.2d 126 (1934), it certainly equated them in *Zaskey v. Farrow*, 159 Kan. 347, 154 P.2d 1013 (1945) and *Yordy v. Yordy*, 169 Kan. 211, 217 P.2d 912 (1950), by citing the *Newell* case.

¹⁰⁸ 6 American Law of Property, secs. 24.56, 24.66 (1952).

¹⁰⁹ Co. Litt. *55a.

will of one party is merely a tenancy at will which is personal in nature and automatically terminated by the death of either party.¹¹⁰ It is submitted that this doctrine presents little difficulty to sustaining the validity of revocable deeds. It is generally held today that the rule is inapplicable to estates that have a designated period of duration other than the will of the parties. Thus a deed that expressly limits a life estate or a fee to the grantee could not be held to create only a tenancy at will, even though the estate is expressly made defeasible at the will of the grantor. Concerning this matter the Restatement of Property provides:

The fact that an estate is created subject to a special limitation . . . by the terms of which the happening of the event upon which the limitation . . . is to operate depends upon the will of the transferor of the estate does not necessarily cause the created estate to be an estate at will. Whether this result follows or not presents a problem in construction.¹¹¹

Of course a revocable deed that does not expressly limit a definite estate to the donee would present difficulties of construction that might compel a court to conclude that only an estate at will was created.

There are statutes in many states that seem to recognize the validity of powers of revocation in deeds of legal interests. Thus when originally codifying their law of powers, the New York legislators adopted the following provision, which has been copied into the laws of many other states:¹¹²

The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another. . . .¹³

Since a grantor may give a general power of appointment to one party while conveying an estate to another, this statute clearly

¹¹⁰ *Lepsch v. Lepsch*, 275 App. Div. 412, 90 N.Y.S. 2d 157 (1949); *Say v. Stoddard*, 27 Ohio St. 478 (1875); *Richardson v. Langridge*, 4 Taunt. 128, 128 Eng. Rep. 277 (Com. Pl. 1811).

¹¹¹ Sec. 21, com. b. See also 2 Powell, *The Law of Real Property*, sec. 256 (1950).

¹¹² Ala. Code (1940) tit. 47, sec. 80; D. C. Code (1961) tit. 45, sec. 1009; Mich. Comp. Laws (1948) sec. 26.123; N. D. Century Code 1959) tit. 59, sec. 1516; 60 Okla. Stat. Ann. (West 1963) sec. 195; S. D. Code (1939) tit. 59, sec. 0415; Wis. Stat. Ann. (West 1957) 232.32.

¹¹³ This formerly was section 144 of the N.Y. Real Property Law (McKinney 1945). It was recently repealed in a general revision of this part of the code. The revision apparently, however, did not materially alter the substantive rule of law. See N. Y. Laws 1964, c. 864, sec. 132.

authorizes him to reserve such a power to himself. But when such a power is reserved to the grantor, it would seem that it is merely a power of revocation; for it enables him to divest the grantee's estate and vest it in himself, thus revoking the gift. Thus the statute clearly seems to authorize the reservation of a power of revocation in the grantor of any type of conveyance.

The deleterious effect such reservations might have upon the grantor's creditors was soon recognized and to remedy the situation the New York legislature adopted the following statute, which also has been copied into the statutes of other states:¹¹⁴

Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.¹¹⁵

This provision expressly recognizes the power of revocation by name and it infers the effectiveness of revocable deeds to accomplish the desired result by specifying one instance in which the grantor shall still be "deemed" to be the owner. The natural inference from the statutory language is that, in all cases where the rights of creditors and purchasers are not concerned, the grantor is no longer the absolute owner of the property, and the deed is effective to pass a valid title to the donee. This inference is bolstered by the reviser's notes to this section; indeed, these notes also demonstrate that an exercise of the reserved power was considered to be effective to divest the estate of the donee. The notes say, in part:

As to the creation of powers: There are at present no limits; but the owner may separate from the title the whole or any portion of his authority, in the disposition of his lands, and retain it to himself or vest it in another. Thus a man may convey his estate in fee, and by means of a power of revocation, continue in himself the absolute dominion, leaving only a naked title to the alienee. By this device, the lands are

¹¹⁴ Ala. Code (1940) tit. 47, sec. 75; Ind. Stat. Ann. (Burns 1961) sec. 56-610; Kan. Gen. Stat. (1949) sec. 67-414; Mich. Comp. Laws (1948) sec. 26.104; Minn. Stat. (1953) sec. 502.76; N. D. Century Code (1959) tit. 59, sec. 0535; 60 Okla. Stat. Ann. (West 1963) sec. 267; S. D. Code (1939) tit. 59, sec. 0444; Wisc. Stat. Ann. (West 1957) 232.13.

¹¹⁵ This formerly was section 145 of the N. Y. Real Property Law (McKinney 1945). The recent revision of this part of the New York statutes retains substantially the same language. See N. Y. Laws 1964, c. 864, sec. 163.

placed effectually beyond the reach . . . of the creditors of the grantee. . . . (T)hey may always be defeated by an exercise of the power of revocation.¹¹⁶

These same arguments can be drawn from New York Real Property Law, sec. 267, which provides:

A conveyance of, or charge on, an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and incumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined. . . .

This statute also has its counterpart in other states.¹¹⁷

Mention has already been made of the difficulties courts have had with future interests following estates whose holders also have an absolute power of disposition. The commonest statutory provisions that have been adopted to meet this situation are patterned on what formerly was New York Real Property Law, secs. 149 and 150:

Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee simple absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers.

The language of these statutes seems easily applicable to revocable deeds in which the donor retains some possessory estate;

¹¹⁶ Printed in 3 New York Revised Statutes 889 (2d ed., 1836).

¹¹⁷ Colo. Rev. Stat. Ann. (1953) c. 59, sec. 59-1-3; Fla. Stat. (1944) sec. 726.88; Ind. Stat. Ann. (Burns 1949) sec. 33-404; Mich. Comp. Laws (1948) sec. 26.903; Minn. Stat. Ann. (1953) sec. 513.09; Nev. Rev. Stat. (1957) sec. 11.185; N. J. Stats. Ann. (West 1940) tit. 25, sec. 2-4; Ore. Rev. Stat. (1953) c. 95, sec. 95.030; S. C. Code (1962) tit. 57, sec. 309; Wisc. Stat. Ann. (West 1957) 240.03. For similar statutes from which the same inference could also be drawn, see Cal. Civ. Code (Deering 1949) sec. 1229; Idaho Code (1948) sec. 55-903; Mont. Rev. Code Ann. (1947) tit. 29, sec. 203; N. D. Century Code (1959) tit. 59, sec. 0559; S. D. Code (1939) tit. 51, sec. 1407.

the power of revocation is certainly an absolute power of disposition within the meaning of these laws. The first part of each section implies that the power may be validly exercised at least in favor of a purchaser; and the latter part seems to provide that the donee's interest is valid in the absence of an exercise of the power. These sections expressly exclude trust cases and thus are clearly applicable to deeds of legal interests. There are similar statutory provisions in other states.¹¹⁸

In *Tenant v. John Tennant Memorial Home*¹¹⁹ the court suggested another common statutory provision that seems to infer that revocable deeds of land are valid and can be used to effectuate the intention of the parties. The statute read:

A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest thus liable to be defeated, to be on that ground adjudged void in its creation.

Though this statute was originally merely a part of a larger one designed primarily to prevent the destruction of contingent remainders under the technical rules of the common law, it now enjoys a separate existence in many states.¹²⁰ The language is quite broad and appears to authorize the creator of a future interest to provide in the instrument creating it for its destruction "in any manner or by any act or means." It would not appear to place too much strain on these words to interpret them to include a reserved power of revocation.

In this same case the court relied upon a basic premise of our

¹¹⁸ Ala. Code (1940) tit. 47, secs. 76, 77; D. C. Code (1961) tit. 45, secs. 1005, 1006; Mich. Comp. Laws (1948) sec. 26.99, 26.100; N. D. Century Code (1959) tit. 59, secs. 0539, 0540; 60 Okla. Stat. Ann. (West 1963) secs. 262, 263; S. D. Code (1939) tit. 59, secs. 0439, 0440; Tenn. Code Ann. (1955) sec. 7603; Va. Code (1950) tit. 55, secs. 55-7, wording differs greatly; Wisc. Stat. Ann. (West 1957) 232.08, 232.09.

¹¹⁹ 167 Cal. 570, 140 Pac. 242 (1914).

¹²⁰ See Ariz. Rev. Stat. (1956) tit. 71, sec. 116; Cal. Civ. Code (Deering 1949) sec. 740; D. C. Code (1961) tit. 45, sec. 814; Mass. Gen. Laws (Ter. Ed.) c. 284, sec. 11; Mich. Comp. Laws (1948) sec. 26.33; Minn. Stat. (1953) sec. 500.15; Mont. Rev. Code Ann. (1947) tit. 67, sec. 418; N. Y. Real Prop. Law (McKinney 1945) sec. 57; N. D. Century Code (1959) tit. 47, sec. 0228; Ohio Rev. Code (Baldwin 1953) sec. 2131.06; R. I. Gen. Laws (1956) c. 433, sec. 5; S. D. Code (1939) tit. 51, sec. 0228; Wisc. Stat. Ann. (West 1957) 230.32. The language of some of these statutes is more easily susceptible than others to this interpretation.

system of private ownership to justify the validity of revocable deeds. The court said:

The right to acquire and possess property, guaranteed by the Constitution, includes the right to dispose of it, or any part of it, and for that purpose to divide it in any possible manner. . . . It also includes the right to impose upon the grant of such estates any reservations or conditions which the grantor may see fit to place in the grant. The only limitation upon these rights is that they must be exercised in a way not forbidden by law.

This argument is basically sound and convincing. However, it must be recognized that the right of free disposition is limited not only by express prohibitions against specific transactions but also by certain policy considerations that are present in our legal system. Some of these considerations are designed to protect owners from fraudulent or hasty acts by giving effect only to those dispositions executed in such a way as to evidence, not only that they are in fact the act of the owner, but also that his intentions were sufficiently mature and deliberate to be given legal effect. Others are designed to protect third parties who might subsequently come into contact with the property, subsequent creditors and purchasers from the donor or donee. The next two chapters will discuss these considerations.

Chapter III: Are Revocable Deeds Testamentary?

Soon after the Statute of Wills conferred upon Englishmen the right to dispose of the legal title to their landed wealth by will, Lord Coke recommended the use of revocable gifts as a more satisfactory method of accomplishing the same result. He said:

And touching wills, whereof you have much good matter in the said case of Butler and Baker, my advice to all who have lands is, that you take care by the advice of learned counsel, by act executed, to make assurances of your lands according to your true intent, in full health and memory; to which assurances you may add such conditions or provisoes of revocation as you please. For I find great doubts and controversies daily arise on devises made by last wills, sometimes in respect . . . of obscure and insensible words, and repugnant sentences, the will being made in haste; and some pretend that the testator, in respect of extreme pain, was not *compos mentis*, and divers other scruples and questions are moved upon wills.¹

Cases in which the reasonable desires of a testator are thwarted for the reasons mentioned by Coke in this passage still occur with distressing frequency. And to these uncertainties of probate, other reasons for seeking another means of disposing of wealth among one's survivors may be added today; predominantly the delays and expenses often encountered in probate and administration. Though many reforms have been made in this field since the renowned case of *Jarndyce v. Jarndyce*,² the Anglo-American system of administering the estate of a decedent is something less than a tribute to the ingenuity of our ancestors. There seems little sense in tying up a decedent's property for a lengthy period of time merely to secure payment of his debts. Certainly everyone will agree that the creditors must be paid. But does this justify the impoverishment of the surviving dependents for a year while the court satisfies itself that there are no unknown creditors--which is usually the case?

¹ Butler & Baker's Case, 3 Co. Rep. 25a, 76 Eng. Rep. 684, 709 (1591).

² This fictitious case "drones on" through most of Bleak House until the costs completely exhaust the property in suit. That Dickens did not unduly exaggerate the delays and expenses encountered in Chancery during the early part of the nineteenth century, see Holdsworth, Charles Dickens as a Legal Historian, 79-119 (1929).

Thus, it is no wonder that many seek to find a means of distributing, at least, some of their property among their survivors that is free of the pitfalls often encountered in probate and administration.³ The revocable deed of gift seems to be the natural answer to such quest, for the practical effects of such a deed are very similar to those of a will. The property does not pass completely beyond the reach of the donor until his death. Should financial reverses or changed social relations necessitate the reclamation of the property, the donor may do so at any time during his life merely by exercising his power of revocation; he need fear no costly or time-consuming court action in this respect for he need offer no reason, explanation, or justification to any one for exercising his reserved power. Yet if the power is not exercised, the donee's estate becomes absolute and indefeasible at the moment of the donor's death without the need of any further act or formality.

When the revocable deed is viewed in this light, when it is frankly admitted that it might be used as a substitute for a will, the most serious questions as to its validity are faced. Is not such a gift testamentary? If not, is it not invalid simply as an evasion of the Wills Act?

Though courts have at times inclined toward the view that an intent to avoid probate will render a disposition invalid, the better rule today is to the contrary. As long as the gift is *inter vivos*, the fact that the donor was motivated by a desire to avoid probate is immaterial. This conclusion was reached in a recent trust case,⁴ where the court said:

If an owner of property can find means of disposing of it *inter vivos* that will make a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it. The fact that the motive of a transfer is to obtain the practical advantage of a will without making one is immaterial.

³ Deeds in one form or another have often been discussed along this line, but apparently uncertainty about the validity of an instrument with a reserved power of revocation eliminated such deeds from consideration. See Keegan, *Deeds in Lieu of Wills*, 16 A.B.A. Jnl. 779 (1930).

⁴ *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944). See also *Nichol, Tr., v. Emery*, 109 Cal. 323, 41 Pac. 1089 (1895) where the court said: "A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. . . ."

The problem thus resolves into the question of whether a revocable deed of a legal interest is an inter vivos transfer. There are not many cases passing upon this precise issue and the matter may be considered as still open. However, it is submitted, that logic and the better authority sustain the proposition that such instruments are not necessarily testamentary. Cases in Georgia⁵ and Kansas⁶ clearly hold such instruments not to be testamentary; but since the validity of the reserved power is doubtful in these states,⁷ these decisions are of little significance here. There are also decisions in Alabama,⁸ California,⁹ Connecticut,¹⁰ Indiana,¹¹ Kentucky,¹² Massachusetts,¹³ Mississippi,¹⁴

⁵ *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928); *Price v. Gross*, 148 Ga. 137, 96 S.E. 4 (1918); *Shelton v. Edenfield*, 148 Ga. 128, 96 S.E. 3 (1918); *Hamilton v. Cargile*, 127 Ga. 762, 56 S.E. 1022 (1907); *Daniel v. Veal*, 32 Ga. 589 (1816). But see *Dye v. Dye*, 108 Ga. 741, 33 S.E. 848 (1899).

⁶ *Thom v. Thom*, 171 Kan. 651, 232 Pac. 250 (1951). *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854 (1908); *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567 (1903).

⁷ See chapter II.

⁸ *Mays v. Bursleson*, 180 Ala. 396, 61 So. 75 (1913). Grantee of deed that reserved the right to sell brought ejectment against purchasers from the grantor's heirs. Held: For plaintiff.

⁹ *Lowe v. Ruhlman*, 67 Cal. App. 2d 828, 155 P.2d 671 (1945); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914). In the *Tennant* case, the grantee of a deed that reserved the right to revoke in grantor was sued by grantor's heirs to quiet title and for possession. Held: For defendant. In the *Lowe* case, the grantee of a deed that purported to convey a life estate but which reserved to grantor the right to revoke was sued by grantor's general devisees. Held: For defendant.

¹⁰ *Dennen v. Searly*, 149 Conn. 126, 176 A.2d 561 (1961). Four tenants in common of certain land executed an "agreement" which the court construed to be a deed, providing that the land should be so held that upon the death of each coowner the property would vest in the survivor or survivors for life and upon the death of the last the property would pass to certain named persons. The instrument also provided that upon the consent of all the original coowners that might at any time be living, the property could be sold and the proceeds retained by such surviving coowners. Upon the death of one of the original coowners his heirs claimed an undivided quarter of the land. In denying this claim the court said: "The interests of all of the remaindermen, whatever they were, were irrevocably granted upon the execution of the deed, although subject to extinction if the power of sale was exercised. The deed did not remain ambulatory until the death of the grantors, as would have been the case with a will. It was not testamentary in character."

¹¹ *Kokomo Trust Co. v. Hiller*, 67 Ind. App. 611, 116 N.E. 332 (1917). Grantee of deed that reserved to grantor the right to sell and convey was sued by grantor's residuary devisees. Held: For grantee.

¹² *McC Campbell v. McC Campbell*, 198 Ky. 816, 250 S.W. 122 (1923). Grantees of deed that reserved to grantor the power to revoke sued his subsequently married widow who claimed dower. Held: For Plaintiffs.

¹³ *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903). Grantee of deed conveying all presently owned property "which may be remaining in my name and ownership at time of my death" was sued by the heirs of the grantor. Held: For defendant.

¹⁴ *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147 (1855). Grantees of deed that reserved to the maker the right to revoke it sue to set aside the admission of the instrument to probate. Held: For grantees.

Missouri,¹⁵ and Tennessee¹⁶ holding that the grantees of such instruments at the grantor's death have a title that is superior to the claims of the grantor's heirs. Though the validity of the reserved power is clearly established only in Alabama, Connecticut, and Kentucky,¹⁷ the language of the other cases cited indicates that the courts held the instruments to be valid inter vivos conveyances despite the fact that they felt that an exercise of the power would have been effective to divest the donee's interest. However, there are other cases,¹⁸ some within the above mentioned jurisdictions,¹⁹ that indicate that such instruments are testamentary, and a writer has recently generalized as follows:

If the grantor reserved a power of revocation of the deed or a power of sale over the property the prevailing view appears to be that the deed is testamentary.²⁰

It seems that much of the confusion caused by these instruments springs from the fact that our concepts of intervivos and testamentary transfers are undergoing change. At one time, some courts seemed to feel that any disposition that provided for the posthumous destination of property was testamentary;²¹ thus instruments that sought to convey the remainder following a reserved life estate were occasionally held invalid unless executed with the formalities of a will.²² And the requirements necessary

¹⁵ *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 207, 206 S.W.2d 483 (1953) overruling *Goins v. Melton*, 343 Mo. 413, 121 S.W.2d 821 (1938). Grantee of deed with reserved power "to sell, rent, lease, mortgage or otherwise dispose of said property" was sued by residuary devisee of grantor. Held: For defendant. Court said: "We think we should put our decision on the ground that the reservation of a power to revoke is valid because that is the modern trend."

¹⁶ *Stamper v. Venable*, 117 Tenn. 557, 97 S.W. 812 (1906). Grantee of deed that required him to "deed back to the party of the first part when called for so to do" was sued by the grantor's heirs. Held: For defendant.

¹⁷ See chapter II.

¹⁸ *North v. North*, 2 S.W.2d 481 (Tex. Civ. App. 1927); *Butler v. Sherwood*, 196 App. Div. 603, 188 N.Y.S. 242, affirmed without opinion in 233 N.Y. 655, 135 N.E. 957 (1921); *Wren v. Coffey*, 26 S.W. 142 (Tex. Civ. App. 1894); *Roberts v. Coleman*, 37 W. Va. 143, 16 S.E. 482 (1892).

¹⁹ *Douglas v. Snow*, 304 Ky. 805, 202 S.W.2d 629 (1947); *Seay v. Huggins*, 194 Ala. 496, 70 So. 113 (1915); *Ellis v. Pearson*, 104 Tenn. 591, 58 S.W. 318 (1900); *Cunningham v. Davis*, 62 Miss. 366 (1884); *Masser v. Masser's Executor*, 32 Ala. 551 (1858).

²⁰ *Ritchie, Alford, and Effland, Cases and Materials on Decedents' Estates and Trusts* 309 (2d ed., 1961). See also, *Ward, Deed With Unexercised Power of Revocation As a Will*, 30 Geo. L. Jnl. 473 (1942).

²¹ See *Roberts v. Coleman*, 37 W. Va. 143, 16 S.E. 482 (1892).

²² *Shepherd v. Nabors*, 6 Ala. 631 (1844); *Dunn v. Bank of Mobile*, 2 Ala. 152 (1841). This issue did not arise as frequently as might be expected because

(Continued on next page)

to qualify a revocable trust as a valid, inter vivos conveyance have been materially liberalized only within the last several years.²³ Though the limits of the inter vivos and testamentary categories have not yet been established, the courts usually agree that the primary criterion of doubtful instruments is the intention of the maker;²⁴ if he intends that the instrument shall immediately pass an interest in the property, it is an inter vivos conveyance;²⁵ but if he intends that the instrument shall have no immediate effect and shall pass an interest only at his death, then it is testamentary.²⁶

The simplicity of this criterion is illusory, for it depends in large measure upon the subjective element of the party's intent. From the nature of things, such intent can seldom be known with certainty; it can only be presumed from the language and conduct of the party. Since these factors are seldom the same in any two cases, it is extremely difficult to isolate any particular factor that of itself will swing the scale one way or the other. However, the gravest difficulty with the criterion is that the intent requisite for an inter vivos transfer is not specified with clarity. The formula merely states an intent "to presently pass an interest" without attempting to define the term interest. The ambiguity is evident when we consider the problem raised by a deed with a power of revocation. Qualified estates have long been known to the common law and it has never been doubted that they are "interests" in property.²⁷ As indicated in the last chapter, courts often construe revocable deeds as conveying a qualified estate. Thus, it would seem, that an intent to convey such an estate is all that is necessary to render the disposition inter vivos. But this argument seems inconclusive for two reasons. In the first place, a layman is incapable of grasping the signifi-

(Footnotes continued from preceding page)

of the old common law rule that prevented the creation of freeholds to commence *in futuro*.

²³ The changing attitude with respect to revocable trusts over which the settlor has retained elements of management control may be seen in the various amendments that were made to sec. 57 of Restatement, Trusts, before the second edition was published.

²⁴ 1 Page, *The Law of Wills*, sec. 6.2 (Bowe-Parker Rev. 1960). See also Annotations, 11 A.L.R. 23 at 41 (1931) and 31 A.L.R.2d 532 at 542 (1953).

²⁵ Page, *op. cit. supra* note 24, at sec. 6.2; Tiffany, *The Law of Real Property*, sec. 1070 (3rd ed., 1939).

²⁶ Page, *op. cit. supra* note 24, at sec. 6.2.

²⁷ 1 Restatement, *Property*, secs. 16, 9 (1936).

cance of the myriad divisions of interests in land which are recognized by the common law; to assume that he could form an intention concerning such a complex interest as a qualified estate that is subject to the whim of the grantor would be presumptuous, if not folly. In the second place, even if he could formulate such an intent, how can we be certain that such an estate should be considered an "interest" within the meaning of the rule. Perhaps a qualified estate that is subject to the whim of the donor is different in kind and not merely in degree; maybe it should be relegated to the position of the expectancy of an heir rather than classified as an "interest."

It is submitted that the intent that the law requires to make a transfer *inter vivos* is the same intent that is necessary for the valid delivery of any instrument. Though even today there does not seem to be complete unanimity of judicial opinion thereon, the modern trend is to recognize delivery as the manifestation of an intention to enter into a legal transaction, a manifestation that the act shall produce legal effects.²⁸ How often have we immediately signed a contract when shoved into our hand, and then read it before handing it back? The mere signing of the paper does not indicate our intention to be bound thereby; if, upon reading, we find it objectionable, we can destroy it. But when we hand the instrument back or in any other way relinquish control over it, we signify our intention that the document is to be legally operative, that we are to be bound thereby. This is the purpose and essence of delivery; it enables the court to separate the legally significant from the irrelevant; it permits the actor one last minute of grace to contemplate the effect of his act and the wisdom of undertaking the legal obligations involved therein.

It seems that many courts have difficulty in harmonizing the concept of delivery with the reserved power of revocation. If the grantor has reserved the power to revoke, how can the instrument be said to have been delivered? The reservation of the right to revoke, they say, betrays a non-final intent, an intention not to be bound by the instrument. It is submitted, however, that the mere reservation of such a power does not evidence such

²⁸ 3 American Law of Property, sec. 12.64 (1952); 4 Tiffany, *op. cit. supra* note 24, at sec. 1034.

an intent. The reservation only indicates that the estate conveyed by the instrument is qualified and not absolute; it has no direct connection with the donor's intent concerning the binding effect of the instrument; it is a condition on title and not one on delivery. Upon execution of the deed, the donor does intend that it shall be legally binding upon him. True, he realizes that he has not incurred a heavy liability, for the economic effect of the conveyance can be mitigated by an exercise of the reserved power. But he does realize that he has entered into a legal act, one whose effects are regulated and controlled by legal rules and principles and not wholly by his personal whim or caprice; he realizes that the transaction cannot be undone simply by destroying the document and pretending that it never existed.

The distinction between conditions on title and conditions on delivery is illustrated by those cases in which a grantor has handed an ordinary deed to a third person for the purpose of being subsequently given to the grantee. In such cases it is usually held that the transaction is effective only if the grantor surrenders control over the deed. If he retains an absolute right to recover the deed from the third person, the third person is usually considered to be the grantor's agent for the purpose of making a future delivery; and the transaction is generally held ineffective.²⁹ If the third person is truly the agent of the grantor, his *alter ego*, then the transaction is analagous to the shifting of the deed from one hand to the other; it contains nothing that has legal significance as indicating an intention to be bound by the instrument. Thus, the grantor's right to control the third person and reclaim the instrument from him in these cases betrays a non-final intent on his part; it is a condition on delivery and thus renders the transaction legally ineffective. But if the grantor retains no right to control the third party, if he cannot reclaim the deed, his intention that the instrument shall have legal effect is clear and in this situation the cases generally sustain the validity of the transaction.³⁰ This is so even though

²⁹ 3 American Law of Property, sec. 12.67 (1952); Tiffany, *op. cit. supra* note 24, at secs. 1050, 1054. But see *In re Rynier's Estate*, 347 Pa. 471, 32 A.2d 736 (1943); *In re Hartman's Estate*, 320 Pa. 331, 182 Atl. 232 (1936).

³⁰ Annotation, 52 A.L.R. 1222 (1928). Where an escrow arrangement is used to implement an agreement to sell, it has been held that the vendor may withdraw from the arrangement and countermand his instructions to the escrowee in

(Continued on next page)

the grantee is not entitled to the instrument until the occurrence of some future event, as the payment of the purchase price or the death of the grantor. Though such conditions are sometimes referred to as conditions on delivery, they are really conditions on title,³¹ and as such they do not detract from the legal efficacy of the transaction.

Is it possible for a power of revocation to be a condition on title and not, at the same time, a condition on delivery? This question was considered in *Kokomo Trust Co. v. Hiller*.³² In this case the deed provided: "The grantor reserves full possession and control of the above described real estate and the right to sell and convey said real estate during his lifetime, but at his death if he die seized of the above real estate, then this conveyance shall be in full force and effect." The deed was given to one Richards to deliver to the donee at the donor's death; there was no contingent instruction to return it to the donor if he should call for it. After the donor died his residuary devisee brought suit for the land. The court held in favor of the donee. The court said:

We do not believe, as urged, that the reservation in each of the deeds of a right to sell and convey the premises should be taken as part of the instructions given to Richards. The reservation deals with the quantity of estate conveyed. The instructions dealt with the disposition of instruments conveying such quantity of estate. . . . He reserved the right only in a specified manner to defeat the fee which he had conveyed. We believe that the reservation and the instructions are distinct propositions.

Thus, the court clearly recognized that the power to revoke can qualify the title conveyed without affecting the intent which is required for a valid delivery.

(Footnotes continued from preceding page)

the absence of a valid and binding underlying contract. See *Tiffany, op. cit. supra* note 24, at sec. 1052.

³¹ The only reason that the term, conditional delivery, works in these cases is that a special set of rules has been developed for escrows. Thus even though there is a "conditional delivery" in these cases, it is held that the grantor may not withdraw, that the grantee receives some interest in the property before the occurrence of the event that is subject to execution and alienation, and that the grantee receives full title upon occurrence of the event with no further delivery by the grantor or depository being necessary. Corbin takes the position that the delivery in these cases is not really conditional; see I Corbin, *The Law of Contracts*, sec. 251 (1950).

³² 67 Ind. App. 611, 116 N.E. 332 (1917).

A similar result was recently reached in a California case, *Osborn v. Osborn*.³³ In compromise of a disputed claim a father deeded land to his son; the deed reserved a life estate to the father and was expressly "subject to all conditions, exceptions and reservations" contained in a contemporaneously executed trust agreement. The deed was not given to the son, but was delivered to the trustees, who were to hold it until the father's death when it was to be given to the son. There was ill-will between the parties and apparently the primary purpose of the trust was the holding of the deed to secure to each the benefits of the compromise agreement; to allow the father the free use of the land during life but to require him to pay taxes, repairs, etc. The agreement provided that either party shall have "the right to revoke the deed in the event [the other] wilfully harms" him. After the father's death, his second wife claimed the land and the son sued to determine his rights. In a divided decision, the court held in favor of the son. The majority said, in part:

Defendant contends, however, that Thomas' [the father] reservation of the right to revoke the deed, in the event that Merinoeth [the son] harmed him . . . made the delivery to the trustees conditional so that no estate vested in Merinoeth by virtue of the deposit of the deed with the trustees. This contention cannot be sustained. Thomas' right to revoke did not affect the delivery to the trustees, but merely limited the future interest created to a vested remainder subject to being divested upon the happening of a condition subsequent.

The distinction between a reservation that qualifies title and one that qualifies delivery is often confused by broad statements to the effect that a valid delivery requires that the grantor "surrender his own control over the title,"³⁴ or manifest "the intention to pass immediate and irrevocable title."³⁵ These statements are true but confusing for they seem to say that a valid delivery precludes the reservation of any power of revocation; that such was not the meaning of either of these authorities is clear from the complete context in which they were made. Where the power of revocation merely qualifies title, the estate conveyed is irrevocable; the grantor cannot take it back; he can only determine

³³ 42 Cal. App. 2d 358, 267 P.2d 333 (1954).

³⁴ 3 American Law of Property, sec. 12.64 (1952).

³⁵ *Rothney v. Rothney*, 41 Cal. App. 2d 566, 107 P.2d 294 (1940).

it by an exercise of the reserved power. This has the practical effect of revoking the grantee's estate, but such is the nature of all qualified estates. Upon the occurrence of the defeating or determining event, the grantee's estate ends.

At first blush this distinction seems rather tenuous and fine; but it is submitted, it is sound. The law must distinguish between acts that are preliminary to and in preparation of the dispositive act and the act itself. If the reservation of the power to revoke qualifies the intention to enter into a legal act, the intention is not sufficiently final for the law to recognize it, and the instrument can have no legal effect. But if the power to revoke qualifies only the estate conveyed, then the intent to enter into the legal transaction is clear,³⁶ and effect should be given to it. Whether the reservation qualifies delivery or title depends upon the donor's intent concerning the binding effect of the instrument. If he intends to be able to defeat the donee's claim simply by destroying the instrument, the reservation is a condition on delivery, for in such a case the donor does not unequivocally intend the instrument to be binding on him. But if the donor intends to be able to defeat the donee's rights only by performing another legally significant act, then he is unequivocally committed to the legal significance of the instrument (he foregoes the right to privately determine its operation and effect and submits these to legal rules and procedures), and the reservation is a condition on title.³⁷ This seems to be the test advocated by Ballantine when he wrote:

A deed is not rendered testamentary because of reservations respecting the use of the property during the grantor's life, or by provisions that "title" shall pass at the grantor's death, or even by a power of revocation; but it must divest the

³⁶ It has often been argued that the presence of a power of revocation indicates the donor intended the instrument as a present conveyance, else it was unnecessary to reserve it. See *Mays v. Burleson*, 180 Ala. 396, 61 So. 75 (1913); *Cribbs v. Walker*, 74 Ark. 104, 85 S.W. 244 (1905); *Hall v. Burkham*, 59 Ala. 349 (1877). *Cribbs v. Walker*, 74 Ark. 104, 85 S.W. 244 (1905). "In regard to the power of revocation, the better opinion is that it tends rather to rebut than to sustain the idea that the instrument containing it is of a testamentary character." 1 Jarman, Wills 17.

³⁷ Thus in *Huber v. Backus*, 79 S.D. 342, 112 N.W.2d 238 (1961), where the grantor extracted a parol promise from the grantee that she would reconvey upon demand, the court stressed that the promise did not reserve to the grantor any right to recall the instruments themselves. "It did not relate to the deeds . . . but concerned only decedent's rights in the property thereby conveyed during the remainder of his life."

grantor to some extent of his title, at least to the extent of creating a liability to have it drawn out of him without further act on his part.³⁸

This, it is submitted, is the crux of the distinction between revocable deeds and wills; they might accomplish similar results, but there is a radical difference in the operation of the two. The will has legal effect only at the death of the testator;³⁷ it does not purport to create any rights in the devisee before that time; his expectancy can be destroyed merely by a destruction of the instrument. The revocable deed, on the other hand, has legal effect upon execution; it immediately passes an estate to the grantee; the estate conveyed cannot be taken back but it can be determined by a valid exercise of the power; an exercise of the power requires another legal act with formalities equal to those that were required for the conveyance to the donee in the first place.⁴⁰

It must be conceded that the distinction between a condition on delivery and a condition on title might elude the average layman; even some lawyers seems to feel that the grantor of a deed can revest title in himself merely by destroying the deed.⁴¹ However, when making a revocable gift, it is submitted, that the layman can and does formulate an intention concerning the binding effect of the instrument upon him. It is this intent that the court should seek to ascertain in these cases. The closeness of the distinction will often result in inept language being used

³⁸ Ballantine, *When Are Deeds Testamentary?* 18 Mich. L. Rev. 470 at 483 (1920).

³⁹ 1 Page, *The Law of Wills*, sec. 5.1 (Bowe-Parker Rev. 1960).

⁴⁰ 3 Restatement, *Property*, sec. 346 (1940); see also Simes and Smith, *The Law of Future Interests*, sec. 972 (2d ed., 1956). This matter is expressly regulated by statute in many states which have adopted provisions similar to the following: "A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner." *New York Real Property Law* (McKinney 1945) sec. 165; cf. *New York Laws* 1964, c. 864, sec. 149.

⁴¹ The parties in *Rothney v. Rothney*, 41 Cal. App. 2d 566, 107 P.2d 294 (1940), acted under advice of counsel. Though it is arguable that the court permitted the extinguishment of the reserved power by parol in *Hamilton v. Jones*, 32 Tex. 598, 75 S.W. 554 (1903), it seems clear that the court really held either that the power was void or that it has been impliedly stricken from the instrument before delivery.

Of course, the doctrine of estoppel or the recording statutes often permit the grantor of an unrecorded deed to create a valid title in a bona fide purchaser. These are special cases, however, and in no way detract from the general rule.

in the instrument. The basis of the dissent in the *Osborne* case, *supra*, was that the trust agreement also provided that "wilfull refusal or failure of either party to comply with the obligations herein provided . . . shall permit either party to rescind this agreement and shall confer upon the grantor the right to cancel the within mentioned deed and this agreement by a declaration duly executed and recorded with the formality of a deed and a thirty day written notice thereof served upon the grantee. . . ." Certainly this language can be construed to evidence a condition on delivery; if the effects of the instruments can be frustrated simply by their cancellation or destruction, they have not been validly delivered. But the majority, looking at the whole transaction—the prior compromise agreement and the complex method utilized to effectuate it—concluded that the parties had intended the instruments to have present, legal effect and that this language must be construed otherwise. It is submitted that this is a sound result, for the intention required for delivery must be gleaned not only from the language of the instrument but also from the circumstances surrounding its execution.⁴² Some courts have been very liberal⁴³ in this matter and have held that instruments that purported to reserve the power to revoke "this deed"⁴⁴ or which provided that the deed was to be "null and void"⁴⁵ upon exercise of the power, to be valid. Literally construed, such language betrays an intent that would be fatal to a valid delivery. However, if the court can satisfy itself that the donor had the requisite intent, it would appear to be proper to construe the words as a limitation on the title and thus give effect thereto.

The cases that have held deeds with powers of revocation testamentary have usually involved instruments that reserved more than a power to revoke and whose language betrayed an intention that the instrument create no present right in the

⁴² See Tiffany, *The Law of Real Property*, secs. 1034-46 (3rd ed., 1939).

⁴³ By far the most liberal is *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903), where the deed purported to convey all property presently owned and "which may be remaining in my name and ownership at time of my death." It is difficult to harmonize this language with the intent that is required for a valid delivery. But this was a "hard case" and probably will not be extended.

⁴⁴ *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147 (1855).

⁴⁵ *Mays v. Burleson*, 180 Ala. 396, 61 So. 75 (1913). In *Kokomo Trust Co. v. Hiller*, *supra* at note 32, the deed was to be "in full force and effect" if land was not sold during the grantor's lifetime.

grantee.⁴⁶ *Butler v. Sherwood*⁴⁷ is an oft-cited case of this nature. A woman about to undergo a serious operation, executed an instrument that purported to be a quit-claim deed of all her realty and personalty to her husband. The instrument provided: "This conveyance and transfer are made upon the condition that the party of the second part, my husband, survive me, and the same is intended to vest and take effect upon my decease and until said time the same shall be subject to revocation upon the part of the party of the first part." The court held the instrument to be testamentary and ineffective to convey any title to the husband. The court said:

It could not be determined at any time prior to her death whether her husband survived her, and unless he survived her there was clearly no intention of conveying to him. Moreover, she provided that the conveyance and transfer "are intended to vest and take effect only upon my decease". . . . There was no moment from the time of making the instrument down to the very instant of dissolution when any rights could vest under the *intent or language* of this deed, and beyond this it was provided that "until said time, the same shall be subject to revocation upon the part of the party of the first part"; so that the supposed grantor was in full control of the property during all of her life subsequent to the making of the deed, with the right reserved to *revoke the instrument itself*. (emphasis supplied.)

It is difficult to generalize this decision. The mere condition that the grantee survive the grantor has been held sufficient to render an instrument testamentary.⁴⁸ The same is true of provisions that

⁴⁶ Thus in *Roberts v. Coleman*, 37 W. Va. 143, 16 S.E. 482 (1892) and *Mosser v. Mosser's Executor*, 32 Ala. 551 (1858), the instruments referred to executors and administrators. In *Ellis v. Pearson*, 104 Tenn. 591, 58 S.W. 318 (1900) and *Wren v. Coffey*, 26 S.W. 242 (Tex. Civ. App. 1894), the instruments purported to convey at death if not disposed of before then. And in *Seay v. Huggins*, 194 Ala. 496, 70 So. 113 (1918); *Dye v. Dye*, 108 Ga. 741, 33 S.E. 848 (1899); and *Cunningham v. Davis*, 62 Miss. 366 (1844), the instruments provided that they were not to be effective until death. Concerning the influence of such language as this, see *Cohn v. Klein*, 209 Cal. 421, 287 Pac. 459 (1930), where the court expressly recognized that an instrument that contained a power of revocation might have been effective to create a defeasible interest had such language not betrayed an improper intent.

⁴⁷ 196 App. Div. 603, 188 N.Y.S. 242, affirmed without opinion in 233 N.Y. 655, 135 N.E. 957 (1921).

⁴⁸ *Tyson v. Hutchinson*, 164 Ga. 661, 139 S.E. 519 (1927); *Spicer v. Spicer*, 314 Ky. 569, 236 S.W.2d 474 (1951); 1 Page, *The Law of Wills*, sec. 6.6 (Bowe-Parker Rev. 1960).

the conveyance shall take effect at death.⁴⁹ However, the court expressly construed the reservation as being the right "to revoke the instrument itself." As explained above, if such was the maker's intent, this was a condition on delivery and not one on title. It is admittedly difficult to determine the maker's intent in this matter but in view of all the language in the deed, no objection to this finding of the court can be made. So construed the case is perfectly consistent with the proposition that a reservation of a power to revoke which merely qualifies the title conveyed does not render the instrument testamentary.

In this case the court seemed disturbed by the fact that the deceased "undertook to accomplish by deed what the law requires to be done by will." Since stress has been placed on the similarity in effect between a revocable deed and a will, it might be well to specify the difference between the two. If the deceased in this case intended to retain all elements of ownership so that she could destroy the husband's claims simply by destroying the instrument, her intent was clearly testamentary. But if she intended the instrument to create rights that could not be destroyed so simply, if she intended the instrument to have permanent existence, her intent was not testamentary.⁵⁰ Once a will is revoked, it has no significance in an abstract of title; but a deed which has been revoked pursuant to a power must always remain in the history of title; it is like a mortgage that has been satisfied; its present effect might be nil, but it did operate to place, at least, a part of the title for a time in another.

The problems faced by courts in determining the intent in these cases is only a little more difficult than that involved in cases dealing with deeds that contain no power of revocation but which expressly state that they are not to take effect until the maker's death or that the title is to vest only at the maker's death. At first courts took a formal approach to such instruments,

⁴⁹ Purcell v. Baskett, 121 Kan. 678, 249 Pac. 671 (1936); Nobell v. Beaver, 133 Okla. 247, 271 Pac. 420 (1928); 4 Tiffany, The Law of Real Property, sec. 1074 (3rd ed., 1939).

⁵⁰ "The right to revoke a will, which is based on the fact that the will does not become operative until the testator's death, is in effect a right to render the instrument absolutely nugatory, while an express power of revocation contained in a conveyance *inter vivos* does not involve a right to render the instrument absolutely nugatory, but merely impowers the grantor to divest an estate or interest which is created by the conveyance." 4 Tiffany, The Law of Real Property, sec. 1071 (3rd ed., 1939).

gave the language a literal and technical interpretation, and held the instruments testamentary.⁵¹ But experience has demonstrated that laymen do not always perceive the distinction between a present conveyance of a future interest and a future conveyance of a possessory interest. A desire to effectuate the intention of the parties has caused some courts to reevaluate their prior holdings and sustain such instruments if satisfied that the makers intended them to have present effect.⁵²

It is probable that the makers of some deeds providing that they were not to be effective until death were desirous of making revocable gifts. No objection can be taken to decisions holding these instruments ineffective. The intent required to make a valid revocable deed is complex; it requires the intention that the instrument shall always be effective as a conveyance, though the economic effect of the transaction can be defeated in a very limited and specified manner—the exercise of the reserved power that determines the grantee's estate. The further the language strays from the customary form, the less likely it is that the donor had the requisite intent, and the more reluctant the court should be in giving effect to the instrument. This conclusion results from the wisdom of the requirement of delivery in Anglo-American law. It would be wrong for a court to give effect to an act that was not definitely intended to have legal significance. As indicated above the mere signing of the instrument is not a sufficient safeguard in this respect; but when the maker evidences his intention that the instrument is final, that it creates present legal rights that are binding on him, then the instrument can and should be given effect according to its terms.

Although it is submitted that the foregoing discussion of

⁵¹ 1 Page, *The Law of Wills*, sec. 6.5 (Bowe-Parker Rev. 1960).

⁵² *Lindsey v. Christian*, 222 Ark. 169, 257 S.W.2d 935 (1953); *Smith v. Smith*, 218 Ark. 228, 235 A.W.2d 886 (1951); *Carter Oil Co. v. McQuigg*, 27 F. Supp. 182 (D.C. Ill. 1939), affirmed 112 F.2d 275; *Couch v. Hoover*, 18 Tenn. App. 523, 79 S.W.2d 807 (1934). 1 Page, *The Law of Wills*, sec. 6.5 (Bowe-Parker Rev. 1960); 4 *Tiffany, The Law of Real Property*, sec. 1074 (3rd ed., 1939); Comment, 16 *Univ. Det. L. Jnl.* 87 (1953); Note, 10 *Miss. L. Jnl.* 183 (1938). But see *Gaston v. Mitchell*, 192 Miss. 452, 4 So. 2d 892, 6 So. 2d 318 (1941), where the court said: "We are no longer free to rationalize as to the effect of such a provision. It has repeatedly been held by the Court to be testamentary and inoperative to vest any interest *in praesenti*. Its plain language is not susceptible of a construction that only the delivery and enjoyment of the property is to be withheld, but in specific terms provides that the conveyance itself is to be effective as such, not from the date of execution, but at grantor's death."

revocable deeds is analytically sound and correct, this study would be incomplete without a consideration of the policy questions raised by their testamentary flavor. We must recognize that a revocable deed permits a man to make a testamentary-type disposition of his property without complying with the strict formalities required for the due execution of wills, and it must be questioned whether or not anything of importance is lost by the absence of these formalities. It is generally said that the formalities of the Statute of Wills serve two principal functions: one, evidentiary; the other, ritual.⁵³ By the former the court is assured that the instrument is genuine and truly the act of the decedent. And by the latter the court is assured that the instrument was executed with deliberation and intended as a will, that it was not merely a preliminary draft or haphazard scribbling.

It seems clear that the formalities of execution, that are essential to the validity of all deeds of realty, serve the same ends as the ritual function of the Statute of Wills. Though the formalities of a deed are less than those of a will, they are certainly sufficient to caution an intending grantor and warn him of the seriousness of his act. And when the requirement of delivery is added to these formalities, it would appear that the ritual function is better served by deeds, even though they reserve a power of revocation, than by wills; for though an intent that a will is to be legally effective is presumed from the formalities of its execution, the law in the requirement of delivery demands other evidence of its intent before giving effect to a deed; as indicated above delivery requires the manifestation of an intent that the instrument is legally operative and creates indestructible, though possibly defeasible, rights in another.

It is submitted that the evidentiary function of the Statute of Wills is also better served by revocable deeds than by wills. The will is essentially a secret document; though the witnesses attest to its execution, they usually do not know its contents and, when testifying at probate, usually cannot be certain that pages were

⁵³ Guilliver and Tilson, *Classification of Gratuitous Transfers*, 51 *Yale L. Jnl.* 1 (1941). The authors mention a third, the protective function, which seeks to protect the testator from imposition while on his death bed. They suggest that this function is outmoded today when most wills are executed in lawyers' offices while testators are in good health. These same considerations are equally applicable to revocable deeds.

not substituted at some time after it was executed. The deed on the other hand is more public in nature. It will usually pass beyond the physical control of the grantor at delivery; it will generally be recorded. It will often pass an estate that takes effect in possession during the life of the grantor.⁵⁴ Thus the deed is "in circulation" and creates rights in others during the grantor's life. If it were not genuine in any respect, the purported grantor would naturally object, and the forgery would be immediately discovered. The superiority of such an instrument over a will in this respect is obvious; there can be no better guarantee of the genuineness of an act than the acquiescence in it by the purported actor.

Thus, it is submitted that nothing of real importance is lost by the absence of the strict formalities of the Statute of Wills in the execution of revocable deeds. Moreover, it is submitted that a strong argument for the validity of such instruments can be drawn from the fact that Anglo-American law considers the right generally to determine one's successors in interest as an incident of complete ownership: the execution of a revocable deed is a reasonable and deliberate attempt to exercise this right, and as such our courts should strive to effectuate it.⁵⁵ Ballantine concluded his study on the distinction between deeds and wills with an observation that is appropriate in this regard. He said:

It is a more convenient and economical method to dispose of property by deed than by will. It would be the sounder policy for the law, in case of doubt, not to be overready to condemn an instrument as testamentary, but to uphold it as a deed of conveyance, and thus make it effectual in the simplest manner, especially if it be so executed as not to be good as a will.⁵⁶

⁵⁴ It has been suggested that courts might distinguish between revocable deeds that convey a possessory interest and those that convey only a future interest. See Note, 23 Miss. L. Rev. 683 (1939). The courts have not drawn such distinction and, it is submitted, rightly so. Though it is much easier to see the objective fact of a change of possession, the law recognizes the transfer of right or interest as being just efficacious. Though this metaphysical transfer is not visible, its occurrence is recognized and felt by the donor who realizes that he cannot frustrate it without performing another, affirmative legal act.

⁵⁵ See Gulliver and Tilson, *op. cit. supra* note 53, at 2.

⁵⁶ Ballantine, *When Are Deeds Testamentary?* 18 Mich. L. Rev. 470 at 483 (1920).

Chapter IV: The Rights of Third Parties.

The rights of persons claiming through the grantor or grantee of a revocable deed depend in some measure upon the theory that is used to sustain the transaction between the original parties. Some courts have spoken of the reserved right of revocation as a condition subsequent¹ while others have held it to be a true power.² Though under either theory the grantee receives a qualified estate,³ the grantor's rights may vary materially depending on which approach is taken. Discussion here will be limited to a consideration of the rights that flow to the various parties when the reservation is viewed as creating a power. This is the approach most recent cases have taken with respect to the operation of revocable deeds,⁴ and it is submitted, the one that will be taken in any future case in which the choice is material to the outcome.⁵

Once this theory is accepted, it is not difficult to define the interest and rights of the donee. Upon execution of the instrument he receives a qualified estate and his rights are the same as the holder of any other similar estate. Depending upon the terms of the grant it may be an estate for years, for life, or in fee; it may be possessory or future; however, the mere fact that it is subject to a power does not make it contingent.⁶ The grantee may convey his interest at pleasure;⁷ it is subject to the claims of his creditors,⁸ and if inheritable it is subject to the claims of his surviving spouse.⁹ Upon the expiration of the power unexercised the estate automatically becomes absolute,¹⁰ and the donee's interest is then treated in the same way that it would have been if no power had been reserved.

¹ *Ricketts v. Louisville, St. L. & T. Ry. Co.*, 91 Ky. 221, 15 S.W. 182 (1891); *Blanchard v. Morey*, 56 Vt. 170 (1883).

² *Stamper v. Venable*, 117 Tenn. 557, 97 S.W. 812 (1906); *Bouton v. Doty*, 69 Conn. 531, 37 Atl. 1064 (1897).

³ See 1 Restatement, Property, sec. 16 (1936), where the term "fee simple defeasible" is used instead of "qualified fee."

⁴ *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 207, 206 S.W.2d 483 (1953). *Harman v. Hurst*, 160 Md. 96, 153 Atl. 24 (1931); *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914).

⁵ See herein, *supra* at page 18.

⁶ See *Simes and Smith, The Law of Future Interests*, sec. 150 (2d ed., 1956).

⁷ 1 Restatement, Property, sec. 50 (1936).

⁸ 1 Restatement, Property, sec. 52 (1936).

⁹ 1 Restatement, Property, sec. 54 (1936).

¹⁰ 1 Restatement, Property, sec. 58 (1936).

The successors to the grantee's interest, however, take through him and thus hold subject to the same limitations he did.¹¹ Since it is customary to reserve the power of revocation in the deed of gift, there will seldom be any possibility of a bona fide purchaser without notice from the grantee. However, since the power can be reserved in a separate instrument, the situation might arise and it seems likely that the power would be cut off in such a case. Though no cases on this point have been found, this conclusion seems to flow naturally from the fact that the power is not an interest in property.¹² Moreover, statutes in many states expressly notice are concerned, a power shall be a charge upon land only provide that in so far as creditors and purchasers for value without from the date that the instrument containing the power is recorded.¹³

It has at times been argued that the subjection of the successors of the grantee's interest to the grantor's power of revocation is repugnant in so far as it permits the defrauding of just claimants through the grantee. It must be conceded that a levy by creditors upon the donee's interest is likely to prove futile, for the grantor will probably exercise his reserved power before they can derive any economic benefit from the land. However, this objection was succinctly answered by the court in *Ricketts v. Louisville, St. L. & T. Ry. Co.*,¹⁴ when it observed:

The deed is notice to the creditors of the reserved power. If they trust the grantee upon the credit of the estate thus granted, they do so knowing the risk, because the deed gives them notice of it.

This reply might be little comfort to the unpaid creditors; possibly the law should be more solicitous of them. However, it is submitted that the law goes as far as it can in these cases. If the donor permits the donee to retain his qualified estate in the property, the creditors can compel payment therefrom; but if the donee's interest is terminated, he has no further rights to the

¹¹ 1 Restatement, Property, sec. 50 (1936).

¹² See 4 American Law of Property, sec. 17.8 (1952) on the operation of the recording acts.

¹³ See, e.g., Mich. Comp. Laws (1948) sec. 26.125; New York Laws 1964, c. 864, § 142. Compare Del. Code Ann. (1953) titl. 25, sec. 109.

¹⁴ 91 Ky. 221, 15 S.W. 182 (1891).

property, and his creditors can have none. The law cannot compel a benefactor to pay the debts of the recipient of his bounty merely because of his past liberality. The situation is somewhat analagous to that that arises in cases involving protective trusts.¹⁵

These same considerations are equally applicable to the grantee's surviving spouse. The better rule recognizes the derivative character of dower and curtesy; these rights are merely incidents of and therefore cannot be greater than the other spouse's estate.¹⁶ Thus, it seems clear that the claim of the surviving spouse of a deceased grantee is also subject to the grantor's reserved power.¹⁷ But since she will usually have notice, and since she is never a purchaser, there does not appear to be any reason to consider this result unjust.

Though the operation of revocable deeds causes little difficulty in so far as the interest of the grantees and the claims of their successors are concerned, the same is not true when the rights of the grantor are being considered. The classical notion that a power is merely a right to affect title to property but not an interest therein has caused much difficulty in this respect.¹⁸ It is well settled that in the absence of statute the creditors of the donee of a general power of appointment cannot reach the property subject thereto unless the power is exercised in favor of a volunteer.¹⁹ This rule of the law of powers was applied by the Supreme Court of the United States in *Jones v. Clifton*²⁰ to a power of revocation reserved by the grantor in a deed. In this case a man deeded land to his wife but reserved a power to revoke the grant. He subsequently became insolvent and the assignee in bankruptcy sued to recover the land from the wife. In holding in favor of the wife the court reiterated the maxim that a power is not a transferable interest in property and hence cannot be reached by creditors. In the only other case found

¹⁵ See Scott, *The Law of Trusts*, sec. 155 (2d ed., 1956).

¹⁶ See Monograph on Dower & Curtesy as Derivative Estates in 1 Restatement, Property, Appendix, 1-15 (1936); 1 Walsh, *Commentaries on the Law of Real Property*, sec. 100 (1947).

¹⁷ 1 Restatement, Property, sec. 54 (1936).

¹⁸ Simes and Smith, *The Law of Future Interests*, sec. 942 (2d ed., 1956); 5 *American Law of Property*, sec. 23.14 (1952).

¹⁹ Simes and Smith, *op. cit. supra* note 18, at sec. 944.

²⁰ 101 U.S. 225 (1879).

involving a revocable deed of a legal interest²¹ a state court reached a similar conclusion.

There is much that can be said against the conclusion of each of these cases. Whether the power is a transferable interest in property or not, it is certainly a thing of value to its holder. He can increase the value of his estate in the amount of the property subject to the power merely by performing the formalities required for an exercise of the power. Why should it be beyond the reach of creditors? Though the only cases found actually involving deeds of legal interests are the ones mentioned above, there are two competing lines of trust cases that are somewhat analagous. The first of these lines tends to support the results of the cases already discussed and to indicate that the grantor's creditors cannot reach his reserved power of revocation. These are the cases holding that the mere fact that a trust is revocable does not in the absence of statute enable a settlor's creditors to reach the trust estate.²² The other line of authority contains cases in which the settlor reserved a general power of appointment rather than a power of revocation. The American Law Institute has taken the position that when

a person transfers property in trust for himself, for life and reserves a general power of appointment, although the power is not exercised, the interest subject to such power and the settlor's beneficial life interest, can both be subjected to the payment of the claims of creditors of such person and claims against his estate to whatever extent other available property is insufficient for that purpose.²³

Comparatively few cases have applied this rule and its limits are therefore indefinite. No logical reason is seen why it could not be extended to apply to cases in which the settlor has reserved a power of revocation rather than a power of appointment; nor for that matter does there appear to be any reason why the rule must be limited to cases in which the settlor has reserved a life estate along with his power. This rule, which is still in the

²¹ *Continental Nat. Bank of Louisville v. McCampbell*, 184 Ky. 658, 213 S.W. 193 (1919).

²² 3 Scott, *The Law of Trusts*, sec. 330.12 (2d ed., 1956); 2 Restatement, *Trusts*, sec. 330, com. 0 (2d ed., 1959).

²³ Restatement, *Property*, sec. 328 (1948 supplement). See also Simes and Smith, *op. cit. supra* note 18, at sec. 944; 5 American Law of Property, sec. 23.18 (1952).

state of development, seems to indicate that the courts might be taking a more sympathetic approach to the claims of creditors in this type of case. Since authority involving the rights of the creditors of the grantor of a revocable deed of a legal interest is scarce, possibly the courts in future cases involving such claims will lean towards this line of trust cases and work out some method of relief.

Even though the present state of the decisions offers little hope to the grantor's creditors, there are statutes which provide relief in certain types of cases. The National Bankruptcy Act²⁴ provides that all powers that the bankrupt might have exercised for his own benefit can be reached by the trustee in bankruptcy. Though it might still be arguable whether or not this provision is applicable to a reserved power that is exercisable only by will, it is clearly applicable to all powers that might have been exercised during the bankrupt's life.²⁵ Thus it would apply to most revocable deed cases²⁶ and give relief to the grantor's creditors if he has committed an act of bankruptcy and can be so adjudicated.

There are more liberal statutes in many states that give relief to creditors even though the grantor is not or cannot be adjudicated bankrupt. Thus a New York statute²⁷ provides:

Where the grantor is a conveyance reserves to himself for his own benefit, an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned.

There are similar statutes in Alabama,²⁸ Florida,²⁹ Indiana,³⁰ Kansas,³¹ Michigan,³² Minnesota,³³ North Dakota,³⁴ Oklahoma,³⁵ South Dakota,³⁶ and Wisconsin.³⁷ The language of these statutes is very

²⁴ Sec. 70(a), 11 U.S.C., sec. 110(a).

²⁵ See 1 Scott, *The Law of Trusts*, secs. 57.1, 330.12 (2d ed., 1956).

²⁶ Though the grantor reserved a power to revoke "by deed or will" in a few cases, none has been found in which he reserved a power to revoke by will alone.

²⁷ New York Laws 1964, c. 864, sec. 163.

²⁸ Ala. Code (1940) tit. 47, sec. 75.

²⁹ Fla. Stats. Ann. (1941) sec. 726.08.

³⁰ Ind. Stats. Ann. (Burns 1961) sec. 56-610.

³¹ Kan. Gen. Stats. (1949) sec. 67-414.

³² Mich. Comp. Laws (1939) sec. 26.104.

³³ Minn. Stats. (1953) sec. 502.76.

³⁴ N. D. Century Code (1959) sec. 59.0535.

³⁵ 60 Okla. Stats. Ann. (West 1963) sec. 267.

³⁶ S. D. Code (1939) sec. 59.0444.

³⁷ Wisc. Stats. Ann. (West 1957) 232.13.

broad and seems clearly applicable to all creditors and purchasers from the grantor, whether they take with notice of the prior deed or not. Thus in *Blackwell v. Harbin*³⁸ the court applied such a statute in favor of a subsequent grantee from a donor who had not exercised his power of revocation, the court said:

One who purchases from the grantor—whether with or without knowledge or notice of the previous existence of the instrument in which the reservation was made—and takes his conveyance is protected in the title conveyed to him, just as if the grantor had not make the previous instrument to another, containing the reservation of a power of revocation.³⁹

Of course the fact that a deed contains a power of revocation does not exempt it from the general rules concerning fraudulent conveyances. If the gift is made during insolvency, if it renders the grantor insolvent, or if it is made with the intent of defrauding creditors, it is voidable by them.⁴⁰ The general creditors are thus afforded a measure of protection by these provisions. There are also special provisions in the statutes of many states concerning the fraudulent nature of conveyances which reserve a power of revocation and which provide that such conveyances of land are void against "subsequent purchasers from such grantor for a valuable consideration of any estate or interest so liable to be revoked."⁴¹ These statutes have seldom been judicially construed, but it would seem that such subsequent purchasers could be afforded similar protection even in the absence of statute. It has often been held that a power of appointment may be exercised by implication; this is especially true where the instrument clearly refers to the property over which a power is held and where the instrument could have no operation except as an exercise of the power.⁴² It would seem that this general principle of the law of powers⁴³ could be applied to revocable deeds and relief granted

³⁸ 186 Ala. 531, 65 So. 35 (1914).

³⁹ It would seem that a similar result could often be reached under statutes that under certain circumstances purport to change "an absolute power of disposition" into a fee in so far as the rights of creditors are concerned.

⁴⁰ 1 Glenn, *Fraudulent Conveyances and Preferences*, secs. 262-272 (Rev. ed. 1940). Concerning the extent to which future creditors are protected, see secs. 316-340.

⁴¹ These statutes are cited in chapter II at note 117.

⁴² Simes and Smith, *The Law of Future Interests*, sec. 973 (2d ed., 1956).

⁴³ There are statutes in some states which seem to be particularizations of these general principles. See Cal. Civ. Code (Deering 1949) sec. 1229; Idaho

(Continued on next page)

to purchasers of the property from the grantor even in the absence of the statutory provision.

If the grantor has exercised his reserved power, the situation presents little difficulty. Upon exercise of the power the grantee's estate ceases;⁴⁴ the grantor becomes vested of his original estate, and his creditors may reach it in the same manner as though the deed had never been executed. However, courts have sometimes had difficulty in determining when and to what extent the power has been exercised. Assuming compliance with the formal requirements⁴⁵ it seems that whether an instrument is an exercise of the power, and if so, to what extent, is primarily a question of the manifested intention of the party. In *Continental Nat. Bank of Louisville v. McCampbell*⁴⁶ a man deeded land to his wife for life, remainder to his children; the deed expressly provided that the grantor "does hereby retain, reserve and hold the power to revoke in whole or in part the grant of any and all of said land or any part or parts thereof." The man subsequently became indebted to plaintiff who obtained a judgment against him. The donor subsequently mortgaged the property to another to secure payment of a present loan. Arguing the mortgage was a total revocation of the prior deed, the plaintiff thereupon brought this action to subject the land to the payment of his judgment. The court held in favor of the donees, saying:

We are of the opinion that the mortgage . . . if a revocation at all, was but a *pro tanto* revocation of the deed. . . . This

(Footnotes continued from preceding page)

Code (1948) sec. 55-903; Mont. Rev. Code (1947) tit. 29, sec. 203; N. D. Century Code (1959) tit. 59, sec. 0559; S. D. Code (1939) tit. 51, sec. 1407.

⁴⁴ 1 Restatement, Property, sec. 56 (1936).

⁴⁵ The formal requirements of an instrument executing a power are established by a combination of the provisions of the instrument creating the power and by certain rules of law. Thus when the power is created, its author may specify that it be executed only "by will" or "by deed." He may require additional formalities, e.g., a will with four witnesses, but statutes often specify that such additional formalities are not essential to the validity of an exercise of the power. However, it seems that he may not authorize less formalities than would be necessary to transfer the interest if it were owned by the holder of the power. 3 Powell, *The Law of Real Property*, secs. 398, 399 (1952); 3 Restatement, Property, sec. 346 (1940). The statutes of many states expressly so provide. See Ala. Code (1940) tit. 47, sec. 82; D. C. Code (1961) tit. 19, sec. 107-wills; Ky. Rev. Stats. (1956) sec. 394.070-wills; Mich. Comp. Laws (1948) sec. 566.40; Minn. Stats. (1953) sec. 502.64, 502.65; New York Laws 1964, c. 864, secs. 148, 149; N. D. Century Code (1959) tit. 59, sec. 0521; 60 Okla. Stats. Ann. (West 1963) sec. 224; S. D. Code (1939) tit. 39, sec. 0421; Va. Code (1950) sec. 64-52; Wisc. Stats. Ann. (West 1957) 232.38.

⁴⁶ 184 Ky. 658, 213 S.W. 193 (1919).

construction is not inconsistent with the terms of the power reserved in the deed, for it must be borne in mind that McCampbell reserved and held the power to revoke in whole or in part the grant made to his wife and children. . . . If the mortgage amounts to an exercise of the power thus reserved, it did so only to the extent of the mortgage debt, and did not embrace the whole estate or any part greater than enough to satisfy the \$8,000 with interest and costs. The residue, whatever ascertained to be, did not belong to McCampbell but was the property of his children as remaindermen.

This decision seems sound, but it is submitted that the court was merely being cautious when it stressed the fact that the reservation expressly referred to a partial revocation. It is well settled that in the absence of controlling language to the contrary a donee of a general power of appointment may divide the estate into as many parts and interests as he sees fit; he need not exercise the whole power at one time nor need he give the whole estate to one person.⁴⁷ The same should be true by analogy of the power of revocation and should justify a court in recognizing a grantor's subsequent execution of a mortgage as only a partial exercise of his reserved power of revocation.

In *Cassady v. Cain*⁴⁸ the Kentucky court was again called on to determine whether or not a grantor had exercised his reserved power. Here the owner of mineral lands conveyed them to plaintiff, reserving "full control and management of all the properties hereby conveyed for and during his natural life, together with all the rents, or incomes from any and every source that may be derived from said property, or either of them, and he further reserves the right during his natural life to sell and convey said property, or any part thereof, with good title, as though this deed had never been executed." The grantor subsequently sold and conveyed away the surface rights. Later the grantor and plaintiff united in the execution of an oil and gas lease to X by the terms of which a royalty of three hundred dollars per year was to be paid on each producing well drilled. About ten years later the grantor entered into a written contract with defendant, who owned adjoining lands, whereby it was agreed that if defendant procured an assignment of X's lease, he would exploit both his

⁴⁷ Simes and Smith, *The Law of Future Interests*, sec. 976 (2d ed., 1950).

⁴⁸ 311 Ky. 179, 223 S.W.2d 744 (1949).

own and the grantor's property and pay a royalty of one hundred dollars on each well on either tract. The defendant was successful in procuring the assignment but the grantor died soon thereafter. The plaintiff thereupon brought this suit to determine the rights of the parties. The court held that the deed to the plaintiff had not been revoked in so far as the oil and gas rights were concerned; since the donee was the owner in remainder of the minerals, he was not bound by the agreement and was entitled to enforce the original terms of the lease. This conclusion seems sound. The power could not be validly exercised except by an instrument bearing the formalities of a deed. Moreover, the grantor had not evidenced an intention to revoke the gift in remainder of the mineral rights; indeed he had the plaintiff join with him in the execution of the lease to X after he had conveyed away the surface rights by himself. Possibly the contract with the defendant was intended to bind only the life estate; however, in all probability it was preliminary to making some arrangement whereby plaintiff could enjoy the benefits thereof upon the grantor's death; but certainly it was not intended as a revocation of plaintiff's gift.

Much of what has heretofore been said concerning the rights of a grantor's creditors is equally applicable to the rights of a surviving spouse who was married by the grantor after executing a revocable deed.⁴⁹ Since the reserved power is not considered to be an interest in property, the surviving spouse can ordinarily claim no dower interest in the land. This is the conclusion that was reached by the court in *McC Campbell v. McC Campbell*.⁵⁰ This result might seem unfair; but it again appears that cases involving revocable trusts are analogous, and here they suggest possible limits to the rule. Doctrines of illusory trusts, fraud on the spouse's share, and colorable transfers are being developed to prevent husbands and wives from using the revocable trust to frustrate the dower and other testamentary rights of their spouses.⁵¹ No reason is seen why these same doctrines could not be applied to revocable deeds so that the surviving spouse of the

⁴⁹ It is also applicable to the rights of spouses married subsequent to the deed in states that have substituted a statutory share for the inchoate right of dower.

⁵⁰ 198 Ky. 816, 250 S.W. 122 (1923).

⁵¹ See Macdonald, *Fraud on the Widow's Share* (Michigan Legal Studies 1960).

maker of such an instrument could not be permitted to claim her rights in the property conveyed in the same way and under the same circumstances.

Concededly there are reasons of policy which indicate that a man should not be allowed to place property beyond the claims of his creditors and surviving spouse while retaining substantial elements of control thereover. It is submitted that these reasons do not argue against the validity of revocable deeds; they merely argue for a changed concept of the nature of reserved powers. Whether the revocable deed of a legal interest is recognized as valid or not, the revocable trust appears to be a permanent institution in American law. Thus a solution to these problems will eventually have to be found and there seems to be no reason why the solution developed for the trust cases cannot be made equally applicable to the non-trust cases. Thus, it is submitted, these difficulties should not deter courts from recognizing the validity of such a useful instrument as the revocable deed of gift.