

Catholic University Law Review

Volume 16 | Issue 3

Article 3

1967

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Recommended Citation

John L. Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute*, 16 Cath. U. L. Rev. 256 (1967).

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Revocable Gifts of Personal Property: A Possible Will Substitute*

JOHN L. GARVEY**

PART V: CASES INVOLVING REVOCABLE GIFTS.***

APPARENTLY LEGAL THOUGHT did not always so roundly condemn the idea of revocable gifts as it does today. There are several early cases indicating that the absence of a power of revocation in any donative transaction involving a substantial amount of property was a suspicious circumstance to be explored by the court and explained by the donee before the gift was given effect.¹ And, indeed, dicta indicating that a person when entering into a gift inter vivos may, if he sees fit, reserve to himself the right to revoke it can also be found in some of the older cases.² The significance of these dicta, however, is concededly dwarfed by the number of modern cases containing broad statements about the invalidity of any such gift.

1. *Authority Indicating Revocable Gifts Void*

In view of the vast number of cases which contain language concerning the irrevocable elements in gifts inter vivos, it is surprising how few cases actually involved a serious attempt by a donor to bestow his property upon another while reserving to himself a bare jural power or right to undo the economic result of the transaction in the event subsequent happenings indicated the wisdom of such a course of conduct. One of the earliest cases

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

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*** For parts I-IV, see 16 CATHOLIC U. L. REV. 119 (1966).

¹ Richards v. Reeves, 149 Ind. 427, 49 N.E. 348 (1898); Slack v. Rees, 66 N.J. 447, 56 Atl. 466 (1904); Fretz v. Roth, 70 N.J.Eq. 764, 64 Atl. 152 (1906); Appeal of Rick, 105 Pa. 528 (1884); Coutts v. Ackworth, L.R. 8 Eq.Cas. 558 (1869).

² See James v. Aller, 68 N.J.Eq. 666, 62 Atl. 427 (1904); Nicholas v. Adams, 2 Whart. 17 (Pa. 1836).

apparently condemning such a revocable gift is *Rosenburg v. Rosenberg*.³ About a year before he died, Henry Rosenberg conveyed all his personal property to his son by an absolute deed of bargain and sale. As part of the same transaction, however, the son executed a sealed instrument acknowledging receipt of the property and reciting that in consideration therefor the property was to be "retransferred to the said Henry Rosenberg, if at any time he shall desire." After Henry died, his administratrix sued the son for the property, and the court said that the transaction could not be sustained as a gift inter vivos. Throughout its opinion, the court seemed more worried about the fact that this was a qualified gift, *i.e.*, a gift of less than the donor's full interest in the property, than that it was revocable. Thus the court stressed that the obligation imposed on the son

is in the nature of a condition imposed on the title transferred to the donee, and applies to the identical property which was the subject of the gift, for the defendant's promise is not simply to account to the donor for the proceeds or to pay to him a fixed sum of money . . .

It must be remembered that the possibility of creating future interests in personalty and the validity of conditional gifts was recognized only recently.⁴ If the law had progressed to its present state when this case was decided, it seems likely that the court might have come to a different conclusion. Thus, it is submitted, that the current value of the case as precedent on the validity of revocable gifts is slight. Moreover, it should be observed that all of the language in the case on the subject of gifts inter vivos is dicta. The court eventually implemented the intention of the parties and, though it is difficult to find trust intent in the language of the instruments, sustained the transaction as a valid revocable trust.

The second case that is frequently cited to demonstrate the invalidity of revocable gifts is *Brown v. Crafts*.⁵ Apparently attempting to defeat his widow's rights in his property, a man physically gave negotiable securities to his daughter and, at the same time, executed an absolute bill of sale for them to her. As part of the same transaction, the daughter executed a power of attorney under which the father was to hold the securities during his life, manage them, have their use and income, and the right to sell or pledge them to pay his debts as though they were his own. The daughter then redelivered the securities to her father and they were thereafter kept in a safety-deposit box to which both had access. After the man died, his widow sued to claim her testamentary share in the securities. The court held in favor of

³ 40 Hun. 91 (N.Y. Sup. Ct. 1886).

⁴ Concerning the difficulty some New York courts still have with gifts of future interests, see Part IV, n.22, 16 CATHOLIC U. L. REV. 146 (1966).

⁵ 98 Me. 40, 56 Atl. 213 (1903).

the widow, saying that the transaction was testamentary and void. This case seems to be a precursor of the many revocable trust cases involving the "dower" rights of a settlor's surviving spouse in the trust property. Indeed, the language in the case concerning the control of the donor rendering the transfer "colorable, not real" is similar to the language of *Newman v. Dore*,⁶ in which the doctrine of illusory transfers was announced. In view of the peculiar nature of the widow's claim in this type of case, it is submitted that the value of this case as precedent today on the essential validity of revocable gifts where no widow's claim is involved is slight.

The next case⁷ that is frequently cited as condemning revocable gifts is *Jones v. Luing*.⁸ In this case, a blind woman had indorsed two promissory notes in blank and pledged them as collateral for a loan. Upon payment of the loan, the notes were entrusted to the lady's son to be given to her. When the son returned home, the mother "told me [the son] to keep the notes, and if she did not need them before she died for me to divide them equally between Mrs. Emma Pease and myself." After the mother's death, the donees brought suit against the makers of the notes; the mother's administratrix intervened, and the court awarded the notes to her. The court held that this was an invalid attempt to make a future gift. It is difficult to find fault with this case. According to the purported donee's own account of what transpired, it does seem that he was to receive no title whatsoever until his mother's death. He appears to have been merely a bailee for safe-keeping until she died and then he was, for the first time, to become an owner of the property. Thus, the donor's death was a condition precedent to the gift itself.⁹

One year after *Jones v. Luing* was decided, an Illinois court was faced with a true revocable gift in *Devine v. Stepanek*.¹⁰ In that case, a man physically gave two certificates of deposit to the defendant, saying: "The money is yours, and in case I need it you will have to give it to me; if I do not need it you will keep it." After the donor had died without calling for the money, his administrator brought suit for, and recovered, it. If this case is correctly decided, then revocable gifts are bad. Here there was no defect in the delivery since the donor physically lost control over the money and retained a

⁶ 275 N.Y. 371, 9 N.E.2d 966 (1937).

⁷ *Chamberlain v. Eddy*, 154 Mich. 593, 118 N.W. 499 (1908), is sometimes cited as holding revocable gifts invalid. The case, however, did not involve an attempt to make such a gift. A man who was contemplating suicide gave certain property to his sister, saying that she could "have the same to use." Observing that the man had apparently left his intent ambiguous to hide his suicidal design, the court held that no gift had been made. By leaving his intent ambiguous, the man reserved control over the legal effects of the transaction; had he not committed suicide, he could have denied that he had intended to make any gift whatever. By leaving his intent ambiguous, he also made it easy for the court to find that whatever donative intent he had was testamentary and thus ineffective.

⁸ 152 Iowa 276, 132 N.W. 371 (1911).

⁹ See Part IV, 16 CATHOLIC U. L. REV. 146 (1966).

¹⁰ 176 Ill.App. 61 (1912).

bare legal right or power to recover it. Nor was this an attempted future gift and thus testamentary; the donor's death was not the event upon which title was to pass; title passed immediately and the only significance of the donor's death was that it marked the termination of his right or power to recover the money. It is submitted that the court erred in this case because of the over-generalization of the rule of delivery that had been announced in an earlier Illinois decision, *Telford v. Patton*.¹¹ In the *Telford* case, a man had directed that a certificate of deposit be issued in the name of L. J. Patton. The man told no one of the purchase of the certificate, not even the purported donee, and retained it in his possession until his death several months later. The purported donee sued the deceased's administrator in replevin for the certificate, but the court properly held in favor of the administrator since there was no proof that the certificate had been purchased in this form with a donative intent. In its opinion, however, the court spoke of the requirement of delivery, saying:

In the absence of any proof of declarations made by Telford to the bank, and in the absence of any proof as to his intention in obtaining the certificate, it cannot be said that he was ever wholly divested of control and dominion over the deposit so long as the certificate remained in his possession. The bank did not have the signature of L. J. Patton, and did not know who L. J. Patton was, but did know that Samuel Telford made the deposit, and had no reason to suppose, so far as the proof shows, that he may not have been calling himself by another name, or using another name, for some private purpose of his own.

Clearly, the retained control this court was worried about and condemned was the power Telford had to cash the certificate and recover his property without ever admitting that any gift had been made. Note that this is not the type of retained control that was involved in the *Devine* case. In that case, the certificates had been physically given to the donee. If the donor had wished to revoke that gift, he would have had to concede that the gift had been made and rely solely on an exercise of the legal right that he had expressly reserved. Though the court did not recognize it, certainly these cases are distinguishable.

Another case that is frequently cited to establish the proposition that gifts inter vivos must be irrevocable is *Grignon v. Shope*.¹² According to the purported donee's testimony, his elderly aunt had given him a sum of money, "upon the condition that if she did not revoke the gift before death it would become absolute." The nephew, however, had immediately executed an ordinary promissory note to his aunt for the sum. After the aunt died, her executor sold the note to the plaintiff who thereupon brought suit on it

¹¹ 144 Ill. 611, 33 N.E. 1119 (1892).

¹² 100 Ore. 611, 197 Pac. 317 (1921).

against the nephew. The court properly entered judgment against the nephew on the note. In holding the attempted gift void, the court said:

The answer, in order to be effective, should have alleged facts showing that it was the intention of Anna M. Scott, the alleged donor, to relinquish the right of dominion over the *subject of the gift* and to create the right of dominion in B. F. Shope, the defendant. The delivery of such a gift must be not only of possession, but also of the dominion and control of the property . . . (Emphasis added.)

Clearly the court is speaking of the requirement of delivery. But it is submitted that the court has confused the matter by speaking of the right of dominion over the "subject matter of the gift." The money had been physically given to the defendant; there was no evidence that he was to preserve it as an identifiable fund; apparently he had in fact used the money for his own purposes as he saw fit. Thus it seems clear that the defendant did have dominion over the "subject of the gift." It is submitted that what the court really meant was that by taking back the ordinary promissory note the alleged donor had retained control over the legal effects of the transaction; she had retained the power to revoke the gift in such a manner as would deny that any gift had ever been made. Thus, there was in truth a defective delivery. The retention of the power to revoke in this manner showed that the alleged donor was not yet sure that she wanted her words of conditional gift to have legal significance. For this reason, the law could not implement them and could only recognize the debtor-creditor aspect of the transaction.¹³

The most recent case, that is generally cited as authority for the proposition that gifts inter vivos must be irrevocable, is *Johnson v. Hilliard*.¹⁴ In this case, an elderly woman, in ill health, physically gave certain bonds to a friend and at the same time signed the following statement: "I give Mrs. Henry Johnson the sole right to my bonds all of them, for my expenses in case I pass away." As part of the same transaction, Mrs. Johnson signed a statement providing: "If Mrs. Scharf should get well and strong again, I will return to her four bonds as she requested. If she passes away, I am to give Anna Zalinski [one of the bonds and have Mrs. Scharf's name put on her tomb stone.]" Mrs. Scharf died two weeks later and the public administrator brought suit for, and was awarded, the bonds. The court's opinion is confused. The court stated that a "gift inter vivos, as we understand it, is one in which the donor parts with all present and future dominion over the property given." Thus the court seemed to ignore the great body of cases that have given effect to gifts upon condition and to gifts of future interests.¹⁵ The court expressly recognized the difficulty sometimes encountered

¹³ See Part III, 16 CATHOLIC U. L. REV. 131 (1966).

¹⁴ 113 Colo. 548, 160 P.2d 386 (1945).

¹⁵ See Part IV, text at n. 23, 16 CATHOLIC U. L. REV. 146 (1966).

in determining whether a particular transaction amounts to a valid gift *inter vivos* or an abortive attempt at a testamentary disposition, and rightly stated that the ultimate test lies in the intention of the donor. But on the basis of all the evidence, the court finally concluded that Mrs. Scharf had not had a present donative intent when entering into the transaction. It must be conceded that the language of the documentary evidence ("I give . . . in case I pass away," construed by the court to mean "I give . . . when I pass away") does seem to indicate that there was to be no gift, that no title whatever was to pass, until the donor's death. Thus it is arguable that the donor had made her death a condition precedent to the gift itself. But since the instruments had been drafted by laymen, and especially since the donor had parted with physical control of the property itself, it is submitted that the court could have been more liberal in construing the instruments and should have given effect to the deliberately declared and well proven intention of the decedent.

2. Authority Indicating Revocable Gifts Valid

A. Gifts of Money Subject to Contract Duty to Repay

Surprising though it may be, more of the cases that actually involved serious attempts by donors to make revocable gifts have given effect to the intentions of the parties than have frustrated them. Donors with cash in hand and contemplating some type of a gratuitous disposition of it have been the most successful. *Walston v. Twinford*¹⁶ is a typical case. There, a mother gave sixty-five hundred dollars to her daughter and took back a demand promissory note for the sum. The note provided that any balance of either principal or interest due at the death of the mother, Mattie A. Picot,

is herewith positively to be treated, deemed and considered a gift to [the daughter] by said Mattie A. Picot, or her estate and neither her personal representatives, heirs at law, next of kin or any other person or persons shall have any interest, right or title in such unpaid balance, and title shall vest in such balance immediately upon the death of the payee. . . .

The mother died five years later, never having demanded repayment of the sum. Her administrator sought judgment for principal and accrued interest; but the court ruled in favor of the daughter, holding that there was nothing due on the note and that the daughter's obligation to her mother had been completely satisfied. Since this was a demand note, the mother could have undone the economic result of the transaction and revoked the disposition at any time she saw fit simply by demanding payment of the principal sum; the validity of this aspect of the transaction is expressly rec-

¹⁶ 248 N.C. 691, 105 S.E.2d 62 (1958).

ognized by the court in its opinion. But when the mother died without having demanded payment, the daughter's obligation to repay was extinguished and the disposition became absolute. This was the actual holding of the case.

Courts have frequently been faced with similar transactions. Though there are decisions to the contrary,¹⁷ the decided weight of recent authority is that such transactions are valid and effective to accomplish the intention of the parties.¹⁸ Several early cases,¹⁹ however, after recognizing these arrangements as attempts at revocable gifts, held them void on that ground. Thus, when faced with its first case of this nature, the Kentucky Court of Appeals held the transaction ineffective, saying:

In relation to the various requisites of a valid gift, a vast amount of abstruse learning is to be found in the decisions of the courts, English and American, upon this subject. And conflicting as those decisions are upon most points, it

¹⁷ *Drake v. Wayne*, 52 Ga.App. 654, 184 S.E. 339 (1936); *Shafer v. Manning*, 132 Ill. App. 570 (1907); *Knott's Adm'r. v. Hogan*, 61 Ky. (4 Met.) 99 (1862); *Rodemer v. Rettig*, 114 Ky. 634, 71 S.W. 869 (1903). See also *Smith's Adm'r. v. Smith*, 214 Ky. 785, 284 S.W. 83 (1926); *Dimon v. Keery*, 54 App. Div. 318, 66 N.Y.S. 817 (1900); *Sinclair v. Travis*, 231 N.C. 345, 57 S.E.2d 394 (1950); *In re Gardner's Estate*, 82 Ohio L.Abs. 185, 162 N.E.2d 579 (1959).

¹⁸ For the sake of clarity and accuracy, the cases have been divided into four groups: 1) those involving demand obligations; 2) those involving time obligations that matured before the payee's death; 3) those involving installment obligations; and 4) those involving time obligations which had not matured at the time of the payee's death. Only the cases in the first two groups involve gifts that were revocable at the whim of the payee at the time of his death; however, the courts have drawn no distinction on this basis and have cited the cases in all four groups indiscriminately.

1) Demand obligations: *Gould v. Van Horne*, 43 Cal. App. 147, 187 Pac. 35 (1919); *Sebrell v. Couch*, 55 Ind. 122 (1876); *Soc'y of Missionary Catechists v. Bradley*, 112 Ind. App. 556, 44 N.E.2d 209 (1942); *Smith's Estate*, 244 Iowa 866, 58 N.W.2d 378 (1953); *Welsch v. Straub*, 74 Kan. 292, 96 Pac. 148 (1906) (dictum); *McGlasson v. McGlasson's Ex'r.*, 56 S.W. 510 (Ky. 1900), *overruled*, *Rodemer v. Rettig*, *supra* note 17, but cited with approval in *De Lapp v. Anderson's Adm'r.*, 305 Ky. 336, 203 S.W.2d 389 (1947); *In re Alms' Estate*, 153 Minn. 256, 190 N.W. 253 (1922); *Helmick v. Probst*, 170 Misc. 284, 9 N.Y.S.2d 975 (1939) (sealed instrument); *Walston v. Twinford*, 248 N.C. 691, 105 S.E.2d 62 (1958); *Bedford's Ex'r. v. Chandler*, 81 Vt. 270, 69 Atl. 874 (1908).

2) Matured time obligations: *Novak v. Lovin*, 33 N.D. 474, 157 N.W. 297 (1916); *Compton v. Westerman*, 150 Wash. 391, 273 Pac. 524 (1928).

3) Installment obligations: *Connelly v. Bank of America Nat'l Trust & Sav. Ass'n.*, 138 Cal. App. 2d 303, 291 P.2d 501 (1956); *Bergman v. Ornbaun*, 33 Cal. App. 2d 680, 92 P.2d 654 (1939); *Fallon v. Hackney*, 130 So.2d 49 (Ala. 1959), *rev'd on other grounds*, 272 Ala. 17, 130 So.2d 52 (1961); *Nunnally v. Wilder*, 330 F.2d 843 (D.C. Cir. 1964); *Miller v. Allen*, 339 Ill. App. 471, 90 N.E.2d 251 (1950); *In re Reese's Estate*, 31 Ill. App. 2d 468, 176 N.E.2d 636 (1961); *Milligan v. Gwinn's Adm'r.*, 291 Ky 21, 173 S.W.2d 31 (1942); *Palmer v. Arnett*, 352 Mich. 22, 88 N.W.2d 445 (1958); *Dillard v. Thomas*, 241 Mo. App. 773, 270 S.W.2d 548 (1954); *In re Cairn's Estate*, 33 Misc. 2d 621, 225 N.Y.S.2d 274 (1962); *Kemp v. Strand*, 268 P.2d 255 (Okla. 1954); *Farmer v. Farmer*, 195 Va. 92, 77 S.E.2d 415 (1953); *In re Lewis*, 2 Wash. 2d 458, 98 P.2d 654, 127 A.L.R. 628 (1940).

4) Unmatured time obligations: *Jones v. Darling*, 94 Ga. App. 641, 95 S.E.2d 709 (1956); *Brundrant v. Boyce*, 47 Ind. App. 253, 91 N.E. 968 (1910) (possibly matured); *De Lapp v. Anderson's Adm'r.*, 305 Ky. 336, 203 S.W.2d 389 (1947) (possibly matured); *Kline v. McElroy*, 296 S.W.2d 664 (Mo. 1956); *Brock v. Lueth*, 141 Neb. 545, 4 N.W.2d 285 (1942); *Newcom v. Ford*, 222 S.W. 591 (Tex.Civ.App. 1920).

¹⁹ *Shafer v. Manning & Knott's Adm'r. v. Hogan*, *supra* note 17.

seems to be agreed, on all hands, that it is essential to every gift of this class [*i.e.*, gifts inter vivos] that it should be *irrevocable* by the donor.²⁰

Later, however, the Kentucky court reconsidered its position on the essential validity of this type of transaction and in *DeLapp v. Anderson*,²¹ the facts of which were substantially similar to those of the case mentioned above, gave effect to the transaction according to its terms. This change of attitude on the part of the Kentucky Court of Appeals indicates that regardless of the "amount of abstruse learning . . . found in the decisions of the courts" on the subject of gifts inter vivos, care must be taken in applying the often repeated dicta that gifts must be irrevocable.

Though the great weight of recent authority sustains the validity and effectiveness of these transactions, there is not complete agreement among the courts on whether they amount to valid gifts inter vivos or merely contractual arrangements. Indeed, it must be conceded that most courts, including the Kentucky court in the case mentioned above, have used a contract theory in sanctioning them. Though no fault can be found with these cases, it is submitted that these transactions can be harmonized with the general principles of the law of gifts and sustained as such. The gift theory was adopted and explained in *Bedford's Ex'r v. Chandler*:²²

[A]ll the gift that the decedent intended was irrevocably made and completely delivered when the consideration of the note was made over in exchange for a promise of payment thus limited. The gift consisted of so much of the amount represented by the note as the payee should not collect in her lifetime. The title to the gift passed to the defendant, subject to a right of defeasance in the donor, and the right of defeasance terminated at the donor's death. The reservation of this right did not make the gift invalid.

The reasoning of the court is somewhat confused, but it is submitted that it is basically sound. In the first place, it should be observed that, though the court recognized that the donor had reserved a "right of defeasance," nevertheless it maintained that the gift had been "irrevocably made." The only way this paradox can be explained is to construe the language to mean that the gift transaction itself is irrevocable and beyond the donor's power even

²⁰ *Knott's Adm'r. v. Hogan*, *supra* note 17.

²¹ 305 Ky. 336, 203 S.W.2d 389 (1947). Actually the Kentucky court reconsidered its position several times. See the intervening cases of *McGlasson v. McGlasson's Ex'rs.*, 56 S.W. 510 (Ky. 1900), and *Rodemer v. Rettig*, 114 Ky. 634, 71 S.W. 869 (1903).

²² 81 Vt. 270, 69 Atl. 874 (1908). Other cases that have used a gift theory are *Gould v. Van Horne*, 43 Cal. App. 147, 187 Pac. 35 (1919); *Connelly v. Bank of America Nat'l Trust & Sav. Assn.*, 138 Cal. App. 2d 303, 291 P.2d 501 (1956); *Sebrell v. Couch*, 55 Ind. 122 (1876); *Brundrant v. Boyce*, 47 Ind. App. 253, 91 N.E. 968 (1910); *Novak v. Lovin*, 33 N.D. 424, 157 N.W. 297 (1916); see also *Jones v. Darling*, 94 Ga. App. 641, 95 S.E.2d 709 (1956); *Smith's Estate*, 244 Iowa 866, 58 N.W.2d 378 (1953); *Howard v. Hobbs*, 125 Md. 636, 94 Atl. 318 (1915); *Green v. Redmond*, 132 Md. 166, 103 Atl. 431 (1918).

though its economic effect can be undone by an exercise of the right expressly reserved when the gift was made. The transaction is irrevocable in the sense that the donor can never disavow it or render it completely devoid of legal effect; he will always have to concede that he had made a gift of the money to the donee. But the gift was not absolute and unqualified; it was a gift *cum onere*.²³ The transaction by its terms imposed upon the donee the obligation to repay an equal sum upon the demand of the donor. This obligation was just as integral a part of the transaction as the gift itself. Thus, if the donor had called for performance of this obligation, he would not have been revoking the transaction or denying its legal effectiveness; he would, on the contrary, have been acknowledging the gift and merely demanding that its onerous character be recognized. As indicated in the earlier section on delivery, it is conceded that all gifts must be irrevocable in this same sense, in the sense that they must be "irrevocably made." But it is submitted, as this court held, that this requirement of irrevocability does not preclude donors, when entering into such transactions, from reserving a jur- al right or power through the exercise of which the economic effect of the gift can be undone.

Fault might be found with the court's statement that the gift "consisted of so much of the amount represented by the note as the payee should not collect in her lifetime." This seems to indicate that the court considered the unpaid balance due on the note at the donor's death as the subject matter of the gift; and it might be argued that any such gift (the subject matter of which is not to be ascertained until after the donor's death) is necessarily testamentary and void.²⁴ It should be noted, however, that in the sentence immediately preceding this troublesome one, the court stressed that the gift "was . . . made . . . when the consideration of the note was made over in exchange for a promise of payment thus limited." Thus it is clear that the court considered the gift to have been made when the transaction was entered into, and not at the moment of the donor's death. The easiest way to harmonize this conflict is to construe the word "gift" in the second sentence

²³ Corbin uses this phrase, see 1 CORBIN, CONTRACTS § 151 (1950).

²⁴ Though it is believed that such a gift is testamentary, there is some authority indicating that the law might be moving toward the position that it is not. In *Speelman v. Pascal*, 10 N.Y.2d 313, 178 N.E.2d 723, 222 N.Y.S.2d 324 (1961), noted in 11 CATHOLIC U. L. REV. 115 (1962), the New York Court of Appeals held that a written assignment of the prospective profits of a play yet to be written and produced was a valid, executed gift. See also *In re Roosevelt's Will*, 73 N.Y.S.2d 821 (1947).

The installment note cases—where A transfers money to B and takes B's note for the sum payable over a period of years in regular installments, the note providing that it shall become null and void at the payee's death and that no further installments shall become due thereafter—are interesting in this respect. Though such transactions are generally held effective [see *Connelly v. Bank of America Nat. Trust & Sav. Assn.*, 138 Cal.App.2d 303, 291 P.2d 501 (1956); *Garrett v. Keister*, 56 F.2d 909 (D.C. Cir. 1932); *Thatcher v. Merriam*, 121 Utah 191, 240 P.2d 266 (1952)], it is somewhat unrealistic to consider them as involving a

in a loose, layman's sense to indicate only the actual economic betterment which the donee in fact ultimately derived out of the whole transaction. When so construed, it seems clear that the true subject matter of the technical gift was the money, the full amount of it, that was transferred by the donor to the donee at the inception of the transaction.²⁵ That is when the gift took place and at that time full title of the money passed to the donee.²⁶

Fault might also be found with the court's calling the donor's right to call for repayment a "right of defeasance." Though it is felt that other types of revocable gifts have been accomplished through the use of defeasible titles, it seems clear that in this type of transaction (where money is the subject matter of the gift) no defeasible title is involved. The donee receives absolute and unqualified title to the money; he is free to use it as he sees fit and is under no obligation to preserve it as a separate fund. When the donor exercises his reserved right and calls for repayment, the donee does not become obligated to return the same, identical money that was transferred to him; he merely becomes obligated to repay an equivalent sum out of the general assets of his estate. Thus this type of gift is revoked, not through the exercise of a true right of defeasance, but rather through the maturing of a contract obligation that was created at the time of the gift. Obviously, "right of defeasance" was a poor term for the court to use; but obviously also, the court was hard pressed by the semantic problem of finding a term to explain that the gift had to be irrevocable in one sense though not in the other.

When these transactions are viewed in this light, it will be seen that they are neither pure and simple gifts nor are they wholly contractual; they are gifts burdened with a contract duty.²⁷ The contract is unilateral, the dona-

gift of the original sum. Undoubtedly the parties were thinking of some type of a gift, but it seems unlikely that either thought that the gift encompassed the full sum transferred by A. How can such a gift be better explained than as a present gift of the uncollected balance? Thus, in the *Thatcher* case, the court said: "There was a clearly expressed present gift of such part of the principal as did not become due and was not paid during the lifetime of the donor." And in *Lewis' Estate*, 2 Wash.2d 458, 98 P.2d 654 (1940), the court spoke of "a present interest, or *quantum* of interest" passing to the maker of the note when it was executed.

Consider also the law of class gifts. If Blackacre is transferred to X for life remainder to his surviving children, it is generally said that the children immediately received an interest in the land. Yet the interest of any such child may be increased by the death of another child, decreased by the birth of new children, or completely extinguished by the death of such child. See *SIMES & SMITH, THE LAW OF FUTURE INTERESTS* §§ 640, 653 (2d ed. 1956). This certainly comes very close to a recognition of a present transfer of an interest to be ascertained in the future.

²⁵ In *Sebrell v. Couch*, 55 Ind. 122 (1876), the court said: "It may be assumed that the consideration for the mortgage, whatever it may have been, was delivered to the mortgagor, at or before the execution of the mortgage; this consideration is what constitutes the gift . . ." See also *Gould v. Van Horne*, 43 Cal. App. 147, 187 Pac. 35 (1919).

²⁶ *In re Alms' Estate*, 153 Minn. 256, 190 N.W. 253 (1922).

²⁷ Possibly it is inaccurate to call the donee's obligation contractual. It seems to arise in much the same way as the personal obligation that it is occasionally imposed on the donee

tive act being sufficient consideration to support the donee's promise and make it legally enforceable. The gift is not testamentary for it is wholly made and executed when the transaction is entered into; true, it is burdened by an obligation to be performed later, but this is an obligation subsequent and does not affect or postpone the passing of title. The donee's promise is not testamentary for it is to be wholly performed during the life of the donor; at his death, the obligation by its very terms is fully performed and there is thus nothing left to be cancelled or terminated. Nor is the donee's promise illusory; for it is subject to the whim of the promisee, not that of the promisor.²⁸

The difficulty with this type of revocable gift is rather obvious. Since the donee receives absolute title to the money, is not obliged to preserve it as a separate fund, and is merely under a duty to repay an equal amount out of his general assets, he might squander the money and by insolvency deprive the donor of an effective exercise of his power of revocation.²⁹ Of course, if the donor secures his right to repayment by taking a mortgage on the property of his donee, the threat of the donee's insolvency might not be too serious a problem. But where the donee has insufficient property of his own to give such security, the donor might be reluctant to try this form of revocable gift.

of property subject to an equitable charge. See *Logan v. Glass*, 136 Pa. Super. 221, 7 A.2d 116 (1939), *aff'd* 338 Pa. 489, 14 A.2d 306 (1940); 4 CORBIN, CONTRACTS § 784 (1951). Scott suggests that the obligation in such cases "rests upon principles applicable to the creation of a debt which are older than those applicable to the formation of a simple contract." 1 SCOTT, THE LAW OF TRUSTS § 10.1 (2d ed. 1956).

²⁸ Though the execution of a note expressly providing for repayment only upon the personal demand of the donor-payee seems to be the best method of effectuating these transactions, it has not always been the method used. In *Gould v. Van Horne*, 43 Cal. App. 147, 187 Pac. 35 (1919), the transaction rested wholly in parol; in *Soc'y of Missionary Catechists v. Bradley*, 112 Ind. App. 556, 44 N.E.2d 209 (1942), no note was given but the parties entered into a writing that recited the transaction and the limited obligation of the donee to pay; in *Novak v. Lovin*, 33 N.D. 424, 157 N.W. 297 (1916), the donee executed an ordinary note but as part of the same transaction the parties entered into a separate writing setting forth the limitation on the donee's obligation. When the donee executes an ordinary note for the amount of the gift and the parties rely on a parol agreement to show the limited nature of the donee's obligation, the courts generally hold the transaction ineffective; see *Lanphear v. McLean*, 135 Kan. 266, 10 P.2d 889 (1932); *Green's Estate*, 247 App. Div. 540, 288 N.Y.S. 249 (1936).

When attempting to make this type of revocable gift, it is important that the donor form and appropriately manifest his donative intent at the inception of the transaction and indicate the limited nature of the donee's obligation to repay when transferring the money to him. For otherwise, a simple debt will arise out of the transfer of the money and much difficulty will be encountered in any subsequent attempt to change its nature. See *Harrell v. Westover*, 283 S.W.2d 197 (Ky. 1955); *Doty v. Wilson*, 5 Lans. 7 (N.Y. Sup. Ct. 1871); *Clark v. Sperry*, 125 W. Va. 718, 25 S.E.2d 870 (1943). See also *Selleck v. Selleck*, 107 Ill. 389 (1883).

²⁹ See *Drake v. Wayne*, 52 Ga. App. 654, 184 S.E. 339 (1936).

B. *Gifts of Defeasible Interests in Choses*

For such a donor, there is an alternative. He can transfer the money to a financially responsible third-party and extract a promise to repay an equal amount to the donor upon any demand made during his lifetime, and if no such demand is made, then to the donee.³⁰ This was the form of the transaction in *Blanchard v. Sheldon*³¹ where, after the donor had died without having demanded repayment, the court held that a valid gift had been made and that the donee was entitled to collect the money. The court said that the transaction "vested the property in the \$300 in the [donee], subject to be defeated only by his [donor's] taking some further action in regard to it; and that the transaction can be upheld as a gift inter vivos." Recognizing the transfer of the money to the third-party and the extraction of the peculiar promise of repayment as a sufficient act of delivery to sustain the transaction as a gift, the court said that it was none the less a valid gift because "liable to be wholly defeated" by an exercise of a "condition of defeasance." Since the only "condition of defeasance" was the possible election of the donor to collect the money himself, the court concluded that the "time for exercising this election expired with the life of the donor, and the gift thereby was freed from all condition of defeasance, and the right of the donee . . . became absolute." It is submitted that this decision is eminently sound and logical. When the transaction was entered into, the donee received a defeasible title to the chose and this title became absolute when it was no longer possible for the defeating event to occur.³²

a. *Joint Bank Account Cases.* Concededly there are not many cases in which donors have attempted to preserve their pre-eminence by lending money to a private individual and extracting such a promise of repayment. It is submitted, however, that the joint bank account cases—those involving deposits to the joint credit of the depositor and another, payable to either during their joint lives and to the survivor upon the death of one—are somewhat analogous and can be similarly rationalized as revocable gifts of the deposit chose.³³ Early cases frequently held such transactions ineffective gifts,

³⁰ See *Baker v. Williams*, 34 Ind. 547 (1870), where a soldier deposited money with a friend under a written agreement to return it if the soldier should come back and to pay it to his sister if he should die.

³¹ 43 Vt. 512 (1871), See Part I, 16 CATHOLIC U. L. REV. 119 (1966).

³² An analogous case that uses the classical terminology of property law is *Curley v. Wolf*, 173 Md. 393, 196 Atl. 285 (1938).

³³ Cases involving the settlement options of insurance policies might also be analogous. Thus in *Toulouse v. New York Life Ins. Co.*, 40 Wash.2d 538, 245 P.2d 205 (1952), a man became entitled to the proceeds of an endowment policy and elected a settlement option providing that the proceeds would be left with the company at interest, to be paid in whole or in parts to himself at any time upon demand, any balance remaining with the company at his death to be paid to a named individual. After the man died, his executor claimed the balance but the court denied the claim and awarded the balance to the named individual.

arguing that the retention of a right of withdrawal by the donor-depositor detracted from the requisite surrender of dominion and control. Most modern cases, however, repudiate this argument and generally tend to give effect, at the depositor's death, to his donative intent by awarding the balance then in the account to the surviving co-owner.³⁴ These transactions cannot, however, be considered satisfactory revocable gifts unless the donee was in some manner restrained from withdrawing money from the account and using it for his own benefit during the depositor's lifetime. Undoubtedly the weight of modern authority refuses to give effect to the donative aspect of these transactions if it can be proven that the donor-depositor imposed such a restriction.³⁵ But in his thorough and remarkable studies of the joint bank account cases,³⁶ Professor Kepner argues that this rule is an "anachronism" and that it should be abandoned.³⁷ He points out, moreover, that despite the rule, the donor-depositor in fact can and probably frequently does restrict withdrawals by his donee-co-owner. This anomaly is most evident when cases resolving disputes that arose before the donor's death and determining the rights of the parties during their joint lives are compared with the cases resolving disputes that arose after the donor's death and determining only the survivorship right of the donee. Though most modern courts tend to favor the donee-survivor in suits between him and the donor's estate, they tend to favor the donor-depositor in suits between him and the donee.³⁸

The explanation of this anomaly lies in the fact that the rights of the donee-co-owner depend upon the depositor's intention in opening the account, and the fact that most courts admit parol evidence to prove this in-

Accord, Mutual Ben. Life Ins. Co. v. Ellis, 125 F.2d 127 (2d Cir. 1942), *cert. denied*, 316 U.S. 665 (1942); cf. Wilhoit v. Peoples Life Ins. Co., 218 F.2d 887 (2d Cir. 1955). See also Comment, *Life Insurance Settlement Options and the Statute of Wills*, 50 NW. U. L. REV. 796 (1956); 1 PAGE, WILLS § 6.17 (Bowe-Parker Rev. 1960).

³⁴ See BROWN, PERSONAL PROPERTY § 65 (2d ed. 1955); 4 CORBIN, CONTRACTS § 783, especially at n. 29, and § 914, n. 32; Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959), especially cases cited in n. 5.

³⁵ See, e.g., Powell v. Powell, 222 Ark. 918, 263 S.W.2d 708 (1954); *In re Whaley's Estate*, 3 Ill. App. 2d 333, 122 N.E.2d 46 (1954); Urbancich v. Jersin, 226 P.2d 316 (Colo. 1950); Balfour v. Seitz, 392 Pa. 300, 140 A.2d 441 (1959); First Security Bank of Utah v. Burgi, 122 Utah 445, 251 P.2d 297 (1952).

³⁶ Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953) and Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959).

³⁷ Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376, 388 (1959).

³⁸ The donee is generally held accountable to the donor for withdrawals made by him during their joint lives. See, e.g., Landman v. Landman, 136 A.2d 392 (App. D.C. 1957); Gibbons v. Schwartz, 261 App. Div. 794, 27 N.Y.S.2d 214 (1941), *aff'd*, 288 N.Y. 612, 42 N.E.2d 611 (1942); Plainse v. Engle, 262 Wis. 506, 56 N.W.2d 89 (1952). But it is generally held that the donor is under no similar obligation to account for his withdrawals. See, e.g., Winters v. Park, 91 So.2d 649 (Fla. 1956); Loeb v. Dry Dock Sav. Bank, 4 App. Div. 2d 190, 164 N.Y.S. 2d 408 (1957), *aff'd*, 4 N.Y.S.2d 811, 149 N.E.2d 894 (1958); Zander v. Holly, 1 Wis.2d 300, 84 N.W.2d 87 (1957).

tention.³⁹ If all goes well between the parties during the depositor's lifetime, there is likely to be little evidence available after his death that will embarrass the donee's survivorship right. But if a dispute arises before the depositor's death, then he is free to testify and undoubtedly his own statements concerning the intended rights of the donee—even though made after the account was opened and during the course of the trial—have played a large part in the decisions adverse to the donee. Indeed, some courts make it easier for the donor-depositor to achieve the desired result; while permitting the proof of the depositor's intent to control the outcome of the inter vivos cases, they raise an irrebuttable presumption in favor of the donee in the survivorship cases.⁴⁰

Thus it seems that the joint bank account is developing into a legitimate means of making a satisfactory revocable gift. Though the commentators have generally approved of this trend,⁴¹ they have had difficulty in working out a rationalization for the cases that will justify it according to common law principles. Professor Kepner has suggested that the transaction can be viewed as "a present gift of the balance of the account, with the donee's enjoyment postponed until the donor's death."⁴² But the idea of a present gift of a sum to be determined in the future seems to be a contradiction in terms.⁴³ It is submitted that these cases can be better rationalized by viewing the deposit transaction as a present gift of a defeasible remainder interest in the deposit chose.⁴⁴ When the transaction is viewed in this light, the inter vivos cases favoring the donor and the survivorship cases favoring the donee can be easily harmonized. The right of the donee-survivor to the balance in the account at the donor's death is not testamentary for he received title to this fund during the donor's life, *i.e.*, when the account was originally opened and as each subsequent deposit was made.⁴⁵ The donee-survivor had no right to collect and use the money for his own benefit during the donor's lifetime because his title at that time was a future interest and, as such, gave

³⁹ See Annot., 33 A.L.R.2d 569 (1954).

⁴⁰ This appears to be the rule in fourteen American jurisdictions: Alabama, California, Connecticut, Hawaii, Maine, Minnesota, New Hampshire, New Jersey, New York (savings accounts only), Ohio, South Carolina, Washington, Wisconsin and Vermont. See Comment, 60 MICH. L. REV. 972, 986 (1962).

⁴¹ See, *e.g.*, Effland, *Estate Planning: Co-ownership*, 1958 WIS. L. REV. 507, 520; Segatto, *The Joint and Survivorship Bank Account*, 1957 ILL. L. FORUM 655; *Disposition of Bank Accounts, The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953).

⁴² Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376, 388 (1959).

⁴³ But see herein *supra*, n. 24.

⁴⁴ Concededly, nothing in the form of the deposit indicates this intent. But, as previously indicated, *supra* at note 39, most courts have been willing to recognize and give effect to the true intention of the parties even though the form of the account indicated that they had attempted to create a joint tenancy.

⁴⁵ Since the principal expression of gift in most joint account cases is the form of the account, it seems permissible to view subsequent additions to such an account as reaffirmations of the donative intent. Thus each subsequent deposit can be considered a new gift.

him no right to immediate possession or enjoyment. And he had no right to demand an accounting of monies withdrawn by his donor because his title was defeasible, and the act of withdrawal was the event by which his title was pro tanto divested.⁴⁶

b. *United States Savings Bonds*. Undoubtedly the safest way in which a healthy man can preserve his pre-eminence while making a gift that need not pass through probate is to buy United States savings bonds and have them registered either in the beneficiary⁴⁷ or the co-ownership⁴⁸ form. Though beneficiary bonds have a strong testamentary flavor, co-ownership bonds do not, and they are therefore of more interest to the present study. According to the regulations under which these bonds are issued, a co-ownership bond will, upon the death of one of the owners while the bond is outstanding, be paid to the surviving owner and "the survivor will be recognized as the sole and absolute owner."⁴⁹ During the joint lives of the parties, however, such a bond "will be paid to either [registered owner] upon his separate request, and upon payment to him the other shall cease to have any interest in the bond."⁵⁰ Thus during their joint lives, either of the co-owners can individually, and without the consent of the other, defeat the survivorship right of the other by redeeming the bond. But in order to do this, he must have possession of the bond for it will not be paid unless it is physically presented and surrendered to an authorized paying agent. Thus the purchaser of such a bond can preserve his pre-eminence merely by retaining possession of the bond; though he will thus be able to defeat the rights of his co-owner at any time he sees fit by surrendering the bond for payment, his co-owner will not be able to do the same.⁵¹ Yet if he dies with the bond out-

⁴⁶ Though many people have successfully used the joint bank account as a means of accomplishing a revocable gift, prospective donors should be warned that the treatment of these accounts by the courts of the various states is far from uniform and that an element of risk is involved. A commentator has recently observed that some courts, feeling the logical necessity of raising the same type of presumption in the inter vivos and the survivorship cases, have turned such accounts into either an irrevocable property transfer with a strong presumption or an abortive testamentary disposition with a weak one. See Comment, 60 MICH. L. REV. 972, 987 (1962).

⁴⁷ That is, in his own name "payable on death to" his named donee. See 31 C.F.R. § 315.7 (a) (3) (1959).

⁴⁸ That is, in his own name "or" his named donee. See 31 C.F.R. § 315.7 (a) (2) (1959).

⁴⁹ 31 C.F.R. § 315.61 (1959).

⁵⁰ 31 C.F.R. § 315.60 (a) (1959).

⁵¹ Though judgments impairing the right of *survivorship* will not be recognized, the regulations provide that "conflicting claims as to ownership of, or interest in, such bond as between co-owners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings . . ." 31 C.F.R. § 315.20 (1959). Thus it has been held that if the non-contributing co-owner somehow obtains possession of the bond and wrongfully redeems it, he must account to the purchasing co-owner for its proceeds. *Thibeault v. Thibeault*, 147 Me. 213, 85 A.2d 177 (1952); *Altman v. Altman*, 234 Minn. 183, 47 N.W.2d 870 (1951); *Schlefstein v. Schlefstein*, 59 N.Y.S.2d 621, *aff'd*, 269 App. Div. 1047, 59 N.Y.S.2d 624 (1945). See also *In re Hendricksen's Estate*, 156 Neb. 463, 56 N.W.2d 711, *cert. denied*, 346 U.S. 854 (1953).

standing, the donative aspect of the transaction will then be completely accomplished;⁵² for then the surviving co-owner will become the complete owner, and payment will be made to him as though the bond had originally been issued in his name alone.⁵³

Though no case has been found attempting to harmonize this result with the law of gifts, it is submitted that the purchase of a co-ownership bond is very analagous to the opening of a joint bank account, and that the same rationalization suggested above for the bank account cases can also be applied to these bond cases. The purchase of a savings bond in the co-ownership form can be viewed as an immediate gift of a defeasible remainder interest in the chose. The defeating event is the redemption of the bond by the purchaser at any time before his death. If the purchaser dies without redeeming the bond, then at that time the survivor becomes the "sole and absolute owner." Since the survivor initially received his title and became a co-owner when the bond was purchased, and since the purchaser's death merely served to make that pre-existing title "absolute," the gift is not testamentary.

C. *Revocable Gifts of Chattels*

When cases involving men who have cash in hand and who are contemplating some type of a gratuitous disposition of it are put aside, authority sustaining revocable gifts becomes decidedly thin. In *Edgar v. Yant*,⁵⁴ one Duval "presented" a breeding stallion to John Edgar who executed a receipt stating that he was to properly maintain the horse and allow it to be used for breeding purposes and that

at the expiration of two years . . . said Duval, or his assigns, shall have the right to retake possession and full ownership by paying me a sum of money, not exceeding \$2,000.00 in amount, to compensate me for the care, maintenance, handling and breeding thereof, but should said Duval [fail to retake the horse and make the aforesaid payment] then the said horse is to become my absolute and sole property and thereafter I shall own and possess the same for my sole use and benefit . . .

John Edgar subsequently assigned all his rights in the horse to Roy Edgar.

⁵² It has frequently been held that the fact that the purchasing co-owner retained exclusive possession of the bond until his death does not affect the survivorship right of the other owner. See, e.g. *Lee v. Anderson*, 70 Ariz. 208, 218 P.2d 732 (1950); *In re Stanley*, 102 Colo. 422, 80 P.2d 332 (1938); *Levites v. Levites*, 27 Ill. App. 2d 274, 169 N.E.2d 574 (1960).

⁵³ In *Free v. Bland*, 369 U.S. 663 (1962), the Supreme Court held that the regulations were designed not only to facilitate payment by the government but also (in the absence of fraud, duress, etc.) to fix the substantive rights of the parties. The Court recognized that the regulations were a valid exercise of the power of the Federal Government to borrow money and, as such, control and determine the beneficial ownership of the bonds regardless of the property laws of the various states.

⁵⁴ 66 Colo. 599, 185 Pac. 252 (1919).

Several days before the two year period expired, one of John's creditors levied on the horse and this suit was brought to test the propriety of the levy. In holding the levy wrongful, the court discussed the arrangement between Duval and John Edgar:

The contract appears to be a deed of gift⁵⁵ to John W. Edgar, coupled with certain conditions subsequent, under one of which, in certain circumstances and conditions, the donor could retake ownership and possession. . . . The further statement in the instrument that the horse was to be the sole property of Edgar after two years is simply a statement that at the end of that time the title of Edgar to the horse would be free and clear of all conditions, particularly the right in Duval to retake possession and ownership on the payment of \$2,000.00, if the same had not theretofore been exercised. The fact that these conditions were imposed does not invalidate the gift, because they are entirely consistent with it.

Thus the court recognized that Duval had made a valid, though conditional, gift of the stallion to John. The court stressed that the donee received title when the horse was "presented" to him and that the condition merely qualified that title and made it defeasible. At first blush, this might not seem to have been a truly revocable gift, since Duval was obligated to make a payment to the donee before he could recover the horse. But it is submitted that in fact it was. The donee was prohibited from charging fees for permitting the horse to service mares during the two year period; thus he could derive no profit from the animal during this time. Yet he was obligated to feed and maintain it and, according to the express terms of the instrument, the money payment of the donor was designed simply to reimburse the donee for these expenses in the event that he did not ultimately receive full ownership. This was not a gift of an inanimate object, the maintenance costs of which would be negligible. Proper care of the horse for the two years would entail a substantial expenditure by the donee; if the transaction was not to be a trap for the donee, revocation had to be conditioned on reimbursement of this expenditure.

Another successful attempt to make a revocable gift of personal property may be found in *Hackett v. Moxley*.⁵⁶ Though this case involved a gift of a promissory note, it was accomplished by a physical delivery of the note itself and, thus, may be considered analogous to and authority for gifts of tangible property. In this case, a woman gave a promissory note that had been executed in her favor by another to her niece, "subject to no limitations or qual-

⁵⁵ Though the court spoke of the instrument as being a deed of gift, it seems clear that it was not. The instrument was signed only by the donee. The gift was executed, not by deed, but rather by a physical delivery of the property.

⁵⁶ 65 Vt. 71, 25 Atl. 898 (1892). This case is cited with approval in *Goodrich v. Rutland Savings Bank*, 81 Vt. 147, 69 Atl. 651 (1908), in which the court apparently gave effect to a revocable gift of the interest maturing on a bank account.

ifications except that said Abbie Moxley [donor] reserved the right to use such portion of the avails of the note as she might require during her lifetime." The donor died many years after the principal sum, according to the terms of the note, had become payable; but she had never demanded a return of the note or attempted to collect the amount due thereon. After the donor's death, the donee sued on the note and the obligor challenged her title. In holding for the donee, the court said:

The condition annexed to the gift does not nullify it. The only condition of defeasance was the right of the donor to use such portions of the avails of the note as she might require during her lifetime. She required nothing, and by her death the gift was freed from this condition of defeasance.

Since revocation was conditioned on what the donor might "require," it is possible that this gift was not completely revocable at the whim of the donor. Yet it has been held that when such language as this is used in a gratuitous transaction, it embodies a subjective and not an objective standard and that the donee is obligated to return the property whenever the donor expresses a desire for it, whether or not he can show an actual need on his part.⁵⁷ If the language is so construed, this gift was wholly revocable at the whim of the donor. It should be noted that while referring to the limitation as a condition annexed to the gift, the court clearly indicated that it qualified the title of the donee to the property and rendered that title defeasible.

D. *Deeds of Gift That Recite A Power of Revocation*

Though several donors have attempted revocable gifts of personalty through the execution of a deed of gift containing a power of revocation, it is difficult to find any direct authority concerning the validity of such transactions. Though *Butler v. Sherwood*⁵⁸ is frequently cited as holding that such a gift is necessarily void, it is submitted that the multiple bases of the decision leave the matter doubtful. In this case, a woman who was about to undergo a serious operation executed a quit-claim deed of all her realty and personalty to her husband. The instrument provided that "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" by me. In holding the instrument testamentary, the court stressed not only the reserved power of revocation but also the fact that the instrument was to "take effect" only upon the donor's death, and then only if her husband had survived her. Moreover, in discussing the validity of gifts of personal property accomplished through the execution of deeds of gift, the court said:

⁵⁷ See *Drake v. Wayne*, 52 Ga. App. 654, 184 S.E. 339 (1936).

⁵⁸ 196 App. Div. 603, 188 N.Y.S. 242, *aff'd* without opinion, 233 N.Y. 655, 135 N.E. 957 (1921).

Delivery by the donor, either actual or constructive, operating to divest the owner of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of intention to give, or of an actual present gift, yet, unless there is a delivery, the intention is defeated.

Certainly the court erred on this point. According to the overwhelming weight of authority, an inter vivos gift may be made by a formal deed of gift without a physical delivery of the property.⁵⁹ Thus it is submitted that the actual holding of the case is quite limited, and that its authority on the validity of revocable gifts accomplished in this manner is doubtful.⁶⁰

Without seeming to appreciate the true nature of the instrument involved, a California district court in *Mutual Benefit Life Ins. Co. v. Clark*⁶¹ frustrated a revocable gift that a donor had attempted to accomplish through a deed that expressly recited a power of revocation. In this case, a man executed a formal (though apparently unsealed) document purporting to assign an insurance policy to a lady, "to have and to hold . . . in case she survives me, otherwise this assignment to be void. I hereby reserve the right to cancel this assignment without notice to or consent of the assignee." Though the assignment was filed with the insurance company, the donor did not mention the assignment to the donee and he retained possession of the policy until his death. In holding that the proceeds of the policy should be paid to the decedent's estate, the court said that the transaction "was, at most, an attempted testamentary disposition." The court cited a statute providing that "verbal" gifts are not valid unless the means of obtaining possession and control of the thing are given.⁶² The court never once acknowledged that this was not a "verbal" gift and apparently failed to recognize that the instrument of assignment was in substance a deed of gift.⁶³ Under these circumstances, it is submitted that this decision is not strong authority on the essential validity of such deeds. Only a few years earlier, the California Supreme Court had approved the effectiveness and non-testamentary character of such a deed of land by saying:

The reservation of the power to revoke did not operate to destroy or in any wise

⁵⁹ See BROWN, PERSONAL PROPERTY § 46 (2d ed. 1955); Annot., 63 A.L.R. 537 (1929); 48 A.L.R.2d 1405 (1956). Though the New York courts originally recognized the sufficiency of an unsealed deed only in cases where a manual tradition was difficult or impossible, this limitation has been abandoned. See Mecham, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 568, 582 (1926).

⁶⁰ See also *in re Flamenboum's Will*, 159 N.Y.S.2d 887 (1957), involving a deed that recited a power of revocation but which had not been delivered.

⁶¹ 81 Cal. App. 546, 254 Pac. 306 (1927).

⁶² See CAL. CIV. CODE § 1147 (West 1954).

⁶³ That this formal though unsealed instrument qualifies as a deed of gift, see Annot., 48 A.L.R.2d 1405 (1956).

restrict the effect of the deed as a present conveyance of a future vested interest. It merely afforded the means whereby such a vested future estate could be defeated and divested before it ripened into an estate in possession.⁶⁴

Certainly it seems likely that if the district court had been aware of this precedent and the fact that the instrument of assignment was in reality a deed, the outcome of the case might have been different.

The only other case⁶⁵ indicating that a deed of personalty that expressly reserves a power of revocation might not be wholly effective to accomplish the intention of the parties is *Daniel v. Veal*.⁶⁶ The case arose after the donor's death when his administrator sought to recover the property from the donee. Though the court denied the administrator's claim and thus gave effect to the gift, it did so under a theory that would have denied the donor's right to recover the property had he so desired before his death. The court said 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." Obviously, this portion of the opinion is dicta; the donor had not attempted to exercise his reserved right and its validity was not in issue. It should be noted, moreover, that this case arose in a period when the possibility of creating future interests in personalty was none too clear; possibly this dicta was merely an application of the outmoded rule that "a gift or devise of a chattel for an hour is forever."⁶⁷

The facts of *Strong's Ex'rs. v. Brewer*⁶⁸ were very similar to those of *Daniel v. Veal*. Here, however, the donor actually exercised his reserved power, revoked the gift, and then gave the property to another. The second donee brought suit against the original donee to recover the property. In holding for the second donee, the court discussed the operation of the original deed:

If [the donor] failed to execute that power, upon his death, the property would pass absolutely and unconditionally to William Strong [the original donee] by the deed; but the execution of the power, reserved to the father, would defeat the title of William. This was the intention of the parties, and we can give full effect to it. . . . There is no inconsistency or repugnancy in the agreement.

Thus the repugnancy argument was repudiated and the gift held effective.

⁶⁴ *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914). See also *Lowe v. Ruhlman*, 67 Cal. App. 2d 828, 155 P.2d 671 (1945).

⁶⁵ Apparent attempts at revocable gifts by deed were held ineffective in *Seay v. Huggins*, 194 Ala. 496, 70 So. 113 (1915); *Cunningham v. Davis*, 62 Miss. 366 (1884); *Epperson v. Mills*, 19 Tex. 65 (1857); and *Turner v. Montgomery*, 293 S.W. 815 (Tex. Civ. App. 1927). In each case, however, the instrument purported to convey not only presently owned but also subsequently acquired property and thus was obviously testamentary. See also *Mosser v. Mosser's Ex'r*, 32 Ala. 551 (1855), in which the "deed" was to "take effect" at the maker's death and purported to appoint an executor for her estate.

⁶⁶ 32 Ga. 589 (1861).

⁶⁷ *Brooke*, Abr. Devise 13 (1576). See, Part IV at n. 19, 16 CATHOLIC U. L. REV. 146 (1966).

⁶⁸ 17 Ala. 706 (1850).

Appeal of DuBois,⁶⁹ *Jones v. Clifton*,⁷⁰ *Ricker v. Brown*,⁷¹ and *Wall v. Wall*⁷² may also be cited as indicating that revocable gifts can be accomplished by deeds that reserve a power of revocation. It must be conceded, however, that though each of these cases involved such an instrument and though each case indicated that the instrument was effective to accomplish the intention of the parties, yet each for one reason or another might not be considered true precedent on this point.⁷³ Despite this dearth of favorable authority, however, it is submitted that the chances of this type of revocable gift being sustained today are good. Now that we recognize the possibility of dividing the ownership of personalty into the various segments found in the law of real property,⁷⁴ and now that the validity of powers of revocation in deeds of land is being established,⁷⁵ it seems likely that the validity and effectiveness of such deeds of personalty will also be recognized. Such deeds could easily be considered to operate in the same way as similar deeds of land. Upon execution, they immediately convey a defeasible interest to the donee. Depending upon whether or not the donor reserves the possessory interest in himself, the donee's interest would be either possessory or future; in either event, however, it would be a presently existing segment of the total ownership of the property, and thus the transaction would in no way be testamentary. If the donor dies without exercising his reserved power, then the donee's partial ownership would by its very nature ripen into absolute ownership. If, however, the donor exercises his power and revokes the gift, then the donee's interest would be defeated and the donor would be left with complete ownership in himself.

PART VI: CONCLUSION.

Concededly, a handful of cases giving effect to a variety of attempts to make revocable gifts does not necessarily mean that the next court faced with such a transaction will, or even should, look with favor on it. These cases do, however, demonstrate that the idea of a valid though revocable gift inter vivos can be harmonized with common law principles, and that there is nothing analytically inconsistent between them. It is hoped that they might also aid

⁶⁹ 121 Pa. 368, 15 Atl. 641 (1888).

⁷⁰ 101 U.S. 225 (1879).

⁷¹ 183 Mass. 424, 67 N.E. 353 (1903).

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

⁷³ The *DuBois* case merely involved a tax question; the transaction in the *Jones* case might be considered a revocable trust; the deed in the *Ricker* case conveyed both realty and personalty and the court devoted its attention exclusively to the land; and the *Wall* case merely held that the instrument was not entitled to probate as a will. See also *Richard v. Reeves*, 149 Ind. 427, 49 N.E. 348 (1898), in which the court seems to have given effect to a donor's exercise of a reserved power of revocation.

⁷⁴ See, Part IV, text at n. 17, 16 CATHOLIC U. L. REV. 146 (1966).

⁷⁵ See Garvey, *Revocable Gifts of Legal Interests in Land*, 54 Ky. L. J. 19 (1965).

in dispelling the prejudice so many loose statements about revocable gifts have caused, and enable us to approach such transactions with an open mind to judge their advantages and disadvantages impartially.

If personal experience is not sufficient proof, certainly the popularity of the revocable trust demonstrates that men frequently desire "to have the assurance of their estate, and possessions revocable in their own times, and irrevocable after their own times."¹ Undoubtedly, there are many reasons for this human trait, but two of the principal ones seem to be: 1) a desire for assurance that the donee will continue to display the same esteem and respect for the donor after the gift as that shown before it, and 2) a desire on the part of the donor to be assured that his benevolence will not on some future day—in the unlikely event of some unforeseen adversity—contribute to his impoverishment. Certainly there is nothing improper or unworthy of legal recognition in either of these desires.² Indeed, most European countries recognize and attempt to satisfy them by holding all gifts to be revocable in the event of "ingratitude."³ But this civil-law doctrine has not worked well. The courts have had great difficulty in determining what acts by donees are sufficiently serious to call for an application of the rule. As Dean Pound has pointed out, the donee's obligation of gratitude does not seem to be "sufficiently tangible to be made effective by the machinery of the legal order."⁴ Thus, we have to approve the refusal of Anglo-American courts to borrow this doctrine from the civil law. We must remember, however, that our rejection of the doctrine is not based upon a denial of the existence of the duty of gratitude. It is merely a recognition of the fact that legal procedures, because of their inherent limitations, are not capable of directly enforcing it.

Under these circumstances, it seems that the law should consciously try to develop a means whereby donors can secure the performance of this obligation for themselves. Concededly, permitting a man to reserve the right of revoking his gifts, for any reason or caprice he might entertain, seems to go beyond what is necessary. But, it is submitted, the recognition of a donor's right to reserve such a power is the only practical means the law has of permitting donors to protect themselves. Only then, will courts be freed of the

¹ BACON LAW TRACTS 316 (Readings on the Statute of Uses).

² The sympathy of some courts for, and their desire to implement, the intention of the parties can be found in several cases where what appeared to be a power of revocation was ignored so that the transaction could be more easily sustained. See *Meriden Trust & Safe Deposit Co. v. Miller*, 88 Conn. 157, 90 Atl. 228 (1914); *Waite v. Grubbe*, 43 Ore. 406, 73 Pac. 206 (1903); *Appeal of Fassett*, 167 Pa. 448, 31 Atl. 686 (1895); *Pirie v. Le Saulnier*, 161 Wis. 503, 154 N.W. 993 (1915).

³ When codified in the French Civil Code, the circumstances of ingratitude were defined and limited to cases 1) where the donee had attempted to take the life of the donor, 2) where the donee had been guilty of cruelty, crimes, or heinous injury toward him, and 3) where the donee had refused subsistence to the donor. FRENCH CIVIL CODE (1803) art. 955. The provisions of the LOUISIANA CIV. CODE art. 1560 (Revision of 1870) are similar.

⁴ 1 POUND, JURISPRUDENCE 416 (1959).

task of weighing the circumstances of individual cases to determine whether or not the donee's conduct justifies a revocation of the gift. The recognition of a donor's right to reserve such a broad power should work no undue hardship on donees; since the power must be clearly reserved when the gift is made, the donee of a revocable gift will always know of the tenuous nature of his enjoyment and will be able to guide his actions accordingly.

It seems likely that a desire to implement, as far as possible, a donee's duty of gratitude is responsible, at least in part, for our recognition of the right of settlors to reserve unqualified powers of revocation when establishing their trusts. Early cases occasionally questioned the competence of counsel who drafted irrevocable trusts and thus left their clients without "a power of altering that which was done, so as to meet the various exigencies that may arise in future life."⁵ The trust, however, is a rather expensive institution, available only to those contemplating gifts of substantial value. Moreover, it is wholly unsuited to the accomplishment of gifts of chattels, which produce no income from which the expenses of administration may be paid. Certainly donors of moderate means and those contemplating gratuitous dispositions of chattels are entitled to some similar method of securing the performance of the obligations of their donees.

There are several objections that might be urged to revocable gifts. In the first place, it might be argued that permitting a donor to reserve a power of revocation detracts from the cautionary aspect of the requirement of delivery. It seems clear that one of the major functions of the delivery requirement in gifts *inter vivos* is to caution donors of the seriousness of the transaction they are contemplating and to deter them from making ill-considered dispositions. Thus, after noting the psychological difference between a donor who merely expresses a donative intent and one who not only expresses such an intent but also sees the property pass out of his control, Mechem said: "The *wrench* of delivery, if the expression be understood and permissible, the little mental twinge at seeing his property pass from his hands into those of another, is an important element to the protection of the donor."⁶

It must be conceded that if the validity of revocable gifts becomes well established donors will probably feel freer to make *inter vivos* gifts. Indeed, it is felt that this is one of the most beneficial advantages that might flow from the general recognition of the validity of this type of gift. Donors worried about the uncertainties of life would no longer find it necessary to hoard their wealth until their deaths in order to provide for the ever-present possibility of some future catastrophe that might leave them impoverished. Realizing that they can reserve a power of revocation that will enable them to recover the property if such a catastrophe ever materializes, they will feel

⁵ *Coutts v. Ackworth*, L.R. 8 Eq.Cas. 558 (1869). See also *Appeal of Rick*, 105 Pa. 528 (1884).

⁶ Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 341, 348 (1926).

encouraged to immediately give some of their surplus wealth to others, to their less fortunate relatives and friends, and thus more of the country's wealth will find its way into the hands of those who need and will use it.

Even though the general recognition of the validity of this type of gift might result in more gifts being made,⁷ this does not necessarily mean that such gifts would be ill-considered or ill-advised. Indeed, the converse seems to be indicated. The donor will continue to consider the wisdom of his generosity and the advisability of permitting the gift to stand until the moment of his death. Thus, in its final result, a revocable gift will probably receive more thought and consideration than most absolute gifts.

But the basic answer to this objection is the fact that the same act of delivery will still be required to execute a revocable gift as would have been required to implement the transaction had it been an absolute gift. Thus, when a donor attempts to make a revocable gift of an ordinary chattel, we would still generally require a physical delivery of the property itself. In such a case, the donor would still feel that little mental twinge that Mechem described as the "wrench" of delivery. Concededly, he might not worry so much about the twinge; but after all, a revocable gift is not so serious a matter from the donor's point of view as an absolute one. The twinge would be there, and it would deter the donor from performing the act unless he was certain that he intended the transaction to produce legal consequences and have significance in the eyes of the law. This, it is submitted, is the critical element in the requirement of delivery.⁸ The law is not as interested in a man's consideration of the practical consequences of an act as it is in making certain that he intended the act to produce legal consequences. Once it finds this intent, once it discovers that the effects of the act were intended to be determined by legal rules, the law can assume that deliberation about practical consequences was commensurate with the nature of the transaction.⁹ The law is not interested in making it difficult for people to dispose of their property as they see fit. Nor has it any right to construct artificial barriers to deter benevolence. It is simply interested in making certain that any particular transaction has passed through the contemplative stage and was in-

⁷ Though more gifts will probably be made, it seems likely that most will continue to be absolute rather than revocable. The tax and insolvency laws are so designed that they will discourage donors from reserving powers of revocation except where the circumstances indicate a definite need for this protection.

⁸ See, Part III, 16 CATHOLIC U. L. REV. 131 (1966).

⁹ This more-or-less has to be so; for what tests can be devised, what formalities can be required, that will demonstrate such deliberation. The strongest argument along this line that can be made against revocable gifts is that the donor might not realize the size of his gift and its effect upon his next of kin. But if we let this argument persuade us, then it would seem that we should go back and re-think the wisdom of permitting a man to change the course of descent and distribution through the execution of a will. Certainly there is no more in the formality requirements of wills than in the delivery requirement of gifts that evidences deliberation about practical consequences.

tended by the parties thereto to have legal significance. Revocable gifts accomplished through a manual tradition clearly come within this test.

Concededly, the satisfaction of the test by revocable gifts accomplished through some other form of delivery, particularly revocable gifts of future interests, is somewhat less clear. The mental twinge of a donor who does not part with physical control of the property, but who reserves the possessory interest in himself, might be very slight indeed. But it is submitted that this results more from the fact that the transaction is a gift of a future interest than from the fact that it is a revocable gift. Unless we are willing to retreat to the position of holding all gifts of future interests void, and unless we are willing to abandon all forms of delivery other than manual tradition, then this twinge, slight though it may be, must be recognized as a sufficient caution to prospective donors to sustain revocable, as well as absolute, gifts of future interests.

It sometimes seems to be thought that recognizing the validity of revocable gifts would encourage and be productive of fraud. There are two parts to this argument. One is that people who find themselves in possession of another's property at the time of his death might be tempted to falsely claim that it had been given, rather than merely lent or bailed, to them. The other is that donees of revocable gifts might, when their donors attempt to exercise their reserved power, try to frustrate them by denying that a power of revocation had been reserved. Both of these objections lose sight of the fact that the same clear proof will be required to show a revocable gift, and all of its elements, as is required to show an absolute gift.

Moreover, while thinking about the opportunities and possibilities of fraud, it might be questioned whether the prevalent thought that revocable gifts are necessarily testamentary does not itself place a premium on fraudulent conduct. Most of the cases involving revocable gifts have come before the courts after the donor had died, when his personal representative claimed the property as part of the probate estate. In several such cases, the only evidence of the reserved power came from the testimony of the donee.¹⁰ One cannot help but wonder how many donees, desirous of seeing the intention of their deceased donor followed and thinking that the end justified the means, have simply neglected to mention all of the terms of the transaction, thus inducing the personal representative (and if suit had been brought, the court) to believe that the gift was absolute and not revocable. Certainly, "indian givers" are not as rare as the decided cases seem to indicate.

The final objection to revocable gifts that will be considered concerns the plight of an individual who innocently purchases the property from a fraudulent donee while unaware of the donor's reservation. It seems clear

¹⁰ See, e.g., *Snyder v. Snyder*, 131 Mich. 658, 92 N.W. 353 (1902).

that such a purchaser should be protected and should be permitted to take the property free and clear of the donor's right or power of revocation. Yet this result is by no means certain. Of course, if the donor's reservation is viewed as a power, it is arguable that it is subject to the bona fide purchaser rule and will be cut off by such a sale.¹¹ But if the reservation is held to create a condition, then the donor has a legal interest in the property¹² which according to common law principles will not be cut off by such a sale.¹³

There are two possible solutions to this problem. One is a broadening of the doctrine of estoppel to preclude donors from taking advantage of their reservation when it would interfere with the rights of innocent third persons. The other, and more likely, solution is the enactment of statutes expressly protecting innocent purchasers from, and the creditors of, fraudulent donees. Indeed, there are already statutes in many states that could be used to achieve this result.¹⁴ Thus a rather common statute provides:

Where any loan of personal property is pretended to have been made to any person with whom, or those claiming under him, possession has remained for five years . . . or *where any reservations or limitation* by way of condition, reversion, remainder or otherwise is pretended to have been made in the alienation of the property so possessed, the absolute right shall be deemed to be with the possession in favor of a purchaser without notice, or any creditor, of the person remaining in possession, unless the written evidence of the loan, reservation or limitation is duly recorded. . . . (Emphasis supplied.)¹⁵

Possibly the five year period of this statute is too long. This, however, is merely a matter of detail. The statute, as it presently exists, embodies the basic idea that reservations and limitations on the title of personalty should be void insofar as the creditors and purchasers from the person in possession are concerned unless the instrument creating such reservations or limitations is recorded.

Though it cannot be denied that there is some merit to the above-discussed objections, it is submitted that they should not be permitted to deprive

¹¹ Though no such case has been found, the argument seems reasonable since this general type of power was originally recognized in Chancery and even today is not generally considered an interest in property.

¹² See 2 RESTATEMENT, PROPERTY § 55 (1936).

¹³ See 4 AMERICAN LAW OF PROPERTY § 17.1 (1952).

¹⁴ KY. REV. STAT. ANN. § 378.050 (1963). For substantially similar provisions in other states. see ALA. CODE tit. 47, § 126 (1958); ARK. STAT. ANN. § 68-1305 (1947); FLA. STAT. ANN. § 726.09 (1944); ILL. ANN. STAT. ch. 59, § 7 (Smith-Hurd 1951); KAN. GEN. STAT. ANN. § 33-104 (1949); MISS. CODE ANN. § 266 (1942); MO. REV. STAT. § 428.050 (1949); S.C. CODE ANN. § 57-308 (1962); TENN. CODE ANN. § 7834 (1955); TEX. REV. CIV. STAT. art. 3999 (1959); VA. CODE ANN. § 55-87 (1950); W. VA. CODE ANN. § 3991 (1961). See also MICH. STAT. ANN. § 26-125 (1957); N. D. CENT. CODE § 59-0518 (1959) OKLA. STAT. ANN. tit. 60, § 197 (1963); S. D. CODE § 59.0417 (1939); WIS. STAT. ANN. § 232.34 (1957)—all of which limit the "lien" of powers in general in so far as the rights of creditors and purchasers from any person having an estate in the property are concerned.

¹⁵ KY. REV. STAT. ANN. § 378.050 (1963).

us of so useful a device as the revocable gift inter vivos. Implicit in our institution of private ownership is the idea that the law should place no undue burden on the right of individuals to dispose of their wealth as they see fit. If we permit a man to gratuitously dispose of his entire interest in a piece of property, it is, as Professor Brown observed, "somewhat arbitrary to deny him the possibility of creating, through gift, limited and lesser interests."¹⁶

¹⁶ BROWN, *PERSONAL PROPERTY* § 49 (2d ed. 1955).