

1966

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Recommended Citation

John L. Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute*, 16 Cath. U. L. Rev. 119 (1967).

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Revocable Gifts of Personal Property: A Possible Will Substitute*

JOHN L. GARVEY**

PART I: INTRODUCTION

Give not to son or wife, brother or friend, power over thee while thou livest; and give not thy estate to another, lest thou repent, and entreat for the same. . . . In all thy works keep the pre-eminence. . . . In the time when thou shall end the days of thy life, and in the time of thy decease, distribute thy inheritance. *Ecclesiasticus 33:20-24.*

THOUGH THE BIBLICAL EXHORTATION to keep the pre-eminence is as appropriate today as ever, the wisdom of the suggested application, "in the time of thy decease, distribute thy inheritance," might well be questioned by the modern estate planner. For the uncertainty, delay, and expense that frequently attend the testamentary gift as it passes through probate and administration have caused many people to seek a different means of providing for the posthumous distribution of their property among their families and friends. The revocable trust has proven to be a popular answer to this quest. For the revocable trust enables a settlor to retain his pre-eminence while making a gift which technically is not testamentary and which therefore need not pass through probate and administration.

The popularity that the revocable trust has achieved indicates that society has found such dispositions useful and convenient. As a means of preserving one's pre-eminence, however, the revocable trust is only of limited utility for it is a rather complex device, unsuited to all types of property and the needs of all individuals. Thus it is difficult to use a trust to implement a disposition of tangible personalty, since such property does not yield income

* This article is based on material submitted in partial satisfaction of the requirements for the degree of S.J.D., University of Michigan. Included are parts I through IV. The concluding sections will appear in 16 CATHOLIC U. L. REV. No. 3.

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and thus provides no funds from which the current expenses of maintaining the property and operating the trust can be paid. And, regardless of the nature of the property, the cost of administering a trust generally renders its use impracticable unless the disposition involves property of substantial value.

It is the purpose of this paper to determine whether a prospective donor can keep his pre-eminence by retaining a power or right of revocation while making a gift of personalty without using the instrumentality of trust. At this point, the reader might be tempted to lay this paper aside, firm in his conviction that though such a result might be accomplished with a gift *causa mortis*, the law prohibits donors from attempting to retain a power of revocation in any other type of donative transaction. Certainly there are statements in many of the cases¹ and texts² that seem to justify this attitude. Yet it should be remembered that the revocable trust has grown into a popular means of disposing of property in the United States only during the past few generations and that many courts have recently had to reconsider their attitude toward some of these trusts in order to recognize their validity.³ Now that the law of trusts has progressed to its present point, it seems proper to re-examine the law of gifts to see why revocable donations cannot be accomplished by this simpler instrumentality.

Though the distinctions will not be developed at this point, two cases in which courts sustained as valid gifts *inter vivos* transactions in which the donors reserved powers of revocation will be mentioned here in the hope of sustaining the reader's perseverance through the rest of the study. In *Blanchard v. Sheldon*,⁴ Aurilla Ballou wanted to give three hundred dollars to her nephew, Daniel Blanchard, but she was afraid that she might need the money before she died. To accomplish her purpose, she lent the money to the defendant and had him execute in return the following note: "For value received I promise to pay to Aurilla Ballou, three hundred dollars with annual interest, on demand, if she called for it before she deceased, if not to be paid to Daniel Blanchard by her order." The aunt subsequently died, not having called for the money. Suit was instituted to determine

¹ See, e.g., *Baugh v. Howze*, 211 Ark. 222, 199 S.W.2d 940 (1947); *Kriedel v. Krampits*, 137 Conn. 532, 79 A.2d 181 (1951); *Kraus v. Kraus*, 235 Ind. 325, 132 N.E.2d 608 (1956); *Bryant's Administrator v. Bryant*, 269 S.W.2d 219 (Ky. 1954); *In re Hamilton's Estate*, 26 Wash. 2d 363, 174 P.2d 301 (1946).

² See 1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 32 (1947); 38 C.J.S. *Gifts* § 39 (1943).

³ The changing attitude of the courts with respect to revocable trusts in which the settlor retains substantial elements of control over the trustee may be seen in the various amendments that were made to Sec. 57 of the *Restatement of Trusts* between the publication of the first and second editions.

⁴ 43 Vt. 512 (1871).

whether the nephew or Mrs. Ballou's executor was entitled to the principal sum. The court held in favor of the nephew, saying:

We think this delivery vested the property in the \$300 in the plaintiff, subject to be defeated only by his aunt's taking some further action in regard to it; and that the transaction can be upheld as a gift *inter vivos*.

In *Gould v. VanHorne*,⁵ the donor gave twenty thousand dollars to a friend. At the time of the gift, it was agreed between the parties that the donee would pay interest on the sum to his benefactor for her life and that if she wanted any additional sums he would "take and advance it to her." The donee fully complied with the terms of the transaction. After the donor's death, her executor brought suit to recover that part of the original sum that the donor had not demanded during her life and which had not been returned to her. In holding for the donee, the court said:

It was the donor's intent to make an absolute gift of the money in question to the defendant. If such was her intention it would not be defeated by the further fact that she required of the defendant that he pay interest on the sum given during her lifetime, nor even that he give her back some of the principal, if desired.

It is clear that the donor in each of these cases was able to "keep the pre-eminence" until her death. In the first, Mrs. Ballou could have revoked the gift and prevented her nephew from enjoying any part of the three hundred dollars merely by demanding full payment of the note before her death; and in the latter, the donor could have revoked by demanding that the donee repay the full twenty thousand dollars at any time she wished. But at the death of each donor, the court gave effect to the obvious intention of the parties and sustained both transactions as valid gifts *inter vivos*. Unless these cases and several others that will be discussed later are to be dismissed as "bad law," several nice distinctions must be made to harmonize them with the multitude of clearly sound cases holding void other attempts at revocable gifts.⁶

A point of difference should be noted between these two cases. Considering the *Blanchard* case as involving a gift of a chose in action, it should be observed that the donor would have recovered the identical property that

⁵ 43 Cal. App. 145, 187 Pac. 35 (1919).

⁶ It might be objected that neither of these cases really involved a gift *inter vivos*; that in each case, the intention of the parties was effectuated through the instrumentality of contract rather than gift. The simplest answer to this objection, however, is that in each opinion the court made it clear that it was sustaining the transaction on a gift rather than a contract theory; neither court felt that any principle of the law of gifts prevented the donor from retaining the type of power of revocation involved.

was the subject matter of the gift if she had chosen to exercise her reserved power; whereas in the *VanHorne* case, where the subject matter of the gift was money, the donor could not hope to recover the identical property given to the donee. Despite this difference, however, it is clear that each donor achieved her basic purpose and retained her pre-eminence until her death. For the purposes of this study, any gift will be considered revocable if its economic result can be undone by the donor at his caprice at any time before his death. The fact that the donor might not be able to reclaim the same property that was given away is thus immaterial if the law permits him to deprive the donee of the economic benefit and revest it in himself at his whim. Clearly the purposes of those who make revocable gifts are effectuated almost as well when they are thus able to undo the economic result of the transaction as they are when they are permitted to reclaim the specific property.

PART II: CAUSA MORTIS GIFTS

The clearest illustration of a valid, non-trust revocable gift of personal property in Anglo-American law is the gift *causa mortis*. Schouler defined such gifts as gifts:

of personal property, made by a party in the expectation of death then imminent, and upon the essential condition that the property shall belong fully to the donee, in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not meantime revoked, but not otherwise.¹

From this definition, it can be seen that the *causa mortis* gift is subject to three possibilities of revocation; the gift is revoked if 1) the donor survives the illness or peril that threatened him when the gift was made,² 2) the donee dies before the donor,³ or 3) the donor, before his death and for any

¹2 SCHOULER, *PERSONAL PROPERTY* 134 (3d ed. 1886).

²The better rule allows the gift to stand even though the donor dies from some peril other than the one contemplated provided death comes before he recovers from, or survives, the original peril. See *In re Reh*, 196 Mich. 210, 162 N.W. 978 (1904); *Ridden v. Thrall*, 125 N.Y. 572, 26 N.E. 627 (1891); *In re Presender's Estate*, 285 App. Div. 109, 135 N.Y.S.2d 418 (1954); *Thomas v. First Nat. Bank*, 166 Va. 497, 186 S.E. 77 (1936); BROWN, *PERSONAL PROPERTY* § 55 (2d ed. 1955); 1 PAGE, *WILLS* § 7.35 (Bowe-Parker Rev. 1960). Some courts, however, hold the gift revoked whenever the donor does not die of the exact peril contemplated when it was made. See *Ellsworth v. Cornes*, 204 Ark. 756, 165 S.W.2d 57 (1942); *Brind v. International Trust Co.*, 66 Colo. 60, 179 Pac. 148 (1919); *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368 (1880); *Blazo v. Cochrane*, 71 N.H. 585, 53 Atl. 1026 (1902).

³No American case involving this circumstance has been found, but statutes in some states provide that *causa mortis* gifts are revoked "by the occurrence of any event which would operate as a revocation of a will made at the same time." CAL. CIV. CODE § 1151; REVISED CODES OF MONTANA, 1947, § 67-1711; N.D. CENTURY CODE ANN § 47-11-11 (1960); S.D.C. 51.1510 (1939). See also BROWN, *PERSONAL PROPERTY* § 55 (2d ed. 1955); 1 PAGE, *WILLS* § 7.36 (Bowe-Parker Rev. 1960).

reason he deems fit, manifests an intention that the gift shall stand revoked.⁴

It is important to note that these three possibilities of revocation are "essential" conditions of such gifts. They inhere in all *causa mortis* gifts; for they are attached to the transaction by law and there is no need for the donor, when making the gift, to expressly mention them as conditions of it. All gifts made by one in apprehension of death from a proximate and impending peril are presumed to be *causa mortis* and thus, subject to the three possibilities of revocation.⁵ Undoubtedly, a donor, even one *in extremis*, can make a gift that would not be subject to any possibility of revocation; but such a gift would be considered *inter vivos* rather than *causa mortis*.⁶ The presumption that arises from the circumstances of the donor is rebuttable. Thus if the evidence shows that the donor intended the gift to be irrevocable, the presumption is rebutted and the transaction is an ordinary *inter vivos* gift.⁷

Undoubtedly, these three conditions of revocation sprung from the testamentary origin of the *causa mortis* gift. As the name indicates, these gifts came into our law from the Roman Law where they were considered in many respects as legacies.⁸ They appear to have developed in English law as testamentary dispositions, judicially created exceptions to the Statute of Frauds,⁹ until the celebrated case of *Ward v. Turner*.¹⁰ In that case, Lord Hardwick established the basis for the non-testamentary nature of such gifts by refusing to recognize a parol declaration of intent as sufficient to implement one, holding, that for the desired disposition to be effective, the property must also be delivered by the donor before his death. Though there is some dispute about certain types of cases,¹¹ the general rule today is that a

⁴ *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929 (1893); *Adams v. Atherton*, 132 Cal. 164, 64 Pac. 283 (1901); *Stout v. McNab*, 157 Cal. 356, 107 Pac. 1005 (1910); *Jane v. Murphy*, 31 Ill. App. 28 (1889); *Weiss v. Fenwick*, 111 N.J. Eq. 358, 162 Atl. 609 (1932); *Vesburg v. Mallory*, 155 Iowa 165, 135 N.W. 577 (1912); *Van Wagoner v. Bonnor*, 72 N.J. Eq. 143, 65 Atl. 239 (1906); *Parker v. Marston*, 27 Me. 196 (1847); *Bliss v. Fosdick*, 86 Hun. 162, 33 N.Y.S. 317 (1895); *Steffen v. Davis*, 52 S.D. 283, 217 N.W. 221 (1927). See also CAL. CIV. CODE § 1151; REVISED CODES OF MONTANA, 1947, § 67-1711; N. D. CENTURY CODE ANN § 47-11-11 (1960); S.D.C. 51.1510 (1939).

⁵ *Parker v. Marston*, 27 Me. 196 (1847); *Van Wagoner v. Bonnor*, 72 N.J. Eq. 143, 65 Atl. 239 (1906); *Weiss v. Fenwick*, 111 N.J. Eq. 385, 162 Atl. 609 (1932); *Becker v. Cleveland Trust Co.*, 68 Ohio App. 526, 38 N.E.2d 610 (1941); 1 PAGE, WILLS § 7.34 (Bowe-Parker Rev. 1960).

⁶ *Gilligan v. Lork*, 51 Conn. 562 (1884); *Prendergast v. Drew*, 103 Conn. 88, 130 Atl. 75 (1925); *Peck v. Scofield*, 186 Mass. 108, 71 N.E. 109 (1904); *Newell v. National Bank of Norwich*, 214 App. Div. 331, 212 N.Y.S. 158 (1925). See also *Robertson v. Robertson*, 147 Ala. 311, 40 So. 104 (1906); *Hatcher v. Buford*, 60 Ark. 169, 29 S.W. 641 (1895); *Keller v. McConville*, 175 Mich. 479, 141 N.W. 652 (1913).

⁷ BROWN, PERSONAL PROPERTY § 51 (2d ed. 1955).

⁸ See INSTITUTES 2.7 pr.

⁹ See Schouler, *Oral Wills and Death-bed Gifts*, 2 L. Q. REV. 444 (1886).

¹⁰ 2 Ves.Sr. 431 (Ch. 1752).

¹¹ There is a split of authority on whether or not a *causa mortis* gift can be accomplished

causa mortis gift must be accomplished by such an act of delivery as would have been sufficient to sustain the transaction had it been an ordinary, inter vivos gift.¹²

The non-testamentary nature of causa mortis gifts in American law was established, and the theory of their operation was well set forth, in the early case of *Nicholas v. Adams*.¹³ The trial court had held a causa mortis gift revoked merely because the donor had executed a will after having made the donation.¹⁴ The appellate court reversed, saying that the lower court had erred because of its "notion that this species of donation is to be treated not as a gift inter vivos, but as a testamentary disposition . . . taking effect for the first time at the donor's death. . . ." The appellate court said that the gift causa mortis is really an inter vivos transaction and that:

it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts, in the event of a deficiency. The first is, not because the gift is testamentary, but because such is the condition annexed to it; and the second, not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors. . . . [T]he donee, consequently, takes paramount to the executor or a legatee.

The court went on to explain that the donee's title is paramount because he receives it from the donor when the act of delivery is performed. Thus, the property is not a part of the donor's estate at the time of his death and

by deed without a delivery of the property. Compare *Knight v. Tripp*, 121 Cal. 647, 54 Pac. 267 (1898) and *McMahon v. Newton Savings Bank*, 67 Conn. 78, 34 Atl. 709 (1895), with *Meyers v. Meyers*, 99 N.J. Eq. 560, 134 Atl. 95 (1926) and *Meach v. Meach*, 24 Vt. 591 (1852). See also BROWN, PERSONAL PROPERTY § 46 (2d ed. 1955); Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 568, 573 (1927); 1 PAGE, WILLS § 7.14 (Bowe-Parker Rev. 1960).

Though an intending donor need not repossess property already in the hands of his intended donee in order to make an inter vivos gift, there is considerable authority that he must recover the property and then redeliver it to his donee in order to make a causa mortis gift. See BROWN, PERSONAL PROPERTY § 45 (2d ed. 1955); Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 341, 368 (1926); 1 PAGE, WILLS § 7.15 (Bowe-Parker Rev. 1960).

¹² BROWN, PERSONAL PROPERTY § 52 (2d ed. 1955); Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 341, 356 (1926); 1 PAGE, WILLS §§ 7.11, 7.12 (Bowe-Parker Rev. 1960).

¹³ 2 Whart. 17 (Pa. 1836).

¹⁴ It is generally agreed that the mere execution of a will after the making of a causa mortis gift does not necessarily revoke the gift. See *Moore v. Shifflett*, 187 Ky. 7, 216 S.W. 614 (1920); *Lumberg v. Commonwealth Bank*, 295 Mich. 566, 295 N.W. 266 (1940); *Hoehn v. Stuttman*, 71 Mo. App. 399 (1897); *Merchant v. Merchant*, 2 Bradf. 432 (1853). In *Jayne v. Murphy*, 31 Ill. App. 28 (1889), however, where the will disclosed a clear intention to revoke the gift, the court held that the gift had been revoked. See also CAL. CIV. CODE § 1152; REVISED CODES OF MONTANA, 1947, § 67-1712; N. D. CENTURY CODE ANN. § 47-11-12 (1960); SDC 51.1511 (1939). The fact that a donor might be permitted to revoke a causa mortis gift by an express provision in his will does not necessarily mean that the gift is testamentary. See 1 SCOTT, THE LAW OF TRUSTS § 57.1 (2d ed. 1956), where the analogous problem with respect to revocable trusts is discussed.

his executor and legatees cannot succeed to it. The donee's title is not absolute when received; for until the donor dies it is "defeasible by reclamation, the contingency of survivorship, or deliverance from the peril." But when the donor dies, it is no longer possible that any of the three defeating events might occur and the donee's title then becomes absolute.¹⁵ This is the view that most American courts take of *causa mortis* gifts. Under it, the gift is the transfer of a qualified title to the donee. Since this is fully executed before the donor dies, the transaction is clearly *inter vivos* and not testamentary. The donor's death is significant neither as the event upon which the gift becomes executed, nor as the event upon which the donee receives his title, but only as the event upon which the donee's qualified title becomes absolute.

Not all courts, however, have adopted this theory of *causa mortis* gifts. In *Hatcher v. Buford*,¹⁶ the court held that the *causa mortis* donee receives no title whatsoever until the donor dies. Under this view, the donor retains full title to the property until his death when it passes for the first time to the donee. Though the court appeared to argue that such a theory did not render the transaction testamentary, its reasoning seems to more logically lead to the conclusion that, though the gift is testamentary, it is exempt from the formality requirements of the Statute of Wills because it is sufficiently evidenced by the act of delivery. To say that a gift that passes no interest in the property to the donee until the donor has died is not testamentary, places an impossible burden on our notion of the distinction between *inter vivos* and testamentary transfers.

Though the theory of *causa mortis* gifts adopted by the *Hatcher* case is believed to be unfortunate,¹⁷ it can be found in several other cases, generally by way of dicta.¹⁸ The distinction between the two theories is frequently phrased in terms of whether the donor's death is viewed as a condition precedent or as a condition subsequent. If the majority theory is followed, death is said to be a condition subsequent; and if the minority theory is followed, death is said to be a condition precedent. Clearly, all that these phrases mean in this context is that death is an event which, under the majority theory, occurs *after* title has passed to the donee (subsequent to the gift) and which

¹⁵ "The title to a gift *causa mortis* passes by the delivery, defeasible only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance." *Emery v. Clough*, 63 N.H. 552, 4 Atl. 796 (1885).

¹⁶ 60 Ark. 169, 29 S.W. 641 (1895).

¹⁷ The *Hatcher* case held that the widow of a deceased *causa mortis* donor could assert a "dower" claim against the subject matter of the gift. The court could have justified this conclusion on the basis of policy without repudiating the usual theory of *causa mortis* gifts. See *Railey v. Railey*, 30 F.Supp. 121 (D.D.C. 1939).

¹⁸ *Wilson v. Wilson*, 211 Ark. 1030, 204 S.W.2d 479 (1947); *Raymond v. Sellick*, 10 Conn. 480 (1835); *Borthwick v. Skurzynski*, 139 N.J. Eq. 520, 52 A.2d 443, *aff'd*, 141 N.J. Eq. 363, 57 A.2d 216 (1948); *In re Nol's Estate*, 251 Wisc. 90, 28 N.W.2d 360 (1947).

merely serves to make that title absolute; and which, under the minority theory, occurs *before* any title whatsoever passes to the donee (precedent to the gift). The phrases describe only the *time* at which the donee is conceived to have received his title and are not primarily concerned with the *nature* of that title, *i.e.*, whether present or future, vested or contingent. The distinction is between conditions that are precedent and those that are subsequent to the gift itself and not the technical distinction between conditions that are precedent or subsequent to the *vesting* of title.

Unfortunately, the courts have not always recognized the true meaning of these phrases. Confusion is frequently found in cases where the donor has expressed the condition of his death at the time of making the gift and the court is called upon to determine the validity of the transaction. In such cases, some courts seem to feel that the gift cannot be sustained under the majority theory if the condition is expressed in the form of a technical condition precedent. This error is noticeable in *Estate of Nols*,¹⁹ where when delivering the property to the donee the donor said, "if I don't come back [from the hospital], you can have it." The court was unwilling to hold the gift void for it felt that few laymen would express the condition of their death in any other manner. Since the court felt that it could not sustain the gift under the majority theory, it adopted the minority view. It is submitted, however, that the gift could have been sustained under the majority theory. Indeed, similar language was used to express the donative intent in *Nicholas v. Adams*,²⁰ which established the inter vivos character of causa mortis gifts. At no place in its opinion did the court in the *Nicholas* case bother to determine whether the condition expressed was precedent or subsequent to the *vesting* of the donee's title. The court did, however, say that the condition was valid, stressing that the contingency did not affect the *passage* of title but merely its perfection, *i.e.*, its becoming absolute.

*Basket v. Hassell*²¹ is generally cited as establishing the rule to be applied under the majority theory in determining the validity of causa mortis gifts where the donor has expressed the condition of his death. In this case, a man owned a negotiable certificate of deposit which was payable on demand. During his last illness and while in apprehension of death, the man indorsed the certificate as follows: "Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself." He then gave the certificate to Basket. The man subsequently died and the court was called upon to determine the ownership of the deposit. The court held that the attempted

¹⁹ 251 Wisc. 90, 28 N.W.2d 360 (1947).

²⁰ *Supra* note 13.

²¹ 107 U.S. 602 (1883).

gift was ineffective. Concededly, there is much language in the opinion that seems to indicate that the court intended to draw simply the technical distinction between conditions that are precedent and those that are subsequent to the vesting of the donee's title. But the outcome of the case is clearly predicated upon the fact that the court found the transaction to be an attempted testamentary disposition and, as such, that it could not qualify as a valid *causa mortis* gift. Since the distinction between conditions precedent and subsequent to the vesting of title is usually immaterial in determining whether or not a transaction is testamentary,²² we should be slow in concluding that this was the distinction intended.

The court held that the indorsement on the certificate of deposit rendered the delivery ineffective.

[A] delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift.

Thus, in the eyes of the court, reduction of the fund to the donee's possession was essential for a valid delivery.²³ But the indorsement on the certificate of deposit precluded such reduction to possession until the donor had died. Thus the donor had made his death an event that had to occur before one of the essential elements of all valid gifts—the act of delivery—could be completed; he had made his death a condition precedent to the gift itself. Clearly this is the important element in the case. The court was not faced with a donee who had received a contingent interest during the donor's lifetime; it was faced by a donee who in its eyes had received no interest whatsoever. Clearly such a transaction is testamentary and cannot be harmonized with the majority theory. Thus it is submitted, the true holding of the case is simply this: When the donor makes his death a condition precedent to the delivery, when he so manipulates the transaction that the act of delivery cannot be completed until his death, then his death is a condition precedent to the gift and the transaction is testamentary and cannot, under the majority theory, be a valid *causa mortis* gift. Certainly, this holding does not

²² See 1 PAGE, *WILLS* § 6.1 (Bowe-Parker Rev. 1960); 1 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 32 (1947).

²³ It is possible to argue with the court on this point. This was an attempted gift of the chose, not of the money. The manual tradition of the document representing the chose, even though so indorsed, could be considered a valid delivery. See *Smith v. Eshelman*, 235 Ala. 588, 180 So. 313 (1938); *Connelly v. Bank of America*, 138 Cal. App. 2d 303, 291 P.2d 501 (1956); *Buchman v. Smith*, 137 N.J. Eq. 215, 44 A.2d 179 (1945); *Parker v. Mott*, 181 N.C. 485, 107 S.E. 500 (1921); *Hoks v. Wollenberg*, 209 Wisc. 276, 243 N.W. 218, 245 N.W. 128 (1932).

condemn gifts which are executed during the donor's lifetime by the passage of some interest in the property to the donee, even though that interest might be contingent.

The distinction between conditions which are precedent to the gift and those which are precedent merely to the perfecting of the donee's title is rather fine but it is submitted that it is valid. It is similar to the distinction currently drawn in the field of trusts to explain why some attempts at revocable trusts are testamentary while others are not. The Reporter's Notes to the new edition of the *Restatement of Trusts* state:

There is a difference between the situation where the death of the settlor is a condition precedent to the creation of a trust, and the situation where the trust is created during the lifetime of the settlor, although he reserves power to revoke it. In the former case no trust is created unless the requirements for the execution of a will are complied with. . . . In the latter case the trust is not testamentary. . . .²⁴

Of course, the settlor's power of revocation in a trust is not a condition, and therefore the analogy is not perfect. Yet conditions and powers are similar in that both render the estate subject to them defeasible and thus prevent it, at least for a time, from being absolute. And the conditions of revocation in a causa mortis gift and the power of revocation in a trust are further similar in that each is generally extinguished upon the death of the donor or settlor respectively.²⁵ It is submitted that just as it is possible to distinguish between conditions precedent to the creation of a trust and the reserved power which qualifies the cestui's title rendering the trust revocable, in the same manner it is also possible to distinguish between conditions precedent to the making of a causa mortis gift and the conditions which qualify the donee's title rendering such gifts revocable. And it is further submitted that the majority rule prohibiting the donor from making his death a condition precedent is designed merely to embody this distinction and to indicate that the same result flows from it in the gift case as in the trust case:²⁶ if the donor's death is a condition precedent to the gift, then the transaction is testamentary and cannot qualify as a causa mortis gift; whereas if the donor's death is

²⁴ § RESTATEMENT, TRUSTS, Appendix at 111 (2d ed. 1959).

²⁵ Concerning revocation by will of donor or settlor, see *supra* note 14.

²⁶ This is the only logical basis for the rule. It must discover some basic defect in the transaction that prevents the court from giving it effect. It cannot be designed simply to identify the technical nature of the condition imposed by law and to indicate that all conditions expressed by the parties must be identical to it; for there are many cases that demonstrate that donors can annex conditions that materially differ from those implied by law without impairing the validity of the gift. Thus it is not unusual for a donor to condition a causa mortis gift on the payment of his debts and funeral expenses. See, e.g., *Smith v. Eshelman*, 235 Ala. 588, 180 So. 313 (1938); *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952);

subsequent to the gift, then (regardless of the technical nature of the donee's title) the transaction is inter vivos and valid.

A donor might make his death a condition precedent to the gift in either of two ways: 1) as in *Basket v. Hassell*,²⁷ by so manipulating the transaction that the act which the court deems essential for a valid delivery cannot be completed until he dies; and 2) by so qualifying his donative intent that he indicates that the transaction is not to be effective until his death. Cases of the first group present no serious difficulty. The greatest problem in them is determining what acts are essential for a valid delivery. Once this issue is resolved, it is an easy matter to determine whether the required act was performed before or after the donor's death. Cases of the second group, however, are troublesome. Unlike the acts of delivery, intent is a subjective thing and it is difficult to tell when it has been improperly qualified. This is the real difficulty in such cases as *Estate of Nols*,²⁸ where the donor expresses his intent in such terms as "This is yours if I die." A literal reading of the language indicates that the donor's death is a condition precedent to the gift; it seems to indicate that the donor had no present donative intent, that he intended the gift to be effective only in the event of, and at the moment of, his death. However, we must realize that the distinction between a disposition to take effect only on the death of the donor and one to take effect immediately but subject to revocation by the donor at any time before his death, is difficult even for the trained legal mind to make. In such circumstances, we should be slow in attempting to determine which of these intents a layman had merely on the basis of the chance phrase he used to express it. We should also consider his actions. And the most significant act performed is the act of delivery—the unqualified surrender of physical control over the property itself. Should not this act be construed as the expression of the donor's intent, "Here, I presently give this property to you." The words actually used can then be construed to mean, "It shall be yours *absolutely* if I die, but if I recover I want it back." Viewed in this light, it is clear that the donor has not improperly qualified his donative intent and that his death is not a condition precedent to the gift; it is merely a condition precedent to the perfecting of the donee's title.²⁹

Knight v. Tripp, 121 Cal. 675, 54 Pac. 267 (1898); *Reynolds v. Maust*, 142 Pa. Super. 109, 15 A.2d 853 (1940). And in *Woodburn v. Woodburn*, 123 Ill. 608, 14 N.E. 58 (1887), such a gift was upheld even though conditioned on the donee's refraining to contest the will of the donor. See also *Currie v. Steele*, 4 N.Y. Super. 542 (1849).

²⁷ *Supra* note 21.

²⁸ *Supra* note 19.

²⁹ Many cases have held *causa mortis* gifts valid even though the donative intent was expressed in terms of "if I die." See *Smith v. Eshelman*, 235 Ala. 588, 180 So. 313 (1938); *Canon v. Williams*, 194 Ga. 808, 22 S.E.2d 838 (1942); *Adcock v. Bishop*, 309 Ky. 502, 218 S.W.2d 52

It is submitted that the rule prohibiting the donor from making his death a condition precedent should be applied more as a negative than as an affirmative requirement in this second group of cases. It should be permitted to strike down only those gifts in which there is affirmative evidence that the donor intended the transaction not to be effective until his death. The acts of delivery are of such a character that they should give rise to a presumption that the donor's intent was not improperly qualified;⁸⁰ and this presumption should be overcome only by affirmative evidence to the contrary, e.g., where the donor states that the gift is not to be effective until he consults an adviser and he dies before such consultation, or where the donee or the property is not identified until his death.⁸¹ Generally, this is the way that the rule is applied in the trust cases;⁸² it would, moreover, lead to substantially the same result advocated by Professor Brown who argued that the rule should be ignored in all cases where "there is an actual delivery of the subject matter, and the intent of the donor to make some gratuitous disposition of his property is clearly proven."⁸³

It sometimes seems to be felt that the majority rule prevents the donor from restricting the donee's use of the property during the interval between the making of the gift and the donor's death. Indeed, though not expressly so stated, this seems to have been another of the reasons why the Wisconsin court felt that it had to adopt the minority rule in order to sustain the gift in *Estate of Nols*. Looking at all the circumstances of the transaction, the court apparently concluded that the decedent had not intended the donee to begin enjoying the property immediately and felt that this conclusion could not be harmonized with the majority rule. It is submitted, however, that a restriction on the donee's right of immediate enjoyment does not necessarily mean that the donor intended the donee to receive no title when the transaction was entered into; it can merely indicate that the title transferred was a future, and not a possessory, interest. Though gifts of future interests raise peculiar problems of delivery, it is now clear that a donor may make a valid inter vivos gift while reserving a life estate in himself.⁸⁵ Though

(1949); *Meyers v. Meyers*, 99 N.J. Eq. 560, 134 Atl. 95 (1926); *In re Hennessy's Estate*, 253 App. Div. 6, 300 N.Y.S. 766 (1937); *In re Spiegel's Will*, 175 N.Y.S.2d 882 (Sur. 1958); *Titusville Trust Co. v. Johnson*, 375 Pa. 493, 100 A.2d 93 (1953); *In re Van Wormer's Estate*, 255 Mich. 399, 238 N.W. 210 (1931); *Lumberg v. Commonwealth Bank*, 295 Mich. 566, 295 N.W. 266 (1940); *Sharpe v. Sharpe*, 105 S.C. 459, 90 S.E. 34 (1916); *Hoks v. Wollenberg*, 209 Wis. 276, 243 N.W. 219 (1932).

⁸⁰ See *infra*, Part III.

⁸¹ In *Yates v. Dundas*, 80 Cal.App.2d 468, 182 P.2d 305 (1947) and *In re Anderson's Estate*, 180 Misc. 827, 46 N.Y.S.2d 128 (1943), attempted causa mortis gifts of property to be acquired in the future were held ineffective.

⁸² See 1 SCOTT, *THE LAW OF TRUSTS* §§ 26, 32, 56 (2d ed. 1956).

⁸³ BROWN, *PERSONAL PROPERTY* § 53 (2d ed. 1955).

⁸⁴ See Note, 1948 WIS. L. REV. 112, 115.

the donee in such a case must await his donor's death to fully enjoy the property, the gift is immediately effective to create a future interest in him and thus, it is not a testamentary transaction. Though authority discussing the matter is slight, there is no logical reason why a *causa mortis* donor may not do the same.³⁶ So long as the transaction is immediately effective *in interest*, so long as the donor does not make his death a condition precedent to the passage of title to the donee, the gift is not testamentary and should be valid.³⁷

Though the revocable character of *causa mortis* gifts is well established, they offer little aid to the prospective donor who is seeking a means of preserving his pre-eminence. Their use for this purpose is seriously curtailed by the fact that they can be made only by those in apprehension of death from a proximate and impending peril.³⁸ Most of the gifts that have been sustained involved donors who were in failing health at the time of the gift or who were about to undergo surgery. The ordinary, healthy donor must seek some other means of preserving his pre-eminence.

PART III: CONCERNING THE REQUIREMENT OF DELIVERY

There are statements in innumerable American cases that seem to preclude the possibility of any type of a valid revocable gift *inter vivos*. In a recent twenty year period, over two hundred such cases were found. Upon examination, however, it was discovered that the vast majority of these statements were clear dicta; the facts recited in most of the opinions disclosed no attempt by either of the parties to make the gift in any way revocable and the courts were merely parroting from earlier decisions broad statements concerning the requisites of valid gifts. Most of the remaining cases announced rules of irrevocability which, it is felt, do not preclude all possibility of any type of a valid revocable gift.

At the outset, it should be noted that the attribute of irrevocability may be ascribed to the donative transaction with a variety of meanings. In the first place, gifts may be said to be irrevocable merely to indicate that once the transaction is completed, it is just as final and binding upon the parties as a transfer supported by consideration; in other words, that once the trans-

³⁶ See *infra*, Part IV.

³⁷ See 1 SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 447 (2d ed. 1956).

³⁸ Without alluding to what they were doing, many courts have sustained *causa mortis* gifts in which the donors seem to have reserved life estates in themselves. See *Fender v. Foust*, 82 Mont. 73, 265 Pac. 15 (1928); *Buckman v. Smith*, 137 N.J. Eq. 215, 44 A.2d 179 (1945); *In re Spiegel's Will*, 175 N.Y.S.2d 882 (Sur. 1958); *Parker v. Mott*, 181 N.C. 485, 107 S.E. 500 (1921); *In re Newland's Estate*, 47 Ohio L. Abs. 246, 70 N.E.2d 234, *aff'd*, 47 Ohio L. Abs. 252, 70 N.E.2d 238 (1946); *Hoks v. Wollenberg*, 209 Wisc. 276, 243 N.W. 219 (1932).

³⁸ *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952); *Irish v. Nutting*, 47 Barb. 370 (N.Y. 1867).

action is completed, the donor cannot change his mind and reclaim the property merely because the transfer was gratuitous.¹ This characteristic of gifts *inter vivos* is commonplace to the modern American mind but it should be realized that such irrevocability is not essential to a systematic law of gifts nor was its general acceptance in Anglo-American Law always as free from doubt as it is today. The *Code of Justinian* provided for the revocation of gifts if the donee proved to be ungrateful.² This doctrine of ingratitude has been carried into most civil law systems³ but it has never been adopted by the common law.⁴ It has, however, at times been argued in the United States that gifts should be revocable if improvident when made.⁵ And, of course, the *causa mortis* gift is *per se* revocable by the donor at his whim;⁶ and in some states, gratuitous trusts are presumed to be revocable in the absence of evidence to the contrary.⁷ It seems clear that some of the statements to the effect that gifts *inter vivos* are irrevocable were designed simply to convey the idea that in the common law such transfers, unlike *causa mortis* gifts⁸ and civil law donations, are just as binding and efficacious as transfers supported by consideration.

Irrevocability can also be spoken of when attempting to define the element of donative intent. The word, give, is ambiguous and is not restricted in meaning to the designation of gratuitous transfers; thus we frequently speak of "giving" a deed to a grantee even though he might have paid consideration therefor. When a man is on his way to the swimming pool and he "gives" his watch to his friend, how do we determine whether this is a

¹ When read in its full context, this clearly is the true meaning of the passage, so frequently cited from Blackstone, that "it is not in the donor's power to retract [a true and proper gift]." See 2 BLACKSTONE, COMMENTARIES *441.

² CODE 7.56.

³ See 4 POUND, JURISPRUDENCE 174 (1959). See also LA. R. C. C. Art. 1559 (1870).

⁴ See however the following statement from *James v. Aller*, 66 N.J. Eq. 52, 57 Atl. 476 (1904), reversed in 68 N.J. Eq. 666, 62 Atl. 427 (1905):

[I]n relation to gifts made by a parent to a child, and made under the influence of the confidence and trust arising from that relation, the further question always arises whether the character and circumstances of the gift are such as to impose a duty toward the donor on the conscience of the donee who claims that the gift is irrevocable.

See also *Crans v. Kroger*, 22 Ill. 74 (1859).

⁵ *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910 (1893); *Maier v. Hill*, 221 Miss. 120, 70 So. 2d 209 (1954); *Appeal of Rick*, 105 Pa. St. 528 (1884).

⁶ See *supra*, Part II.

⁷ CAL. CIV. CODE § 2280; OKLA. STATS. ANN. tit. 60, § 175.41 (1963); TEX. REV. CIV. STAT. art. 7425b-41 (1960). See also 3 BOGERT, TRUSTS AND TRUSTEES § 998 (1962).

⁸ There are statutes in several states that rather ineptly codify this distinction between gifts *inter vivos* and gifts *causa mortis* by providing: "A gift, other than a gift in view of death, cannot be revoked by the giver." CAL. CIV. CODE § 1148; REVISED CODES OF MONTANA, 1947, § 67-1708; N. D. CENTURY CODE ANN. § 47-11-08 (1960); SDC 51.1508 (1939). The phrasing of these statutes seems to clearly indicate that they were designed not to prohibit revocable gifts but merely to indicate that, unlike *causa mortis* gifts, *inter vivos* gifts are not *per se* revocable. See *Murdock v. Murdock*, 49 Cal. App. 775, 194 Pac. 762 (1920).

gift or a bailment for safe-keeping? Clearly, the solution lies in the intent of the parties. In such cases, the easiest way to express the difference between these two possible intents is to phrase it in terms of the absoluteness of the transfer. If the swimmer intended to reclaim the watch when he returned from the pool—if he intended, in a sense, to revoke the transfer—then it is a bailment; but if he did not so intend to reclaim the property, then it is gift. Many cases speak of irrevocability as an essential of the gift transaction merely to explain this aspect of the donative intent.⁹ But clearly, revocability is not the essence of the distinction; for property can be entrusted to a bailee or agent even though the owner does not want the property returned to him¹⁰ and, conversely, a gift can be made even though the donor intends to be able to reclaim the property upon certain contingencies.¹¹

Though these two attributes of irrevocability are reasonably easy to recognize and explain in gift transactions, courts frequently speak of irrevocability as a necessary ingredient of gifts in another, more abstruse, sense. Some courts have used the term when describing the necessary act of delivery; others, in connection with the requirement of a present donative intent. Few of these courts have explained exactly what they meant by their use of the term and the resultant ambiguity has led to the impression that any element of revocability in a donative transaction is fatal to its validity. It is submitted, however, that though there are certain aspects of both the delivery and the intent that must be irrevocable, precedent does not require so broad a rule as to preclude the possibility of any type of revocable gift. The rest of this section and all of the next will be devoted to an examination of the cases to determine precisely wherein the delivery and the intent must be irrevocable and the suggestion of a type of revocable gift that satisfies these requirements and which is therefore felt to be possible. The cases actually involving this type of gift will be developed in Part V.

The requirement of delivery in gifts of personal property is complex and difficult of being accurately phrased in the form of a general rule that can be

⁹ See *Shewmaker v. Shifflett*, 205 Ark. 875, 171 S.W.2d 309 (1943); *Carlson v. Carlson*, 224 Ark. 284, 273 S.W.2d 542 (1954); *Bank of Manhattan Trust Co. v. Gray*, 53 R.I. 377, 166 Atl. 817 (1933); *Zorich v. Zorich*, 119 Ind. App. 547, 88 N.E.2d 694 (1949); *Krause v. Krause*, 235 Ind. 325, 132 N.E.2d 608 (1956); *Brashears' Adm'r. v. Oder*, 291 Ky. 817, 165 S.W.2d 801 (1942); *Rinehart v. Rinehart*, 14 Ill. App.2d 116, 143 N.E.2d 398 (1957); *Mitchell v. Mitchell*, 137 N.J. Eq. 557, 46 A.2d 85 (1946); *Frick v. Cone*, 160 Misc. 450, 290 N.Y.S. 592, *aff'd*, 251 App. Div. 781, 298 N.Y.S. 176 (1936); *Pizer's Estate*, 178 Misc. 7, 32 N.Y.S.2d 821 (1941); *In re Dobish's Will*, 98 N.Y.S.2d 838 (Sur. 1950); *Duboff v. Duboff*, 186 N.Y.S.2d 760 (Sup. Ct. 1959); *Hickman v. Barrett*, 175 Okla. 262, 52 P.2d 40 (1936); *Jeffords v. Poor*, 115 Vt. 147, 55 A.2d 605 (1947). See also *Watkins v. Hodge*, 232 S.C. 245, 101 S.E.2d 657 (1958), and compare it with *Scot v. Haughton*, 2 Vern. 560, 23 Eng.Rep. 963 (1706).

¹⁰ *E.g.*, a delivery into the custody of a servant for the purpose of making a future delivery to a donee; a bailment for sale, see *BROWN, PERSONAL PROPERTY* § 79 (2d ed. 1955).

¹¹ *E.g.*, a gift in contemplation of marriage, see *Annot.*, 24 A.L.R.2d 579 (1952).

applied to all cases. Courts generally define it as the act whereby the donor intentionally relinquishes dominion and control of the subject of the gift to the donee.¹² Though this definition has proven useful as a means of generalizing the results of many gift cases, it is important to realize that it does not specify the type of dominion and control that the donor must surrender. Physical power over the *res*? Jural powers through the exercise of which the *res* can in any way be affected? Or some combination of both?

In the case of chattels that are capable of passing out of the possession of the donor and into that of the donee, the courts usually require this to be done. Thus in *Hamilton's Estate*,¹³ the court held an attempted gift of a piece of jewelry ineffective even though the donor had verbally manifested a donative intent because the donor did not surrender possession of the brooch to the donee. And similarly, in *Young v. Locknit*,¹⁴ the court held an attempted gift of a table ineffective because after verbally expressing donative intent, the donor insisted that the table remain in his house until his sister died. The donor died before the sister and while the table was still in the house. The purported donee sued in trover for the table and the court held that no gift had been made. In the course of its opinion, the court said:

In the instant case the evidence fails to show any delivery, actual or symbolical, that put it beyond the power of the donor to revoke the gift.

Clearly, both cases were properly decided. But the statement of the rule of delivery in the latter case leaves something to be desired. Clearly the court held the gift void because of a defect in the delivery; yet the court seems to say that no gift is valid if the donor has any power of revocation after the delivery; that the delivery must destroy all possibility of revocation.

That the requirement of delivery is not so restrictive seems obvious from cases involving gifts *causa mortis*. With certain exceptions not here material,¹⁵ courts usually agree that the delivery necessary to sustain a gift *causa mortis* is the same as that required in gifts *inter vivos*. That the requirement mentioned in the *Hamilton* and the *Young* cases is necessary in *causa mortis* gifts is clear from such cases as *Genteman v. Sutter*,¹⁶ where the court said:

The delivery of a gift *causa mortis* must be such as would invest the donee with title in case of a gift *inter vivos*. . . . The test of delivery is: "Has the delivery of

¹² BROWN, *PERSONAL PROPERTY* § 39 (2d ed. 1955).

¹³ 26 Wash. 2d 363, 174 P.2d 301 (1946).

¹⁴ 64 Ga. App. 438, 13 S.E.2d 525 (1941).

¹⁵ The delivery requirement of *causa mortis* gifts might differ from that of *inter vivos* gifts in two types of cases: 1) where the donee is in possession of the subject matter before the gift is attempted, and 2) where the gift is attempted to be effectuated by a deed without a delivery of the property. See *supra*, Part II.

¹⁶ 358 Mo. 476, 215 S.W.2d 477 (1948); see also *Trask v. Arcadia Valley Bank*, 230 S.W.2d

possession been such as to put it out of the power of the donor to repossess the property?"

Clearly, the court could not have meant that the delivery to be valid must somehow destroy all possibility of revocation. For if such were the rule then no *causa mortis* gift would be possible; in *causa mortis* gifts, the donor always has the power to revoke for any reason he sees fit at any time before he dies.

That this requirement of delivery in gifts does not always preclude the donor from retaining a power of revocation also seems evidenced by many trust cases. When a trust is attempted to be established by a transfer in trust, as distinguished from a declaration of trust, the validity of the transaction frequently depends upon the effectiveness of the transfer of settlor's title to the trustee.¹⁷ The validity of this transfer is judged not by any peculiar rule of the law of trusts but rather by the general principles applicable to any other transfer of title;¹⁸ frequently, it is judged by the law of gifts.¹⁹ Thus in *Kerwin's Estate*,²⁰ where an attempted charitable trust was held void because the settlor had failed to effectively transfer title of the *res* to the trustee, the court said:

In order to effectuate an inter vivos gift there must be evidence of an intention to make a gift and a delivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property but also invest the donee with complete control over the subject-matter of the gift.²¹

Clearly the court was merely reciting the requirement of delivery that was the basis of the decisions in the *Hamilton* and *Young* cases. Yet clearly this requirement does not prevent the settlor from reserving a power of revocation for it is quite clear that revocable trusts are valid whether accomplished by declaration or transfer.²²

Though it thus seems clear that the requirement of delivery does not always prevent a donor from retaining a power of revocation, it is difficult to determine when such retained control is permissible and when it is pro-

501 (Mo. 1950); *California Trust Co. v. Bennett*, 189 P.2d 531 (Cal. App. 1948), *aff'd*, 33 Cal. 2d 694, 204 P.2d 324 (1949).

¹⁷ 1 RESTATEMENT, TRUSTS § 32 (2d ed. 1959).

¹⁸ *Landon v. Hutton*, 50 N.J. Eq. 500, 25 Atl. 953 (1892).

¹⁹ See 1 SCOTT, THE LAW OF TRUSTS § 32.2 (2d ed. 1956).

²⁰ 371 Pa. 147, 89 A.2d 332 (1952).

²¹ See also *Williams v. Anderson*, 288 Ill. App. 149, 5 N.E.2d 593 (1936):

Both classes of gifts [gifts inter vivos and gifts in trust] which are not of a testamentary kind, must be completed and executed in the lifetime of the donor beyond his power of recall, by a transfer of the possession and legal title to the trustee, or donee.

²² SCOTT, THE LAW OF TRUSTS § 57.1 (2d ed. 1956).

hibited. In the cases discussed above, it seems clear that all that the courts were trying to say was that the donor should have put the property beyond his *physical* power to retake. Though the language used in many of the opinions is broader, it is clear that each attempted gift failed simply because the donor insisted on retaining physical control over the *res*. This is merely an application to the peculiar facts of these cases of the rule of delivery by manual tradition, which is required in some but not all types of gifts. The essence of delivery by manual tradition is the transfer of possession from one person to another.²³ Possession, however, is a factual question dependent in large measure upon the physical relationship between the individual and the thing: generally the person in physical control of an object is considered as having possession of it.²⁴ Thus unless the donor surrenders his physical control, he retains possession and there can be no delivery by manual tradition.

Many of the statements to the effect that gifts must be irrevocable come from cases in which the intending donor failed to part with physical control of the object of the gift.²⁵ Clearly these are sound cases. But clearly also, it is wrong to generalize them into a rule which recites that delivery requires the donor to forego every type of control that might result in a revocable gift. They are wholly unresponsive to the type of revocable gift attempted in *Gould v. VanHorne*,²⁶ where the donor surrendered complete physical control over the money but retained a bare legal right through the exercise of which she could compel the donee to repay an equal sum to her. Indeed, it seems doubtful that the vast majority of cases where the donor refuses to part with his physical control should be considered attempts at revocable gifts at all. The facts of these cases usually indicate no expression by the donor of an intention to make a revocable gift. True, while verbally expressing his donative intent, his conduct indicates that he probably intended to be able to free himself from the transaction and use the property for his own benefit. But it is submitted that this conduct rather than manifesting an intent to make a revocable gift, indicates that the donor has not yet formed a final, definite intent to enter into a legal transaction. By retaining physical

²³ BROWN, *PERSONAL PROPERTY* § 39 (2d ed. 1955).

²⁴ BROWN, *PERSONAL PROPERTY* 21 (2d ed. 1955).

²⁵ *DeMouy v. Jepson*, 255 Ala. 337, 51 So. 2d 506 (1951); *Rolinson v. Rolinson*, 132 Cal. App. 2d 387, 282 P.2d 98 (1955); *Garrell v. Nicholson*, 119 Ga. 458, 46 S.E. 623 (1904); *Pope v. Safe Deposit & Trust Co.*, 163 Md. 239, 161 Atl. 404 (1932); *Monaghan v. Monaghan*, 320 Mass. 367, 67 N.E.2d 476 (1946); *Kobrosky v. Crystall*, 332 Mass. 452, 125 N.E. 2d 385 (1955); *Chaddock v. Chaddock*, 134 Mich. 48, 95 N.W. 972 (1903); *Cooney v. Equitable Life Assurance Society*, 235 Minn. 377, 51 N.W.2d 258 (1952); *Bockman v. Kelm*, 117 F. Supp. 478 (D.C. Minn. 1954); *Harmon v. Kerns*, 169 Okla. 290, 36 P.2d 898 (1934); *Chadrow v. Kellman*, 378 Pa. 237, 106 A.2d 594 (1954); *Pamplin v. Satterfield*, 196 Tenn. 297, 265 S.W.2d 886 (1954); *Wells v. Sansing*, 151 Tex. 36, 245 S.W.2d 964 (1952).

²⁶ 43 Cal. App. 145, 187 Pac. 35 (1919), discussed *supra* in Part I.

power over the *res*, by retaining the ability to "revoke" through self-help rather than some juridical procedure, the donor indicates that he is still contemplating the wisdom of entering into the transaction. This intent should be distinguished from that of a donor who has finally determined to make the gift, to enter into the transaction and submit its operation to legal rules and juridical procedures, but who has reserved a bare legal right to recover the property for his own use if some future event indicates the wisdom or necessity of this course of action.

While stressing the element of physical control, we cannot completely lose sight of the role certain types of legal rights play in some cases. The law does not recognize the practical differences in control that might result from the varying physical abilities of individuals. We have advanced beyond the law of the jungle. Thus there is no doubt that a baby has possession of his candy even though a bully might be physically able to control it. This limitation upon the element of physical control has been formulated into the rule that one has sufficient control to have possession "when others cannot interfere with [his] control of the object without violation of some independent right of [his] either of person or property."²⁷ The baby has possession of the candy because the bully would interfere with his right of person in taking it from him.

Though this limitation upon the necessity of surrendering physical control has generally been recognized and applied in gift cases,²⁸ there is a somewhat similar rule that has frequently been ignored. This rule is that the person receiving physical control of property may be said to receive possession of it even though another can by asserting an independent legal right vest in himself the right to immediate possession. Thus it is generally

²⁷ BROWN, PERSONAL PROPERTY 22 (2d ed. 1955).

²⁸ See *Patterson v. Greenboro Loan & Trust Co.*, 157 N.C. 13, 72 S.E. 629 (1911), where a valid delivery was found in a man's act of placing goldpieces in his grandchild's trunk; the trunk was kept in the donor's home and was used to store property the child used during visits. See also the somewhat similar case of *In re Tardibone*, 196 Misc. 738, 94 N.Y.S.2d 724 (1949). Since the donees in these cases had no idea of the amount of money involved and since the donor in each case could have recovered some or all of the money without leaving any evidence of his trespass, it is possible to view these cases as successful attempts at revocable gifts.

Where the independent right of the donee is slight and it is obvious that the donor has used this means to effectuate the gift so that he could subsequently recover the property for his own use if he so desired, the courts have held the transaction ineffective. See *Falbo v. U. S. National Bank*, 116 Colo. 508, 181 P.2d 1020 (1947), and *Wahl v. Sheehan*, 54 F. Supp. 56 (D.C. Mo. 1944), both of which involved an unknown sum of money placed by the donor in an envelope which belonged to the donee but which the donor retained in his possession. Cases in which the donor rents a safety deposit box in the name of his intended donee, places property therein, and requires the donee to authorize him to have access to the box are somewhat related. See *Livingston v. Powell*, 257 Ala. 38, 57 So.2d 521 (1952); *Reese v. Philadelphia Trust, Safe Deposit & Ins. Co.*, 218 Pa. 150, 67 Atl. 124 (1907); *In re Kaufman*, 281 Pa. 519, 127 Atl. 133 (1924).

said that a bailee at will receives possession of property when it is given into his physical control even though the bailor can at any time terminate the bailment and vest in himself the right to immediate possession.²⁹ The bailor's right is a bare legal one, dependent wholly upon juridical procedures for its execution; it is not a physical power. It is independent in the sense that it springs from the agreement of the parties; it does not necessarily inhere in all such transactions nor does it spring from some defect in the conduct of the parties in entering into the transaction.

Since the retention of such a legal right does not preclude the passage of possession, it is submitted that it should not necessarily preclude the effectiveness of a delivery by manual tradition when physical control is surrendered. This would explain the validity of the deliveries found in the revocable trust and the *causa mortis* gift cases. The trustee receives possession of the *res* when it is placed in his physical control even though the settlor retains a legal right through the exercise of which he can recover the property for his own use. The same is true of the *causa mortis* donee. In each case the reserved right is independent in the sense that it does not necessarily inhere in all such transactions but rather springs from the intention of the parties formed before the transaction was entered into.³⁰ In each case, the reserved right is a legal one; it is not a physical power.

Special notice must be taken of gifts completed through the use of intermediaries. When the intermediary is found to be the agent of the donor, the courts generally hold that there is no delivery until the agent actually presents the *res* to the donee.³¹ In such cases, the *res* generally passes out of the physical control of the donor as soon as the agent leaves his presence. The only control he retains is the legal right to revoke the authority of the agent. Yet the courts are almost unanimous in holding that delivery is not complete as long as the agent retains the *res*. These cases can be harmonized with our theory of manual tradition simply by pointing out that technically the agent receives merely custody, and not legal possession, of property entrusted to him by his principal.³² Moreover, it seems arguable that in such cases the donor's power is not really an independent one. It springs out of

²⁹ See BROWN, PERSONAL PROPERTY § 74 (2d ed. 1955).

³⁰ Even though the right of revocation inheres in all *causa mortis* gifts, it is based upon the presumed intention of the donor. See Part II, at note 7.

³¹ See BROWN, PERSONAL PROPERTY § 40 (2d ed. 1955).

³² It seems clear that an act sufficient to pass legal possession to the donee is required for a valid delivery by manual tradition. I WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 28 (1947). Generally, however, the sufficiency of any particular act is judged by the transfer of factual, and not legal, possession. This test is used, however, simply for practical reasons. Legal possession generally depends upon ownership and, in gift cases, this in turn depends upon the validity of the transaction. See BROWN, PERSONAL PROPERTY § 45 (2d ed. 1955).

the relationship that the law creates between principals and agents. It inheres in the nature of the agent's "possession" and does not spring from some special agreement attached to the relationship. And finally it should be noted that, in the eyes of the law, the agent is merely an extension of the personality of the principal, his alter ego. Thus even though in fact the *res* passes out of the physical control of the principal, nevertheless in the eyes of the law it does not.

Courts have recently shown a marked reluctance to permit these technical rules to defeat the obvious intentions of serious minded donors. The simple expedient used by courts is to find that the intermediary is not the agent of the donor.³³ A variety of factors have been considered in these cases as material in determining the status of the intermediary.³⁴ However, where the donor expressly or impliedly reserves the right to reclaim the property from the intermediary, the courts have generally considered this of critical significance and as over-riding all other factors, and have generally held the intermediary to be an agent of the donor.³⁵ It is submitted that this is an unfortunate result that has frustrated many serious attempts at revocable gifts. Be that as it may, we are now only trying to limit the generality of the broad rule frequently announced in these cases. Though statements in these cases often seem to preclude any type of revocable gift, it is clear that these courts have considered the reserved power as bearing upon the status of the intermediary rather than as bearing directly upon the validity of the delivery. The argument of these courts is: the reserved power con-

³³ *Smith v. Eshelman*, 235 Ala. 588, 180 So. 313 (1938); *Farris v. Farris*, 269 Ky. 466, 107 S.W.2d 299 (1937); *Gernert v. Liberty Nat. Bank & Trust Co.*, 284 Ky. 575, 145 S.W.2d 522 (1940); *Larkin v. McCabe*, 211 Minn. 11, 299 N.W. 649 (1941); *Smith v. Smith*, 313 S.W.2d 753 (Mo. App. 1958); BROWN, *PERSONAL PROPERTY* § 40 (2d ed. 1955).

³⁴ See Note, 57 MICH. L. REV. 295 (1958), where the following factors are suggested as being material: 1) the clarity of present donative intent; 2) knowledge by the donee of the transaction; 3) reasons for use of intermediary; 4) subsequent conduct of intermediary; 5) status of intermediary in other transactions involving the parties; and 6) ultimate disposition of *res* if the gift is held ineffective.

³⁵ *Baugh v. Howze*, 211 Ark. 222, 199 S.W.2d 940 (1947); *Daus v. Drusilla Home*, 118 Ind. App. 639, 79 N.E.2d 420 (1948); *Hill v. Hill*, 144 Me. 224, 67 A.2d 533 (1949); *Geisel v. Burg*, 283 Mich. 73, 227 N.W. 904 (1937); *Wilson v. Davis*, 110 Mont. 356, 103 P.2d 149 (1940); *Zeman v. Mikolasek*, 75 N.D. 41, 25 N.W.2d 272 (1946); *Lynch v. Lynch*, 201 S.C. 130, 21 S.E.2d 569 (1942); *Roseman v. Sauber*, 232 Wisc. 581, 288 N.W. 173 (1939). *But see* *Scoville v. Vail Investment Co.*, 55 Ariz. 486, 103 P.2d 662 (1940); *Leedham v. Leedham*, 218 Iowa 767, 254 N.W. 61 (1934); *Daggett v. Simonds*, 173 Mass. 340, 53 N.E. 907 (1899); *Worth v. Case*, 42 N.Y. 362 (1870); *In re Rynier*, 475 Pa. 471, 32 A.2d 736 (1943); *Giddings v. Giddings*, 51 Vt. 227, 31 Am. Rep. 682 (1878).

When the intermediary is instructed to hold the property and deliver it to the donee only in the event of the donor's death, the cases are widely divided. Some view this as merely a means of postponing the donee's beneficial enjoyment of the property and sustain the transaction; others feel that the expressed contingency means that the donee is to receive the property only if the donor does not reclaim it before his death and hold the transaction ineffective. See *Mechem, The Requirement of Delivery in Gifts*, 21 ILL. L. REV 568, 596 (1927).

stitutes the intermediary an agent of the donor; but when delivery is attempted through such an agent, it is not complete until he surrenders the *res* to the donee; therefore there has been no delivery. Clearly this reasoning does not justify the conclusion that the reservation of a power of revocation is fatal to all attempts at delivery. It is applicable only to the intermediary cases.

Failure of courts to recognize that loss of physical power is the critical factor in delivery by manual tradition has also occasionally led courts to hold gifts void because following the transfer of physical power the donor had a legal power—though not a right—to defeat the title of the donee. Thus in *Hipple v. Skolmutch*,⁸⁶ the donor purchased an automobile as a present for his grandson. The donor could not drive and there was some evidence that the grandson agreed to drive him wherever he might want to go. Since the grandson was a minor, the car was registered in the donor's name. Physical control of the car was surrendered to the grandson who actually drove it for several months before the donor died. A statute provided that, "No person acquiring a motor vehicle from the owner thereof . . . shall acquire any right, title, claim, or interest in or to said motor vehicle until he shall have had issued to him a certificate of title. . . ." The trial court held that there was no gift simply because the statute prevented title from passing. The appellate court affirmed, but was unwilling to lay its decision solely upon the statutory provision. The appellate court held the gift void because of a defective delivery, saying:

Under the facts herein the decedent at any time could have changed his mind if Paul had not driven him where he wanted to go, or for any other reason, and could have sold or mortgaged the automobile at any time. Had decedent executed an assignment to an innocent third party, Paul would have been without recourse. . . . In this case the decedent did not irrevocably give up control and dominion over the chattel.

This reasoning of the court is ambiguous. The court said that the delivery was defective because the donor could transfer title to the car to a third party, leaving Paul without recourse; that this was in derogation of the dominion and control that must be surrendered. But what did the court mean by this? Recourse against whom? The third party? Or the donor?

If the court meant the former, then it is clearly wrong. The fact that a donor might be in a position to defeat the title of the donee to the subject of the gift by a transfer to a bona fide purchaser for value is wholly immaterial in determining the validity of the gift.⁸⁷ If the court meant that the

⁸⁶ 88 Ohio App. 529, 100 N.E.2d 645 (1950).

⁸⁷ See *Beals v. Lord*, 86 R.I. 241, 134 A.2d 127 (1957). See also the many cases in which the

delivery was defective because Paul would have had no recourse against the donor, then it is begging the question. Whether or not Paul would have recourse in such case would depend upon the validity of the gift. This was not an attempted revocable gift where it was stipulated that Paul would have no recourse if the donor revoked the gift. Giving full credence to all the evidence in the case, the only circumstance in which the parties agreed that Paul would have no recourse was if he refused to drive the donor wherever he wanted to go. But the court does not premise its argument upon his circumstance. It says that Paul would have no recourse if the donor revoked "for any . . . reason." The only possible basis for this conclusion is that the court considered the gift invalid for some other reason. Clearly this conclusion cannot be used in demonstrating the invalidity of the gift for it assumes what must be proven.

This is an error that crops up in many decisions where the donor has expressed no intent that the gift should in any way be revocable. While arguing to a defective delivery because the donor was privileged to undo the transaction, the court premises its conclusion that he was so privileged on the fact that the gift was invalid for some reason other than this supposed defect in the delivery. Though the statement of the requisites of a valid delivery which is often found in these cases seems to preclude the validity of any type of revocable gift, it is clear that such statements are too broad and not good authority for that proposition.³⁸

So far, discussion has been limited to cases where a delivery by manual tradition was attempted. There are many cases in which such delivery is

property following the gift was returned to the custody of the donor; *BROWN, PERSONAL PROPERTY* § 39 (2d ed. 1955).

Where the rights of the donor's creditors are concerned, the retention of such power has been held material. See *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287 (8th Cir. 1904); *Little v. Willets*, 55 Barb. 125 (N.Y. Sup. Ct. 1869). In the former case, the court recognized that in so far as the rights of the parties between themselves were concerned the gift was valid.

³⁸ See, e.g., *Williams v. Chamberlain*, 165 Ill. 210, 46 N.E. 250 (1896); *Peters' Adm'r. v. Peters*, 224 Ky. 493, 6 S.W.2d 499 (1928); *Cartall v. St. Louis Union Trust Co.*, 348 Mo. 372, 153 S.W.2d 370 (1941); *In re Humphrey*, 191 App.Div. 291, 181 N.Y.S. 169 (1920); *Davis v. National Bank of Tulsa*, — Okla. —, 353 P.2d 482 (1960). In the *Williams* case, the court argued that since there had been no transmutation of possession the gift was revocable and therefore void; clearly the argument should have been that since the gift had not been perfected by a valid delivery, it was ineffective and therefore "revocable."

Much of this confusion seems to spring from the oft-repeated statement that gifts are revocable until perfected by a valid delivery. Technically, this statement is inaccurate; for clearly there is no gift whatsoever, in the legal sense of the term, until the transaction has been perfected by a valid delivery. (Historically, this might not have always been so. See *Jenk.* 108, 145 Eng.Rep. 76). The statement is designed merely to convey the idea that until the transaction has been perfected by a valid delivery, the intending donor is not legally bound by—and thus, in a sense, can revoke—whatever donative intent he might have formed and whatever acts in execution thereof he might have taken. The statement thus uses the word, gifts, in a nontechnical sense to describe any act or conduct that a layman might

not required. Though delivery is still generally defined in terms of the surrender of dominion and control in these cases, they seldom in so far as they involve gifts of chattels produce statements embarrassing to the theory of delivery being propounded herein; for it is generally clear that when speaking of the loss of dominion and control, the court is referring to physical control over the chattel and that depending upon the circumstances it is often satisfied with less than the surrender of all such control.

There are, however, many statements in cases involving gifts of choses in action that seem to relate the requirement of delivery to the surrender of legal rights and powers. Ambiguity in this area is understandable for choses are merely legal rights, and it is easy to think in terms of the loss of the right or power to maintain suit on the chose when looking for a surrender of control. But the loss of the right to maintain suit cannot be the test of a valid delivery for it is an effect of the gift, not a prerequisite to it.³⁹

Perhaps the clearest illustration of error that has resulted from the unwarranted stress in cases involving gifts of choses on the surrender of legal rights can be found in the bank account cases. The early cases generally held that when a donor attempted to make a gift of an interest in his account by changing its designation on the bank's books into the joint names of himself and the donee, no gift was effected as long as the donor retained his right of withdrawal.⁴⁰ These cases usually reasoned to a defective delivery because the donor had retained control through his right to withdraw the deposit. The trend of recent decisions, however, has been away from this result and to recognize that the mere reservation of a right to withdraw does not preclude the effectiveness of the gift.⁴¹

How can the dominion and control test be applied to this type of case? There is no surrender of physical power over any tangible thing. Nor is there a loss of all jural rights through the exercise of which control may be exerted over the chose. It is submitted that part of the answer lies in the fact that the donor loses control over the act of delivery itself. It is of such

conceivably consider to be a gift. When it is remembered that the statement uses the word in this sense, it is innocuous enough; for then it is clear that it does not tell us anything about true gifts. It is only when we forget that the word is not used in its technical sense that we are tempted to turn the statement around and generalize a bit and come up with the erroneous rule that if a gift is in any way revocable then there has been no valid delivery.

³⁹ The difficulty in applying the loss of dominion and control test to gifts of choses is well pointed out in 4 CORBIN, CONTRACTS § 911 (1951).

⁴⁰ See, e.g., *Clark v. Bridges*, 163 Ga. 542, 136 S.E. 444 (1927); *Taylor v. Grimes*, 223 Iowa 821, 273 N.W. 898 (1937); *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45 (1899); *Rose v. Osborne*, 133 Me. 487, 180 Atl. 315 (1935); *Flanagan v. Nash*, 185 Pa. 41, 39 Atl. 818 (1898); *Daly v. Pacific Savings & Loan Ass'n*, 154 Wash. 249, 282 Pac. 60 (1929).

⁴¹ See BROWN, PERSONAL PROPERTY § 65 (2d ed. 1955); 4 CORBIN, CONTRACTS §§ 793, 914 (1951); *Kepner, Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959).

a character that he cannot reasonably expect to be able to deny that it ever took place.⁴² [The fact that the title of the account was changed must always stand. The donor cannot hide this fact or retrieve the evidence of it.] But, it is felt, that the more important thing is that by performing the act the donor signifies his intent to be legally bound by the transaction of which it is a part and thus loses his complete, personal control over the effects of the transaction. The act consummates his donative intent and makes the whole transaction a jural act.⁴³ He is now and forever committed to its legal effects. He cannot change them in any manner. Concededly he can still alter the practical effects of the transaction. But these can be changed, not by denying that a gift had been made, but only by going forward with the transaction, by conceding the effectiveness of the gift and performing the jural act that the terms of the transaction provide as the means of changing the practical effects. As the court in one of these cases said, the gift "might subsequently prove valueless. . . . But for what it was worth it was a completed gift."⁴⁴

It is impossible to rationalize all of the intricacies of the requirement of delivery in gifts of personal property. In his scholarly study, however, Professor Mechem discovered three desiderata that are generally served by the requirement as it is applied in most of the cases:

[It] a) makes vivid and clear to the donor the act he is doing, b) makes unequivocal to contemporary witnesses, if any, the nature of the act done, and c) gives to the donee, subsequently to the alleged gift, something which may serve as at least presumptive evidence of the truth of his claim.⁴⁵

Implicit in these desiderata, if not actually expressed in the second, is a recog-

⁴² Laymen realize the importance of proof to a law suit. They know that the chances of their being successfully sued depend in part upon the strength of the proof that is available to their adversary. Thus it does not seem unreasonable to relate the firmness of their intention to be legally bound by a particular transaction to the strength of the proof of that transaction that they make available to the other party.

Though the registration of stock in the name of another is generally held to be a sufficient delivery to sustain a gift of the stock to the other even though the donor retains possession of the newly-issued certificates, some courts have been reluctant to apply the rule when the corporation was dominated by the donor and he was in control of its stock books. See *Scott v. Self*, 208 F.2d 125 (8th Cir. 1953); *In re Jackson*, 300 Ill. App. 566, 21 N.E.2d 792 (1939); *In re McCoy*, 189 Wash. 103, 63 P.2d 522 (1937).

⁴³ A jural act:

does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final The necessity for a delivery of a document, and the nature of a delivery, are here the most usual questions in practice.

⁹ WIGMORE, EVIDENCE § 2404 (3d ed. 1940).

⁴⁴ *Burns v. Nolette*, 83 N.H. 489, 144 Atl. 848 (1929).

⁴⁵ Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 341, 354 (1926).

dition that delivery has a packaging effect upon the transaction that enables witnesses—but more importantly, a court—to say with reasonable certainty that the donor is no longer merely thinking of making the gift but has actually done so and now intends his previously expressed donative intent to have legal effect. In this respect, the requirement of delivery serves the same purpose in the law of gifts as it does in many other areas. The law is careful not to attach legal significance to proposed transactions until it is reasonably certain that the parties themselves intended the transaction to produce legal effects. Thus the mere signing of a deed or contract is not sufficient to make it legally operative; the signer must also manifest his intent to be legally bound by the instrument by “delivering” it. It is submitted that the requirement of delivery in gifts is designed in part at least to serve this same purpose: to indicate the donor’s intent that the gift is now complete and legally operative.

In the joint bank account cases, the changing of the title of the account on the bank’s books serves this as well as Mechem’s other desiderata. It is the type of act that a reasonable man would perform only with deliberation and an intent to implement and effectuate some desired purpose. Since a power of revocation in the form of a right to withdraw is retained, it concededly does not require the same amount of deliberation about the practical consequences as would otherwise be involved. But in the same manner, a gift of a hundred dollars requires less deliberation than a gift of a thousand dollars; yet the same type of act is recognized as a valid delivery for a gift of either amount. Deliberation about the practical consequences is not too important a consideration for it will automatically be present in direct proportion to the value of the gift once an intent to make the transaction legally enforceable is found. And such an intent is found in the act of changing the title of the account. Laymen know that the ownership of a bank account is generally identified by the record of the account on the bank’s books. Thus they know that the addition of another’s name to their account is an act of which the law takes cognizance. Therefore when they perform such an act, it can be construed as an expression of an intent to give legal effect to, and thus accept the legal consequences of, the transaction of which it is a part.

It is submitted that this end served by the requirement of delivery explains the true significance of the phrase, loss of dominion and control, as used in these cases. The act must be of such a character that it signifies the donor’s intention to surrender control over the legal effects of the transaction. It must indicate his unqualified intent that the transaction now has legal significance, that it is now legally binding on him and that its effects are to be determined by legal rules and principles and not wholly by his personal caprice. This does not, however, necessarily mean that the donor must surrender

control over the practical consequences of the transaction. The legal effects and the practical consequences must be distinguished. When a revocable trust is created, the legal effect of the transaction is the immediate conveyance of a defeasible interest in the property to the cestui. The settlor is irrevocably committed to this effect, and cannot change it in any manner. But the practical effect of the transaction remains subject to the settlor's control; for by exercising his reserved power, he can terminate the cestui's interest at any time he sees fit. Though an exercise of the power seems to destroy the legal effect of the original transaction, it does not. Any complete abstract of the title to the property will have to show that the cestui for a time owned a defeasible interest therein.

That this is the true meaning of the dominion and control test seems clearly indicated by the many cases in which a valid delivery was found even though the donor did not part with other types of dominion and control. Thus in *Hillebrant v. Brewer*,⁴⁶ a valid delivery was found in the donor's act of placing the donee's brand on certain cattle even though he retained physical control of the animals thereafter.⁴⁷ In *Rand v. Rand*,⁴⁸ a valid delivery was found in the donor's act of filing an affidavit on the public records showing his wife as the owner of a business even though he continued to manage and control the business till his death.⁴⁹ In *Smith v. Acorn*,⁵⁰ a valid delivery was found in the donor's act of delivering a written assignment of an automobile to the donee even though he retained physical control of the car and an element of dominion in the right to use it until his death.⁵¹ In *Garrett v. Keister*,⁵² a valid delivery was found in the donor's act of taking from his debtor and recording an installment note made payable to the donee even though the donor retained possession of the note and a larger element of dominion in the right to collect and use all payments of principal and in-

⁴⁶ 6 Tex. 45, 55 Am. Dec. 757 (1851).

⁴⁷ See also cases involving gifts of stock accomplished by registering it in the name of the donee while the donor retains possession of the newly-issued certificates. *Wilmington Trust Co. v. General Motors Corp.*, 29 Del. Ch. 572, 51 A.2d 584 (1947); *Becker v. Glenn*, 29 F. Supp. 558 (D.C. Ky. 1939); *Crouse v. Judson*, 41 Misc. 338, 84 N.Y.S. 755 (1903); *Manning v. United States National Bank of Portland*, 174 Ore. 118, 148 P.2d 255 (1944).

⁴⁸ 132 F. Supp. 929 (D.C. Ky. 1955). This case well illustrates the confusion that has been generated by the control formula. Though the court parroted the phrase about parting "with all present and future control of the property," it sustained the gift even though it found that until his death the donor "continued to use the property and to draw on the bank account [an asset of the business] and in a general way to conduct his affairs as he had prior to" the gift.

⁴⁹ See also *Gordon v. Barr*, 13 Cal.2d 596, 91 P.2d 101 (1939); *Wilmington Trust Co., v. General Motors Corp.*, 29 Del. Ch. 572, 51 A.2d 584 (1947); *Hardymon v. Glenn*, 56 F. Supp. 269 (D.C. Ky. 1944); *Bryant's Adm'r. v. Bryant*, 269 S.W.2d 219 (Ky. 1954).

⁵⁰ 32 A.2d 252 (D.C. Mun. App. 1943).

⁵¹ See also *M'Kane's Ex'rs. v. Bonner*, 1 Bailey 113 (S.C. 1828).

⁵² 56 F.2d 909 (D.C. Cir. 1932).

terest that might come due before her death.⁵³ Finally in many *causa mortis* gift and revocable trust cases, valid deliveries were found under a variety of circumstances even though the donors and settlors retained the largest elements of dominion and control in their right to appropriate all of the properties to their own uses. Though all these donors retained substantial amounts of dominion and control, nevertheless each transaction was executed by the performance of an act that signified an intention that the transaction of which it was a part was to have legal significance, that its effects were to be determined by legal rules and not wholly by the personal caprice of the donor.

In summary then, it is submitted that the vast majority of the statements that seem to indicate that the reservation by a donor of any type of a power or right to revoke the gift precludes the validity of the delivery are clear dicta. In most of these cases, it is clear that all that the court meant was that the donor must surrender physical control over the *res*. The meaning of the phrase in other cases is obscure but most of these cases can be harmonized by relating it to a requirement that the donor manifest an intent to lose personal control over the legal effects of the transaction. The act of delivery must be of such a nature that it signifies the donor's intention that the transaction is to have legal significance, is to be governed by legal rules and principles. The requirement of surrendering physical control in the manual tradition cases is merely a particularization of this more general principle; when the property is capable of passing out of the donor's physical control, this is the natural act that indicates his intention to be legally bound.⁵⁴ When the act is of such a nature that it does signify an intention to be legally bound, an intention that the effects of the transaction are no longer wholly subject to the personal caprice of the donor but rather are to be determined by legal rules and principles, then it is submitted that the act constitutes a valid delivery even though the terms of the transaction reserve a legal right or power through the exercises of which the donor may undo its practical consequences.

PART IV: CONCERNING QUALIFIED DONATIVE INTENT

Statements in many cases seem to indicate that every attempt by a donor to reserve any kind of right or power to revoke his gift will necessarily detract

⁵³ See also *Connelly v. Bank of America Nat. Trust & Savings Assn.*, 138 Cal. App. 2d 303, 291 P.2d 501 (1956); *Thatcher v. Merriam*, 121 Utah 191, 240 P.2d 266 (1952).

⁵⁴ Though the law seems set in its opposition, the intermediary cases could be evaluated by this norm. When the intermediary is a personal servant, closely dependent upon the employer and thus sensitive to his every wish, the transfer of physical control to the servant clearly does not have the flavor of finality that the law requires. But when the intermediary is more independent, *e.g.*, a lawyer or banker brought in only to effectuate the transaction,

from the proper intent required for a valid gift *inter vivos*. It is clear that in order to make a valid gift the donor must have a present donative intent, that is, he must intend to pass to the donee here and now, at the time the expression of gift is made, title to the property, or at least such interest therein as he intends to be the subject of the gift.¹ His intent cannot be that the title or interest will pass tomorrow, or next year, or at any other future time. If such is his intent, then he has merely promised to make the gift at such future time and the promise is unenforceable unless supported by consideration.² Moreover, if the donor intends that the title will pass only at his death, an added difficulty is encountered, for then the transaction is testamentary and void for that reason, unless executed with the formalities of a will.³

Since most attempts at revocable gifts have come under judicial scrutiny at the donor's death, it is the latter objection—the absence of testamentary formalities—that has generally been pressed upon the courts. It is generally argued that since the donor retained the power or right of revoking the gift at any time before his death, he could not have had a present donative intent, he could not have intended that the donee receive any interest in the property until his death. It is submitted that this argument is fallacious.⁴ Conveyors of land⁵ and settlors of trusts⁶ must have a similar *in praesenti* intent. Yet deeds and trust instruments are frequently held effective to presently pass an interest to the grantee or cestui despite the fact that they might reserve a power of revocation.⁷ Such reserved powers are generally held not to negative the requisite intent but merely to qualify and limit the estate conveyed by the instrument. Is it not possible that a donor's power of revocation might also merely limit the estate of the donee?

the average layman should perceive the possibility of legal consequences being attached to a transfer of possession to him, and thus in such cases it seems that such an act could be viewed as a valid delivery even though a power of revocation had been reserved. See *Daggett v. Simonds*, 173 Mass. 340, 53 N.E. 907 (1899).

¹ See BROWN, *PERSONAL PROPERTY* § 48 (2d ed. 1955), wherein a gift is defined as "a present passing of title."

² *Kraus v. Kraus*, 235 Ind. 325, 132 N.E.2d 608 (1956); *Pomerantz v. Pomerantz*, 179 Md. 436, 19 A.2d 713 (1941); *Berman v. Leckner*, 193 Md. 177, 66 A.2d 392 (1949); *Smith v. Smith*, 353 Mo. 1073, 192 S.W.2d 691 (1946); 1 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 32 (1947).

³ 1 PAGE, *WILLS* § 6.16 (Bowe-Parker Rev. 1960).

⁴ The argument seems to spring primarily from the general confusion that identifies revocability as the essential characteristic of a will. But it is its ambulatory nature that makes a will testamentary; revocability is but an effect of this essential characteristic. See 1 PAGE, *WILLS* § 5.17 (Bowe-Parker Rev. 1960); 4 TIFFANY, *THE LAW OF REAL PROPERTY* § 1071 (1939).

⁵ 3 AMERICAN LAW OF PROPERTY § 12.64 (1952); 4 TIFFANY, *THE LAW OF REAL PROPERTY* § 1070 (3d ed. 1939).

⁶ 1 SCOTT, *THE LAW OF TRUSTS* § 26 (2d ed. 1956).

⁷ 1 SCOTT, *THE LAW OF TRUSTS* § 57.1 (2d ed. 1956); Garvey, *Revocable Gifts of Legal Interests in Land*, 54 KY. L. J. 19 (1965).

Through centuries of adjudications, the courts have developed a technical and sometimes bewildering scheme of estates in our land law. Pollock and Maitland observed that the "most salient trait" of this branch of the law is the fact that proprietary rights in land may be projected upon the plane of time and divided into a variety of chronologically successive segments, each having a duration of its own.⁸ Today we are accustomed to dealing with such divisions of the ownership of land and to calling most⁹ of the segments, future interests. The term is somewhat misleading for it seems to imply that the interest has only future, and no present, existence. But this is not the case. The word, future, refers not to the time when the interest comes into being but merely to the time when the interest will or may become possessory.¹⁰ From the moment of its creation, the future interest is a part of the total ownership. It is a part of the bundle of rights to which we refer when we speak of the complete and absolute title. It has just as much present existence as any other part of that bundle, including the rights of the owner of the possessory interest.¹¹

It is this recognition of the future interest in land as a presently existing though remote segment of ownership that enables us to classify, as valid inter vivos conveyances, many deeds of land that appear to have testamentary characteristics. The deed of a future interest produces its full and complete operative effect upon delivery.¹² It immediately conveys a segment of ownership to the grantee. It has no other, no later, effect. If the grantee subsequently becomes entitled to possession of the land, it is not because the deed creates any new right in him at that time. It is simply because all the other segments of ownership—or, at least, all those prior to the grantee's—have expired or been defeated and the event has occurred which entitles the grantee, by virtue of his previously existing partial ownership, to possession.

Through centuries of "following the law," the chancellors devised a similar system of equitable ownership for cestuis que trust. The recognition of the equitable future interest of a remote trust beneficiary as a presently existing segment of the total equitable ownership of the trust *res* enables us to explain why the revocable trust, the most popular modern will substitute, is technically not a testamentary device. When A declares himself trustee of certain property for his own benefit for life remainder for B, the trust is not testamentary even though A also reserves a power to revoke the trust at any time he sees fit. As Professor Scott explains, "the beneficiary at once

⁸ 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 10 (2d ed. 1898).

⁹ For exclusions, see 2 RESTATEMENT, PROPERTY § 153 (1936).

¹⁰ SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 1 (2d ed. 1956).

¹¹ 1 RESTATEMENT, PROPERTY § 5 (1936).

¹² Ballantine, *When Are Deeds Testamentary*, 18 MICH. L. REV. 470 (1920); 2 TIFFANY, *THE LAW OF REAL PROPERTY* § 359 (2d ed. 1939).

acquires a future interest, although it is an interest subject to be divested by the exercise of the power."¹³ When A dies without exercising the power, B's partial ownership becomes total ownership, not because B receives a new title at that time but merely because A's partial title and power are then extinguished. Thus the declaration of trust operated fully, completely and only during A's life. It was in no way testamentary.

It is true, of course, that our law of personal property does not completely parallel our law of real property. The sources of the two were different and many factors that moulded the one had little influence in the development of the other. Chattels, especially those that were typical in medieval society,¹⁴ generally lack the elements of permanence and indestructibility that are characteristic of land. In view of this, it is not too surprising that our ancestors failed to countenance attempts to create future interests in them.¹⁵ The bulk of our personal property today, however, is no longer of this type. Not only do we have more durable chattels but we also have intangible personalty, the permanence of which somewhat resembles that of land.¹⁶ As these more permanent forms of personalty became common, the courts borrowed from the law of real property and began recognizing the possibility of creating future interests therein.¹⁷ In the United States today, it is generally said that the same types of future interests may be created in nonconsumable personalty as may be created in land.¹⁸

Before this development had taken place, many courts framed a rule to the effect that gifts inter vivos must be absolute and unconditional, that the donor must part with all interest in the donated property and could retain

¹³ 1 SCOTT, *THE LAW OF TRUSTS* § 57.1 (2d ed. 1956); see also 1 BOGERT, *TRUSTS AND TRUSTEES* § 103 (1951).

¹⁴ "[T]he typical chattel in medieval society was the beast." BROWN, *PERSONAL PROPERTY* § 7 (2d ed. 1955).

¹⁵ "In the early days of English history, holdings of choses in action and durable personal property were comparatively insignificant. . . . So it was then considered that the ownership of personal property was absolute and incapable of division into successive interests. . . ." Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433 (1952).

The early cases were also influenced by the thought that attempts to create future interests in chattels were analogous to attempts to create future interests in chattels real. There was a legal presumption that a life estate was larger than any term for years and thus it was frequently held that the grantee of a life estate in a term for years received the whole leasehold estate. See GRAY, *THE RULE AGAINST PERPETUITIES* 76 (4th ed. 1942); SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 334 (2d ed. 1956).

¹⁶ Business corporations are now frequently perpetual. See 8 FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4082 (Perm.ed. 1931).

¹⁷ The historical development of the idea of future interests in personalty and the American theory which views them in the same way as future interests in realty, i.e., as presently-existing segments of total ownership, is well presented in GRAY, *THE RULE AGAINST PERPETUITIES* 723-51 (4th ed. 1942). See also SIMES & SMITH, *THE LAW OF FUTURE INTERESTS*, §§ 351-371 (2d ed. 1956).

¹⁸ 2 RESTATEMENT, *PROPERTY* 814 (1936); GRAY, *THE RULE AGAINST PERPETUITIES* 87 (4th ed. 1942). Cf. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* §§ 360-63 (2d ed. 1956).

no part of the title in himself. This was merely an application of the ancient rule that a "gift or devise of a chattel for an hour is forever."¹⁹ It was a particularization of the general rule that recognized no form of property in personalty other than absolute and indefeasible ownership and which thus prohibited the division of the title to personal property into successive segments. The rule caused many early courts to strike down attempted gifts of personalty in which the donor had reserved to himself a life estate.²⁰ Thus in *Foscue v. Foscue*,²¹ the court held a deed of gift ineffective because the donor had reserved a life estate. The court's opinion is short and merely expresses "regret, that a disposition of property so just and simple in itself, cannot be sustained." The theory of the decision can be found in counsel's argument: "So where a grant is made to one to take effect after the whole estate of which the thing is capable is expended, nothing can pass to the grantee, but the whole remains as before in the grantor." Now that the basis of the rule has disappeared, such gifts are generally sustained today²² provided they are accomplished by deed or a valid delivery.²³

The rule, that gifts must be absolute and unconditional, also caused early cases to hold all gifts upon condition void, but today it is generally recognized that not all conditions render such transactions ineffective. Thus, it is commonly held that gifts made in contemplation of marriage are valid even though conditional.²⁴ Gifts upon condition that the donee use the property

¹⁹ BROOKE, ABR. DEVISE 13 (1576).

²⁰ *Gilbert v. Murdock*, 2 Hayw. 182 (N.C. 1802); *Graham v. Graham*, 2 Hawks 322 (N.C. 1823); *Vernon v. Inabnit*, 2 Brev. 411 (S.C. 1810); *Ingram v. Porter*, 4 M'Cord, L. 198 (S.C. 1827).

²¹ 3 Hawks 538 (N.C. 1825).

²² See, e.g., *Smith v. Smith*, 253 F.2d 614 (4th Cir. 1958); *Gordon v. Barr*, 13 Cal. 2d 596, 91 P.2d 101 (1939); *In re McVicker's Estate*, 39 Ill. App. 2d 389, 188 N.E.2d 731 (1963); *Hurley v. Schuler*, 296 Ky. 118, 176 S.W.2d 275 (1943); *Howard v. Hobbs*, 125 Md. 636, 94 Atl. 318 (1915); *Green v. Redmond*, 132 Md. 166, 103 Atl. 431 (1918); *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604, 3 A.L.R. 896 (1915); *Shaffer v. Kuthy*, 145 Ohio St. 516, 62 N.E.2d 199 (1945); *Beals v. Lord*, 86 R.I. 111, 132 A.2d 127 (1957); *Alexander v. Burnett*, 5 Rich. L. 189 (S.C. 1851). Cf. *In re Waggoner's Estate*, 5 Ill. App. 2d 130, 125 N.E.2d 154 (1955).

There is some confusion in the New York cases. In *Doty v. Wilson*, 5 Lans. 7 (N.Y.Sup.Ct. 1871), the court said that a gift of money could not be valid since the donor had reserved the right to collect interest on the sum until he died. See also *In re McKay's Will*, 120 N.Y.S.2d 738 (Sur. 1953), *aff'd*, 282 App. Div. 744, 122 N.Y.S.2d 926, *motion for leave to appeal denied* 282 App. Div. 841, 124 N.Y.S.2d 352 (1953). But in *In re Sussman's Estate*, 125 N.Y.S.2d 584 (1953), *aff'd*, 283 App. Div. 1051, 131 N.Y.S.2d 880, 284 App. Div. 844, 134 N.Y.S.2d 584 (1954), the court said that gifts of remainder interests following reserved life estates in donors are "clearly" valid but that the only way such a gift can be accomplished by parol is by "an absolute delivery" of the property "to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon." Similar language, suggesting that the donor does not reserve a part of title but merely creates a contract or trust duty in the donee, can be found in other New York cases.

²³ Concerning the problem of delivery in gifts of future interests, see *infra* note 59.

²⁴ See Annot., 24 A.L.R.2d 579 (1952).

for a specific purpose²⁵ or that he provide for the support and burial of the donor²⁶ have frequently been sustained. Though many cases can be found parroting the rule that gifts must be absolute and unconditional, it is generally by way of clear dicta. Brown observes that these dicta are "too broad to fit all the cases, and if distinctions be not carefully drawn are likely to lead to error."²⁷ Walsh states that they "are simply wrong."²⁸

Cases involving conditional gifts are of special interest for they demonstrate that the donor may qualify the ultimate economic outcome of his benefaction upon the occurrence of some future event without impairing the requisite *in praesenti* intent. In attempting to harmonize the conflicting cases, Professor Brown distinguishes between gifts on conditions precedent and those on conditions subsequent.²⁹ Though he spends much time developing his position that the latter are valid, he dismisses the former as invalid without much discussion. Though he never directly so states, he apparently assumes that since no interest can immediately "vest" in the donee when the condition is precedent, then no interest whatsoever can immediately *pass* to him.³⁰ Professor Walsh also maintains that conditional gifts are valid but he is unwilling to accept Brown's distinction.³¹ He points out that the only difference the nature of the condition makes is in the technical classification of the donee's interest as being either vested subject to defeasance or contingent. Whether it is one or the other, he says, is immaterial in determining whether or not the transaction is testamentary. For the only requirement is that the donee presently receive some interest and it is universally recognized today that even a contingent interest is a presently-existing part of ownership.

Certainly Professor Walsh is right in this matter. The esoteric distinction

²⁵ See *Edson v. Lucas*, 40 F.2d 398 (8th Cir. 1930); *Hurley v. Schuler*, 296 Ky. 118, 176 S.W.2d 275 (1943); *Simmer v. Flatt*, 74 Okla. 140, 177 Pac. 545 (1919); *University of Vermont v. Wilbur's Estate*, 105 Vt. 147, 163 Atl. 572 (1933).

²⁶ See *McNamare v. McDonald*, 69 Conn. 484, 38 Atl. 54 (1897); *Northern Trust Co. v. Swartz*, 309 Ill. 586, 143 N.E. 433 (1923); *Curlee v. Hall*, 296 Ky. 657, 178 S.W.2d 193 (1944); *Berry v. Cramer*, 339 Mass. 777, 162 N.E.2d 167 (1959); *Lewis v. Lewis*, 354 Mo. 425, 189 S.W.2d 557 (1945); *Gardella v. Santini*, 65 Nev. 215, 193 P.2d 702 (1948); *Reynolds v. Maust*, 142 Pa.Super. 109, 15 A.2d 853 (1940).

²⁷ BROWN, *PERSONAL PROPERTY* § 49 (2d ed. 1955).

²⁸ 1 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 32 (1947).

²⁹ BROWN, *PERSONAL PROPERTY* § 49 (2d ed. 1955).

³⁰ Mechem apparently made the same assumption; see Mechem, *The Requirement of Delivery in Gifts*, 21 ILL. L. REV. 568, 596 (1927). Simes points out that, at an early period of time, the contingent remainder in land was looked upon, not as an estate or an interest in property, but only as a possibility; it was not thought of as having present existence. He then warns that the "influence of this concept continues to be felt in modern times, but its significance is rapidly waning as the courts continue to recognize a contingent remainder as giving rise to present legal relations between the holder thereof and other persons." SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 137 (2d ed. 1956).

³¹ 1 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 32 (1947).

drawn in the field of real property between vested and contingent interests is important today primarily only in cases involving the application of the rule against perpetuities.⁸² The distinction was of wider significance in the past and concededly at one time it could have been material in determining whether or not a transfer was testamentary.⁸³ But this is not so today. No modern court would hold a deed of land testamentary merely because it transferred only a contingent or non-vested interest to the grantee.⁸⁴ Now that the law has progressed to the point of permitting the creation of future interests in personalty, it would be absurd to resurrect this outmoded relic of the past and apply it to such interests.⁸⁵

Though Walsh refutes the validity of Brown's distinction between conditions that are precedent and those that are subsequent to the vesting of the donee's title, his discussion of revocable gifts leaves much to be desired. Indeed, his position on the essential validity of such transactions is not entirely clear. While discussing the possibility of making gifts of future interests, he unqualifiedly states that if such a gift is "subject to revocation by the donor, it is a testamentary gift and therefore void."⁸⁶ Thus he apparently condemned all attempts at revocable gifts of future interests. Whether or not he felt the same way about revocable gifts of possessory estates is not certain. It must be conceded, however, that there is little reason to suspect that he intended to distinguish in this respect between the two.⁸⁷

Though Walsh did not recognize the possibility of a valid revocable gift,

⁸² See SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 1233 (2d ed. 1956). To a lesser degree, the distinction is also sometimes material in questions of destructibility, alienability, taxation, etc. See *id.* at § 134.

⁸³ The contingent remainder was once thought of as only a possibility of becoming an estate; it was not considered as having present existence. See SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 137 (2d ed. 1956).

⁸⁴ See 4 TIFFANY, *THE LAW OF REAL PROPERTY* § 1070 (3d ed. 1939); 3 *AMERICAN LAW OF PROPERTY* § 12.65 (1952).

⁸⁵ It is difficult to find any American case involving a gift of a contingent interest. In *Abbot's Adm'r. v. Williams*, 2 Brev. 38 (S.C. 1806), the court sustained a transaction as a valid gift even though it said that it was subject to a condition precedent; the court observed that absolute title vested at the donor's death when the condition had been performed. In *Love v. Francis*, 63 Mich. 181, 29 N.W. 843 (1886), the court sustained a gift of a remainder-type interest to the "heirs" of the donor. The court, however, considered this a vested remainder. See also *Ford v. Ford*, 270 Mich. 487, 259 N.W. 138 (1935), sustaining a gift of a postponed interest that was subject to a condition of survivorship. English courts apparently are not bothered by the technical classification of the donee's interest. Thus in 18 *HALSBURY'S LAWS OF ENGLAND Gifts* § 742 (3d ed. 1957), it is said: "Gifts may be made subject to conditions either precedent or subsequent."

⁸⁶ 1 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* § 32 (1947).

⁸⁷ Walsh does not explore the idea of a revocable gift. He simply dismisses such transactions with the statement quoted in the text without discussing the cases that prompted him to make it. It seems likely that he was solely interested in establishing the validity of gifts of future interests in general, and of conditional gifts in particular, and that he was not really concerned with revocable gifts as such. The statement in this context, however, seems odd. The American Law Institute has indicated that an event that involves no element other

Professor Brown did. After extensively discussing *Blanchard v. Sheldon*,³⁸ he indicates his approval of the outcome of the case and seems to defend the general idea of a revocable gift. He argues:

If the donor be permitted to make a gift of his entire interest in the chattel, it is somewhat arbitrary to deny to him the possibility of creating, through gift, limited and lesser interests. It may, of course, be said that if the donor reserves the unlimited right to revoke in substance he has parted with no interest in the subject matter at all, and since gifts to take effect only in the future are admittedly unenforcible, gifts of this nature should be treated likewise. In the dilemma presented the writer believes that the law should carry out the intentions of the donor. . . . If the transaction on the formal side is distinguishable from the mere promise to give, and no reason of public policy exists to thwart it, why should not the will of the donor be sustained.³⁹

The source of many of the statements about the invalidity of revocable gifts seems to be a line of cases represented by *Walden's Adm'rs. v. Dixon*⁴⁰ and *Irish v. Nutting*.⁴¹ In the *Walden* case, a man was preparing to make a journey. He gave a mare to a friend and told him that it was to be his if he did not return. The traveler died without returning. In the *Irish* case, a soldier, on his way to war, gave three promissory notes to a friend saying, "Take them, and if I never return they are yours; if I do return I shall want them." The soldier died about a year later without returning. In both of these cases, the courts held that valid gifts had not been made and awarded the property to the estates of the "donors." Though both of these cases are frequently cited for the proposition that gifts inter vivos must be irrevocable, it is submitted that their value as precedent today is very questionable. They were both decided before the possibility of creating future interests in personal property was widely recognized and each opinion cites and relies upon Blackstone's definition of a gift as the transfer of "the right and the possession of [property] whereby one man renounces, and another man immediately acquires, all title and interest therein."⁴² A careful reading of these opinions indicates that each transaction was held ineffective not so much because it was revocable but rather because it was an attempted transfer of

than an exercise of the volition of the conveyer might possibly be a valid condition for the defeasance of an estate. 1 RESTATEMENT, PROPERTY § 45, comment g, caveat (1936). If this is so, then it seems clear that a donor could make a revocable gift in the form of a gift subject to a condition of the non-exercise of his volition, which would be technically indistinguishable from Walsh's other conditional gifts and clearly within his general thesis.

³⁸ 43 Vt. 512 (1871), discussed in Part I *supra*.

³⁹ BROWN, PERSONAL PROPERTY § 49 (2d ed. 1955).

⁴⁰ 5 T.B.Mon. (21 Ky.) 170 (1827).

⁴¹ 47 Barb. 370 (N.Y. 1867).

⁴² 2 BLACKSTONE, COMMENTARIES *441.

a qualified rather than an absolute interest. Such a rationalization is unacceptable today.

It seems likely that Brown was influenced by these cases when he formulated his distinction between conditions that are precedent and those that are subsequent to the vesting of the donee's interest. He apparently approved of the holdings and did not wish to criticize the cases.⁴³ Yet he also saw nothing wrong with giving effect to the donor's intention in such cases as *Blanchard v. Sheldon*⁴⁴ and *Gould v. Van Horne*.⁴⁵ Looking at these two lines of authority, he must have noted that in the one the donor generally phrased the contingency in the form of a technical condition precedent (this is yours if I die). In the other it was generally phrased in the technical language of a condition subsequent (this is yours, but I reserve the right to take it back) and thought that this was the critical distinction between them. But it is submitted that if these two lines of cases are to be distinguished,⁴⁶ it should be done on the basis of the *time* when title was intended to pass rather than on the basis of the *nature* of that title. It seems possible to argue that the donors in the *Walden* and the *Irish* cases did not really intend to pass any title to their donees at the time of the transactions but were merely designating the persons they desired to receive title in the event of their deaths during the activity. Each donor was about to undertake a somewhat perilous activity. Each sought to provide for the safekeeping of the property during the activity. Each had a definite intention to reclaim the property if and when the activity was accomplished and in each case, the donee was to keep the property only if his benefactor failed to survive the activity. None of these circumstances were present in the *Blanchard* and the *Gould* cases. Here the transfers of the property were not relatable to a desire to provide for its safekeeping nor did these donors have *any fixed intention to reclaim* it at some future time. Here the donors clearly seem to have intended to im-

⁴³ For other cases similar to the *Walden* and the *Irish* cases see: *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949), where a soldier gave his bank book and a signed blank check to a friend saying, "If I happen to crap out, it is all yours. If you need any money while I am gone go to the bank and get it"; *Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118 (1872), where a soldier who had lent a gun to a friend said, "Well, if I never return, you may keep the gun as a present from me"; *Hafer v. McKelvey*, 23 Pa. Super. 202 (1903), where a man before going on a journey gave his landlady a promissory note saying that if he did not come back, it was hers. *Contra*, *Baker v. Williams*, 34 Ind. 547 (1870), where a soldier deposited money with a friend under a written agreement that the money would be returned if the soldier came back, but that if he died, it would be paid to his sister; the transaction was sustained. See also *Virgin v. Gaither*, 42 Ill. 39 (1866).

⁴⁴ 43 Vt. 512 (1871), discussed *supra* in Part I.

⁴⁵ 43 Cal. App. 145, 187 Pac. 35 (1919), discussed *supra* in Part I.

⁴⁶ Possibly the *Walden* and the *Irish* cases should be criticized and not distinguished. Stressing that the donors were able to reclaim the property only upon the occurrence of an event beyond their control (survival of the activity), Walsh argues that they were wrongly decided and that the transactions should have been given effect as valid conditional gifts. 1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 32 (1947).

mediately pass title to their donees and, recognizing that this outstanding title might embarrass them in the event of some unforeseen change of circumstance, they reserved the right to revoke it. Viewed in this light, it may be said that the donors in the *Walden* and the *Irish* cases had made their deaths conditions *precedent to the gifts* themselves, precedent to the passage of any title to the donees. While the donors' deaths in the *Blanchard* and the *Gould* cases were *subsequent to the gifts*, subsequent to the passage of title to the donees, even though they were precedent to such title's becoming absolute.

Though no gift case has been found in which the court expressly recognized this distinction between conditions that are precedent and those that are subsequent to the gift itself, the distinction is not completely novel. It is similar to the distinction currently drawn in the field of trusts to distinguish valid inter vivos trusts from invalid testamentary attempts. According to the *Restatement*, a trust is testamentary "where the death of settlor is a condition precedent."⁴⁷ Clearly, this does not mean that a trust is testamentary if the settlor's death was precedent merely to the vesting of the cestui's interest. For there is no doubt that a trust may be inter vivos even though the interest of all beneficiaries is contingent upon the existence of a state of facts at the time of the settlor's death.⁴⁸ Clearly, the members of the American Law Institute meant that the trust is testamentary only if the settlor's death is a condition precedent to the passage of any title to the cestui, precedent to the trust itself. The *Restatement* enumerates the four instances in which the settlor's death is considered such a condition:

the intended trust may fail, therefore, either 1) where the conveyance is incomplete for want of delivery or because it was not intended to be effective until the settlor's death; 2) where the conveyance is ineffective because the trust property is not designated during the lifetime of the settlor; 3) where the conveyance is ineffective because the trustee is not designated during the lifetime of the settlor; 4) where, although the conveyance is effective, the intended beneficiary is not designated during the lifetime of the settlor.⁴⁹

It is submitted that these same principles can be applied to gifts inter vivos. They are testamentary only if the donor's death has in some similar manner been made a condition precedent to the gift itself, precedent to the passage of any interest to the donee. This will be so in any case; 1) where the gift was incomplete for want of delivery at the donor's death; 2) where the gift was not intended to be effective—in interest—until his death; 3) where the prop-

⁴⁷ 1 RESTATEMENT, TRUSTS § 56 (2d ed. 1959).

⁴⁸ *Id.* at Comment f.

⁴⁹ *Id.* at Comment a.

erty is not ascertainable during his lifetime;⁵⁰ or 4) where the donee was not designated during his lifetime.⁵¹ The first of these groups need not concern us here. We concede that no gift, absolute or revocable, is valid without a proper delivery. Nor are the third and fourth groups of primary concern. They are merely particularizations of the principle found in the second group, *i.e.*, the donor cannot have a present intent if either the donee or the property is not identifiable for these are essential elements of that intent. It is the second group that is of primary concern. How can we tell when the donor intended the gift to be effective in interest?

Many cases have held that discovering this intention is the key to determining whether or not a gift is testamentary.⁵² In so far as revocable gifts are concerned, however, this involves determining whether the donor intended the gift to be immediately effective to transfer a defeasible title to the donee or whether he intended the transaction only to pass an absolute interest at the moment of his death? Unfortunately the distinction between a disposition to take effect only on the death of the donor and one to take effect immediately but subject to revocation at the donor's whim is evanescent and difficult even for the well trained lawyer to grasp. How can we expect a layman to form an intent about so subtle a matter? We cannot. The most that we can do is look at all the circumstances of the transaction and impute a fictitious intent to the donor. It is submitted that when imputing such an intent, we should impute a valid one—one that will sustain the transaction and give effect to the manifested desires of the donor—unless there is something in the transaction that affirmatively manifests an invalid one.⁵³ This is what is done in the trust cases. We assume that the settlor intended the reserved power to qualify the estate of the donee in the absence of special circumstances.⁵⁴ This is but another step in the liberal trend of construing

⁵⁰ See *In re Salzwadel*, 171 Wisc. 441, 177 N.W. 586 (1920) (attempted gift of all property owned at death); *Ladman v. Farmers & Merchants Bank*, 130 Neb. 460, 265 N.W. 252 (1936) (advancements to be considered in determining shares of donees).

This is the principal difficulty with gifts of the balance remaining in a fund or bank account at the donor's death; see herein *infra*, Part V. It is usually held, however, that a gift of the balance of a fund remaining after donor's funeral expenses are paid is valid; see, *e.g.*, *Northern Trust Co. v. Swartz*, 309 Ill. 586, 141 N.E. 433 (1923); *In re McCredy's Estate*, 72 N.Y.S.2d 219 (Sur. 1947), *aff'd*, 274 App. Div. 363, 83 N.Y.S.2d 806, *appeal denied*, 274 App. Div. 1085, 86 N.Y.S.2d 294 (1949); *Reynolds v. Maust*, 142 Pa. Super. 109, 15 A.2d 853 (1940).

⁵¹ See *Calvin v. Free*, 66 Kan. 466, 71 Pac. 823 (1903).

⁵² See *Gordon v. Barr*, 13 Cal.2d 596, 91 P.2d 101 (1939); *Kuebler v. Kuebler*, 131 So.2d 211 (Fla. 1961); *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604 (1915); *Kauffman v. Edwards*, 92 N.J. Eq. 554, 113 Atl. 598, (1921); *In re Sussman's Estate*, 125 N.Y.S.2d 584 (Sur. 1953), *aff'd*, 283 App. Div. 1051, 131 N.Y.S.2d 880, *appeal denied*, 284 App. Div. 844, 134 N.Y.S.2d 586 (1954); *Rennie v. Washington Trust Co.*, 140 Wash. 472, 249 Pac. 992 (1926). See also 1 PAGE, WILLS § 6.16 (Bowe-Parker Rev. 1960).

⁵³ *Mims v. Ross*, 42 Ga. 121 (1871) and *Zeman v. Mikolasek*, 75 N.D. 41, 25 N.W.2d 272 (1946) are good illustrations of circumstances affirmatively manifesting a testamentary intent.

⁵⁴ See, *e.g.*, *Booth's Trust*, 400 Pa. 117, 161 A.2d 376 (1960), where the court ignored an

the testamentary language frequently found in poorly drafted instruments in such a way as to give effect to the intention of the parties wherever possible.⁵⁵ Moreover, since the courts recognize as a valid delivery only such acts as indicate an intention that the transaction is to be immediately binding on the donor and productive of legal consequences,⁵⁶ it is a perfectly logical step to take. Thus, it is submitted, that the same test should be applied in determining whether or not a revocable gift is testamentary as that applied to the revocable trust. If the donor has performed a sufficient act of delivery, then the gift should be held testamentary only if there is something in the transaction that affirmatively shows that the donor did not intend to immediately pass at least a qualified interest to the donee.

When the cases are viewed in this light, when it is recognized that the primary problem is in determining when the donor intended the transaction to be effective in interest, it is clear that whether the donee receives a possessory or only a future interest is not of critical significance. Thus the gifts were sustained in both *Blanchard v. Sheldon*⁵⁷ and *Gould v. Van Horne*,⁵⁸ even though the former involved a revocable gift of a remainder-type interest and the latter a revocable gift of a possessory interest. Of course, if the donee receives a possessory interest, it is easier to see the immediate effect of the transaction and to recognize the *in praesenti* character of the donative intent. But we are familiar enough with gifts of future interests to know that the fact that the donee does not receive the right to immediate enjoyment does not necessarily indicate a testamentary intent.⁵⁹

express provision that the remaindermen were to have no interest until after the life tenant had died. See also 1 BOGERT, TRUSTS & TRUSTEES § 103 (1951); 1 RESTATEMENT, TRUSTS § 26 (2d ed. 1959).

⁵⁵ See 3 AMERICAN LAW OF PROPERTY § 12.89 (1952); 6 POWELL, THE LAW OF REAL PROPERTY 241 (1958); RITCHIE, ALFORD, & EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 308 (2d ed. 1961).

⁵⁶ See herein *supra*, Part III.

⁵⁷ 43 Vt. 512 (1871), discussed *supra* in Part I.

⁵⁸ 43 Cal. App. 145, 187 Pac. 35 (1919), discussed *supra* in Part I.

⁵⁹ Gifts of future interests raise special problems of delivery. Since possession of a chattel is generally required to enjoy the possessory interest in it, a gift of a future interest in such property probably cannot be accomplished through a manual tradition. See SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 445 (2d ed. 1956). A deed of gift is generally used in such cases.

Most gifts of future interests have involved choses in action. It is generally held that a donor may reserve a life estate in a chose while manually delivering the document that represents it into the hands of a donee. *State ex rel. Shaffer v. Kuthy*, 47 Ohio L. Abs. 14, 71 N.E.2d 133, 134, *appeal denied* 145 Ohio St. 516, 62 N.E.2d 199 (1945). And it has frequently been held that the execution of a separate instrument of assignment containing language indicating a division of ownership rights, and the purchase or registration of a chose in such a way as to indicate a division of ownership rights are sufficient acts of delivery to sustain a gift of a partial interest to another. See, *e.g.*, *Frey v. Wubbena*, 26 Ill.2d 62, 185 N.E.2d 850 (1962); *Corkeem v. Salvation Army*, 340 Mass. 165, 162 N.E.2d 778 (1959); *Jackman v. Jackman*, 271 Mich. 585, 260 N.W. 769 (1935); *Thatcher v. Merriam*, 121 Utah 191, 240 P.2d 266 (1952). These forms of delivery have been the most common means of accomplishing revocable gifts as well as gifts of future interests.