CLASSIFICATION OF GRATUITOUS TRANSFERS

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SOME human actions fit rather neatly into legal categories; many do not. This is as true of attempts to give away property as it is elsewhere. If the appropriate category is obvious, the effect of the donor's actions will be determined in terms of compliance with the requirements specified for that type of transfer. If, for example, a man executes before witnesses a writing expressly described as his last will and testament, the validity of the execution of the document will almost certainly be controlled by the statute of wills. But the inventiveness and variety of inclination of human beings often produce situations not readily identifiable in terms of recognized legal patterns. In such cases, the legal classification of the situation is often a vital factor in the reasoning of decisions either sustaining or rejecting the claim of the alleged donee. The court frequently has the choice of placing the case in one of several alternative legal categories, such as will, or gift, or trust, or contract. The legal requirements of these categories differ considerably in form, and the evidence may therefore show compliance with the prescribed formalities of one but not with those of another. It may show a failure to meet the provisions of the statute of wills, but sufficient delivery to support an *inter vivos* gift. It may show no sufficient delivery, but fulfillment of the specifications of a declaration of trust or a contract. If so, an essential and determinative part of the reasoning of the decision is the court's classification of the situation.

Such problems arise most frequently as a result of a person's use of the form of an *inter vivos* transaction with the objective of producing some of the major consequences normally following the execution of a will. He may desire to name ultimate beneficiaries, but retain during his lifetime the economic enjoyment or control of the property, or the power to alter the designation of the beneficiaries. This may be attempted by the reservation of a life estate and a power of revocation or other powers in an outright deed or a living trust, or by fixing his death as the time of delivery of a deed or of the subject-matter of the gift.

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He may set up a life insurance trust with the active administration of the trust commencing at his death. He may name a beneficiary to take his share in a stock purchase plan if he dies. He may try to extend the usual operation of a custodian account to provide for others after his death. The stipulated performance of a contract obligation may be postponed until after the death of the promisor. Deposits may be made in savings banks in a variety of forms naming some one other than the depositor as a participant in the account. How, and by what criteria, are such marginal cases to be classified? This article is written to examine some typical situations of this character, and to appraise the considerations that should influence the courts in this process of classification.¹ However, since these issues primarily involve interpretation of the requirements of transfer, some statements of general policy and a rather detailed analysis of the purposes of those requirements must first be made to furnish the perspective for the discussion of the classification problems themselves.

One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.² This is commonplace enough, but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it.

1. General ideas similar to those expressed here have, of course, been suggested by others. Any student is indebted to numerous sources, some of them long forgotten, for contributions to his own thinking. But the effort in this article to cover a broad area imposes marked limitations of space, and so precludes general chapter and verse citations. Special acknowledgment, however, is due the stimulus originally afforded by the careful functional analysis in Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341.

2. There are, of course, qualifications and limitations on the power, but they are largely irrelevant in the cases under consideration here, which concern the formalities of transfer. For example, these formalities have no connection with restrictions on the power imposed for the benefit of the immediate family, the government, or others, by such instrumentalities as the statutory share of the surviving spouse, the tax laws, and the rule against perpetuities, although cases under them may also, of course, involve classification. Nor do these formalities purport to provide the remedies for such vitiating factors as illegality, incompetency, fraud, undue influence, or other forms of imposition, although they may be used indirectly to nullify transfers so affected, and some of them have a stated prophylactic purpose. It may therefore be generally assumed in these cases that the transferor is competent and free from imposition, and that the transfer does not involve any violation of public policy. Requirements for the protection of those not parties to the transfer, such as recordation, are also immaterial in these controversies between alleged transferee and transferor, or their successors in interest.

If this objective is primary, the requirements of execution, which concern only the form of the transfer — what the transferor or others must do to make it legally effective — seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in these cases. They surely should not be revered as ends in themselves, enthroning formality over frustrated intent. Why do these requirements exist and what functions may they usefully perform? If all transfers were required to be made before the court determining their validity, it is probable that no formalities except oral declarations in the presence of the court would be necessary. The court could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions. But such a procedure does not correspond with existing mores and would be entirely impracticable in our present society for various rather obvious reasons. The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so must accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirements of transfer beyond evidence of oral statements of intent.

In the first place, the court needs to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer. People are often careless in conversation and in informal writings. Even if the witnesses are entirely truthful and accurate, what is the court to conclude from testimony showing only that a father once stated that he wanted to give certain bonds to his son, John? Does this remark indicate finality of intention to transfer, or rambling meditation about some possible future disposition? Perhaps he meant that he would like to give the bonds to John later if John turned out to be a respectable and industrious citizen, or perhaps that he would like to give them to John but could not because of his greater obligations to some other person. Possibly, the remark was inadvertent, or made in jest. Or suppose that the evidence shows, without more, that a writing containing dispositive language was found among the papers of the deceased at the time of his death? Does this demonstrate a deliberate transfer, or was it merely a tentative draft of some contemplated instrument, or perhaps random scribbling? Neither case would amount to an effective transfer, under the generally prevailing law.³ The court is far removed from the context of the statements, and the situation is so charged with uncertainty that even a judgment of probabilities is hazardous. Casual language, whether oral or written, is not intended to be legally operative,

3. The oral statement might conceivably be upheld as a declaration of trust, but the policy and tradition of the courts are against it, no trust language being assumed. The writing might be probated as a holographic will, but, as stated below, this form of transfer, lacking ritual value, has achieved only limited recognition in this country.

however appropriate its purely verbal content may be for that purpose. Dispositive effect should not be given to statements which were not intended to have that effect. The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative. This purpose of the requirements of transfer may conveniently be termed their ritual function.

Secondly, the requirements of transfer may increase the reliability of the proof presented to the court. The extent to which the quantity and effect of available evidence should be restricted by qualitative standards is, of course, a controversial matter. Perhaps any and all evidence should be freely admitted in reliance on such safeguards as cross-examination, the oath, the proficiency of handwriting experts, and the discriminating judgment of courts and juries. On the other hand, the inaccuracies of oral testimony owing to lapse of memory, misinterpretation of the statements of others, and the more or less unconscious coloring of recollection in the light of the personal interest of the witness or of those with whom he is friendly, are very prevalent; and the possibilities of perjury and forgery cannot be disregarded. These difficulties are entitled to especially serious consideration in prescribing requirements for gratuitous transfers, because the issue of the validity of the transfer is almost always raised after the alleged transferor is dead,⁴ and therefore the main actor is usually unavailable to testify, or to clarify or contradict other evidence concerning his all-important intention. At any rate, whatever the ideal solution may be, it seems quite clear that the existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court. This purpose may conveniently be termed their evidentiary function.

Thirdly, some of the requirements of the statutes of wills have the stated prophylactic purpose of safeguarding the testator, at the time of

4. This, as stated below, is inevitable under the current procedure for probating wills. There is no legal impediment to the trial of the issue of an *inter vivos* gift during the donor's lifetime, but the case law indicates that, in fact, this rarely occurs. For confirmation of this conclusion, see Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341, 350. A gift that is genuinely intended is not likely to be disputed by the donor, but formal objections may be raised by his testamentary or intestate successors because of their personal interest, or by his personal representative because of his fiduciary obligations. And it is possible that either the encouragement furnished by the unavailability of the alleged donor to testify, or the stimulus provided by disappointment in the provisions of the will, may contribute to the assertion of more mistaken or deliberately manufactured claims after his death than during his lifetime. Whatever the reason, nearly all of the numerous claims based on the theory of an *inter vivos* gratuitous transfer seem to be raised *post mortem*, and the evidentiary situation is thus, in general terms, pragmatically similar to that of a will.

the execution of the will, against undue influence or other forms of imposition. As indicated below, the value of this objective and the extent of its accomplishment are both doubtful. It may conveniently be termed the protective function.

THE FUNCTIONS OF THE STATUTES OF WILLS

FORMAL WILLS

Ritual Function. Compliance with the total combination of requirements for the execution of formal attested wills⁵ has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion. The ritual function is also specifically emphasized in individual requirements. It furnishes one justification for the provision that the will be signed by the testator himself or for him by some other person. Under the English Statute of Wills of 1540,⁶ specifying a will "in writing," no signature was expressly required. In construing this statute, the courts gave effect to various informal writings of the testator or others, even though the circumstances furnished no assurance that the testator intended them to be finally operative.⁷ These decisions are said to have been influential in the enactment of the provisions of the Statute of Frauds,⁸ which were the first to require a signature.⁹ The signature tends to show that the instrument was finally adopted by the testator as his will¹⁰ and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling.¹¹ The requirement existing in some states that the signature of the testator be at the end of the will has also been justified in terms of this function; since it is the ordinary human practice to sign documents at the end, a will not

5. For detailed surveys of these requirements, see ATKINSON, WILLS (1937) 246 *et seq.*; 1 PAGE, WILLS (3d ed. 1941) 474 *et seq.*; Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1.

6. 32 HEN. VIII, c. 1.

7. See, *e.g.*, *Stephens v. Gerrard*, 1 Sid. 315, 82 Eng. Rep. 1128, 2 Keb. 128, 84 Eng. Rep. 81 (K. B. 1666).

8. 29 CAR. II, c. 3 (1676/7).

9. 2 BL. COMM. *376; FOURTH REPORT, REAL PROP. COMM. (Eng. 1833) app. p. 26. *Lister v. Smith*, 3 Sw. & Tr. 282, 164 Eng. Rep. 1282 (P. 1863); *Nichols v. Nichols*, 2 Phil. Ecc. R. 180, 161 Eng. Rep. 1113 (Prerog. Ct. 1814); *In re Sharp's Estate*, 133 Fla. 802, 183 So. 470 (1938), (1939) 16 N. Y. U. L. Q. REV. 323; *Fleming v. Morrison*, 187 Mass. 120, 72 N. E. 499 (1904); *Shiels v. Shiels*, 109 S. W. (2d) 1112 (Tex. Ct. Civ. App. 1937); (1922) 31 YALE L. J. 334; ATKINSON, WILLS (1937) 160-64; 1 PAGE, WILLS (3d ed. 1941) 120, 192.

11. HOLDSWORTH & VICKERS, LAW OF SUCCESSION (1899) 34; ROOD, WILLS (2d ed. 1926) 202. See also Mechem, *The Rule in Lemayne v. Stanley* (1931) 29 MICH. L. REV. 685.

so signed does not give the impression of being finally executed.¹² The occasional provisions that the testator publish the will or that he request the witnesses to sign also seem chiefly attributable to this purpose, since such actions indicate finality of intention.¹³

Evidentiary Function. The absence of any procedure for determining the validity of a will before the death of the testator¹⁴ has two important consequences relevant to this function. First, as has already been stated, the testator will inevitably be dead and therefore unable to testify when the issue is tried. Secondly, an extended lapse of time, during which the recollection of witnesses may fade considerably, may occur between a statement of testamentary intent and the probate proceedings. Both factors tend to make oral testimony even less trustworthy than it is in cases where there is some likelihood of the adverse party being an available witness and where the statute of limitations compels relative promptness in litigation. The statute of wills may therefore reasonably incorporate unusual probative safeguards requiring evidence of testamentary intent to be cast in reliable and permanent form. The requirement that a will be in writing has, of course, great evidentiary value. A written statement of intention may be ambiguous, but, if it is genuine and can be produced, it has the advantage of preserving in permanent form the language chosen by the testator to show his intent.¹⁵ While, for the purpose of preventing frustration of intent through accident or

12. *Heise v. Heise*, 31 Pa. 246 (1858); *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833) 16. See also *Mechem, The Rule in Lemayne v. Stanley* (1931) 29 *MICH. L. REV.* 685.

13. *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833) 20; *Compton v. Mitton*, 12 N. J. Law 70 (Sup. Ct. 1830); *Trustees of the Theological Seminary v. Calhoun*, 25 N. Y. 422 (1862); *Seguine v. Seguine*, 2 Barb. 385 (N. Y. Sup. Ct. 1848).

14. For a criticism of this, see *Cavers, Ante Mortem Probate: An Essay in Preventive Law* (1934) 1 *U. OF CHI. L. REV.* 440.

15. The case of *Cole v. Mordaunt* (1676), reported in a note to *Mathews v. Warner*, 4 Ves. Jr. 186, 196, 31 Eng. Rep. 96, 107 (Ch. 1798), is said to have been influential in the enactment of the Statute of Frauds. *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833), app. pp. 26, 27; *REPPY & TOMPKINS, HISTORY OF WILLS* (1928) 9; *ROBERTS, STATUTE OF FRAUDS* (2d Am. ed. 1823) 455. Mr. Cole, at a very advanced age, had married a young woman who, during his life, "did not conduct herself with propriety." After his death she set up a nuncupative will, said to have been made *in extremis*, by which the whole estate was given to her, in opposition to a written will made three years before the testator's death giving £3,000 to charity. It developed, in the course of litigation, that the testimony of most of the nine witnesses for the proponents of the nuncupative will was perjured, and that the widow herself was guilty of subornation. The Statute prescribed for realty the prototype of the modern formal will and imposed such severe restrictions upon the execution of nuncupative wills that, practically, the effect was to compel the reduction to writing of wills of personal property as well. It also specified elaborate limitations on the effectiveness of oral revocation of a written will of personalty. 29 CAR. II c. 3 (1676/7) §§ 5, 19, 20, 22; 2 BL. COMM. *501; *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833) 7, 21.

design, the contents of a lost or destroyed will may usually be probated on satisfactory secondary evidence,¹⁶ such cases are relatively infrequent. The requirement of the testator's signature also has evidentiary value in identifying, in most cases, the maker of the document. While the typical statutory authorization of a signature made by another for the testator,¹⁷ and the generally recognized rule that the testator's signature need not be his correct name,¹⁸ both indicate lack of complete adherence to this purpose,¹⁹ such cases are probably quite rare in view of the usual custom in a literate era of signing documents with a complete name. The possibility of a forged signature must be controlled by the abilities of handwriting experts. There is judicial support for the theory that the requirement that the will be signed at the end has an evidentiary purpose of preventing unauthenticated or fraudulent additions to the will made after its execution by either the testator or other parties.²⁰

16. ATKINSON, WILLS (1937) 452; 2 PAGE, WILLS (3d ed. 1941) 373.

17. ATKINSON, WILLS (1937) 253; 1 PAGE, WILLS (3d ed. 1941) 535; *Bordwell, Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 11.

18. *Jenkins v. Gaisford*, 3 Sw. & Tr. 93, 164 Eng. Rep. 1208 (P. 1863); *Wills v. Lewis*, 190 Ky. 626, 228 S. W. 3 (1921); *Reed v. Hendrix*, 180 Ky. 57, 201 S. W. 482 (1918); *Kimmel's Estate*, 278 Pa. 435, 123 Atl. 405 (1924); *Pilcher v. Pilcher*, 117 Va. 356, 84 S. E. 667, L. R. A. 1915 D 902 (1915); *Notes* (1924) 31 A. L. R. 682, (1926) 42 A. L. R. 954, (1938) 114 A. L. R. 1110.

19. *Mechem, The Rule in Lemayne v. Stanley* (1931) 29 MICH. L. REV. 685, 690, n. 17.

20. See *In re Seaman's Estate*, 146 Cal. 455, 460, 80 Pac. 700, 701 (1905); *Matter of O'Neil*, 27 Hun 130, 134, 91 N. Y. 516, 521 (1883); *Irwin v. Jacques*, 71 Ohio St. 395, 407, 73 N. E. 683, 687 (1905); 1 PAGE, WILLS (3d ed. 1941) 559. It is likely that this theory of the purpose of the provision in the English Wills Act of 1837, 7 Wks. IV & 1 Vict., c. 26, which has been copied in American statutes, that wills be signed "at the end," originated in the opinions of Sir Herbert Jenner Fust. See, *e.g.*, *Smce v. Bryer*, 1 Rob. Ecc. 616, 623, 163 Eng. Rep. 1155, 1157 (Prerog. 1848). Certainly there is no indication that the members of the Real Property Commission expected this specification of the position of the signature to perform anything but a ritual function. It was obviously their intention to preclude probate of writings like that involved in *Lemayne v. Stanley*, 3 Lev. 1, 83 Eng. Rep. 545 (C. P. 1681), where the testator wrote his own will which began, "I, John Stanley, make this my last will," and the testator's name thus written was held a sufficient signature.

"It is the almost invariable practice to sign Wills, Deeds, Receipts and all other written Instruments at the foot; and we think it right to require this usual form, in order to prevent questions, whether the name of the Testator appearing in any other part of the Will is a sufficient signature; and in order to cause Wills to be made in a formal manner, and to render void imperfect papers. At present, as we have already observed, if the Testator is prevented by sickness or death from finishing the Will, the gifts which appear to be perfect, so far as respects Copyholds or Personal Estate, will be good. It appears to us that the rule, which allows validity to such imperfect instruments, is attended with more mischief than benefit. It must be impossible to ascertain what were the intentions of a Testator, unless he has given full expression to them. Where a leasehold estate is given to the heir, the Testator may have intended to give a freehold estate to a younger child; and where a gift appears to be complete, there may have been an

The important requirement that this type of will be attested obviously has great evidentiary significance. It affords some opportunity to secure proof of the facts of execution, which may have occurred long before probate, as contrasted with the difficulties that might otherwise arise if an unattested paper purporting to be a will executed, according to its date, thirty or forty years before, were found among the papers of the testator after his death.²¹ Of course, this purpose is not accomplished in every case, since all of the attesting witnesses may become unavailable to testify because of death or some other reason, and their unavailability will not defeat probate of a will.²² The high evidentiary value placed by the courts and legislatures on the testimony of those chosen by the testator as attesting witnesses is shown by the requirement, unusual under the philosophy of the general rules of evidence which leave the calling of witnesses to the initiative of the parties, but regularly accepted for wills, that one or more²³ of the attesting witnesses must be produced at probate if available.²⁴

The provision existing in some states that the will be signed or acknowledged by the testator in the presence of the attesting witnesses

intention to impose some trust or condition on the devisee, in a subsequent part of the Will. The injustice of carrying into effect part only of a general arrangement, and the danger of letting in parol evidence to prove the circumstances under which the paper was left imperfect, appear to us to be conclusive objections against the admission of such papers." *FOURTH REPORT, REAL PROPERTY COMM. (Eng. 1833) 16.*

Even if the evidentiary purpose is assumed, its accomplishment by the requirement is doubtful. The very existence of the blank space above the testator's signature, which theoretically defeats probate, indicates that the additions sought to be prevented have not been made. If they have been made, and thus fill up the blank space, this provision does not furnish an appropriate remedy. If there is no proof that they were made after execution, this provision will not prevent probate. If there is such proof, the appropriate and sensible remedy is to deny probate to the additions only, not to the entire will. There may be some justification for statutory provisions tending to create general practices preventive of evil, even though the provisions are not remedially effective. But this policy should be sparingly employed, since each additional requirement increases the possibility of frustrating intention. This is particularly true of provisions of this character, since non-compliance will be patent on the face of the will; provisions whose infringement depends on the production of oral testimony extrinsic to the document will not so inevitably raise the issue of the validity of the will. For this and other reasons, the desirability of this formality is doubtful. See *ATKINSON, WILLS (1937) 257*; *1 PAGE, WILLS (3d ed. 1941) 560*. The Wills Act Amendment Act of 1852, 15 & 16 VICT., c. 24, substantially liberalized the interpretation of the requirement in England.

21. This objective is particularly emphasized in states requiring the witness to write his address on the will, for the purpose of facilitating his subsequent location. *N. Y. DEC. EST. LAW § 22.*

22. *4 WIGMORE, EVIDENCE (3d ed. 1940) § 1306*; *N. Y. Surr. Ct. Act § 142.*

23. The number depends on local state requirements. *4 WIGMORE, EVIDENCE (3d ed. 1940) § 1304.*

24. *4 WIGMORE, EVIDENCE (3d ed. 1940) § 1287 et seq.*; *FOURTH REPORT, REAL PROPERTY COMM. (Eng. 1833) 16, 17.*

may be justified as having some evidentiary purpose in requiring a definitive act of the testator to be done before the witnesses, thus enabling them to testify with greater assurance that the will was intended to be operative.²⁵

Protective Function. Some of the requirements of the statutes of wills have the objective, according to judicial interpretation, of protecting the testator against imposition at the time of execution. This is difficult to justify under modern conditions. First, it must be reiterated that any requirement of transfer should have a clearly demonstrable affirmative value since it always presents the possibility of invalidating perfectly genuine and equitable transfers that fail to comply with it; there are numerous decisions interpreting these requirements, particularly with reference to the competency of attesting witnesses, wholly or partially invalidating wills that do not seem from the opinions to be in any way improper or suspicious. Secondly, there are appropriate independent remedies for the various forms of imposition, and these prophylactic provisions are therefore not, in the long run, of any essential utility except in instances where the imposition might not be detected. Thirdly, as indicated below, it is extremely doubtful that these provisions effectively accomplish any important purpose. Fourthly, they are atypical; no similar purpose is indicated in the requirements for inter vivos dispositions. Why should there be a differentiation between inter vivos and testamentary transfers in this respect? The purely legal elements of the two categories suggest no justification; in fact, the automatic revocability of a will presents a simpler and more uniformly prevalent means of nullifying the effect of imposition than exists for inter vivos transfers. In spite of the benevolent paternalism expressed in some of the decisions interpreting these requirements, the makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of our society. It is probable that the distinction originally arose because of a difference in the factual circumstances customarily surrounding the execution of the two types of transfer. The protective

25. *Schneider's Will*, 204 Wis. 94, 235 N. W. 412 (1931); *Hoover v. Keller*, 339 Ill. 126, 171 N. E. 163 (1930). This is also somewhat true of publication and requesting the witnesses to sign. But see note 13 *supra*. The report of the Real Property Commission suggests that the requirement that the witnesses be present at the same time has an evidentiary purpose in diminishing the effectiveness of attempts to fabricate wills. "Great additional security against forgery and fraud is obtained by requiring that the witnesses should be present at one time. In case of forgery, it is easier to get two accomplices at different times, than both together . . . if the transaction must be witnessed by both witnesses at one time, they must then agree in the same story, and perjury will be more easily detected by cross-examination." *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833) 18.

provisions first appeared in the Statute of Frauds, from which they have been copied, perhaps sometimes blindly, by American legislatures. While there is little direct evidence, it is a reasonable assumption that, in the period prior to the Statute of Frauds, wills were usually executed on the death bed.²⁶ A testator in this unfortunate situation may well need special protection against imposition. His powers of normal judgment and of resistance to improper influences may be seriously affected by a decrepit physical condition, a weakened mentality, or a morbid or unbalanced state of mind. Furthermore, in view of the propinquity of death, he would not have as much time or opportunity as would the usual inter vivos transferor to escape from the consequences of undue influence or other forms of imposition. Under modern conditions, however, wills are probably executed by most testators in the prime of life and in the presence of attorneys. If this assumption is correct, the basis for any general distinction disappears. For these reasons, this article will proceed on the hypothesis that, while the provisions of the statutes of wills seeking to fulfill the protective function must be reckoned with doctrinally as part of our enacted law, this function is not sufficiently important in the present era to justify any more emphasis than these provisions require.

The courts have regularly asserted that the object of the almost uniform requirement that the witnesses attest in the testator's presence is to prevent the witnesses substituting some other paper for the will actually executed by the testator.²⁷ On the basis of this assumption, since the sense of sight is obviously the most effective one in the discovery of an attempted substitution, the validity of wills has been expressly made dependent, in a variety of situations, on the ability of the testator to see the witnesses sign.²⁸ It would take an entire law review article to discuss all of the possible attempts at substitution, and it can only be stated generally here that it seems very improbable that any such substitution would be attempted, or that, if it were attempted, it would avoid detection.²⁹ Furthermore, assuming that the danger is not

26. See opinion of Lord Camden, dissenting in *Doe dem. Hindson v. Kersey*, 4 Burn, Ecc. Law (5th ed. 1788) 88, 92 (1760), reprinted in 1 Day 41, 56 (Conn. 1802); 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1923 reprint) 314, 337, 356; SWINBURNE, *TESTAMENTS* (3d ed. 1635) 43.

27. *Shires v. Glascock*, 2 Salk. 687, 91 Eng. Rep. 584 (K. B. 1687); *Davy v. Smith*, 3 Salk. 395, 91 Eng. Rep. 892 (K. B. 1694); *Graham v. Graham*, 32 N. C. 219 (1849); *Bradford v. Vinton*, 59 Mich. 139, 26 N. W. 401 (1886); *Reed v. Roberts*, 26 Ga. 294 (1858).

28. *Reed v. Roberts*, 26 Ga. 294 (1858); *Casson v. Dade*, 1 Brown's Ch. Cas. 98, 28 Eng. Rep. 1010 (Ch. 1781). This causes considerable complexity in the case of a blind testator. *Welch v. Kirby*, 255 Fed. 451 (C. C. A. 8th, 1918), 9 A. L. R. 1409, 1416 (1918), *cert. denied*, 249 U. S. 612 (1918).

29. 1 PAGE, *WILLS* (3d ed. 1941) 639; 36 PARL. DEB. (3d Ser. 1837) 974; *FOURTH REPORT, REAL PROPERTY COMM.* (Eng. 1833) 18.

wholly hypothetical, the requirement is not apt to prevent it, because fear of substitution by the witnesses assumes that they are dishonest, and, if that is true, they would be likely to testify that they signed in the presence of the testator, thereby precluding the issue of the violation of the statute being raised unless other witnesses were available.³⁰ There may be some justification for the use of this requirement in individual cases in holding inoperative the will of a dying man in a very weakened physical and mental condition,³¹ and the issue is not likely to arise in normal cases where the testator is not confined to his death bed and so is not prevented from following the witnesses around, and where the typical procedure is for all to sign at the same desk. However, the validity of the requirement in terms of its stated objective is highly questionable.

The purpose of the requirement that the attesting witnesses be competent has been stated by various courts to be protection of the testator against imposition at the time of the execution of the will by surrounding him with a group of disinterested people who would not be financially motivated to join in a scheme to procure the execution of a spurious will by dishonest methods, and who therefore presumably might be led by human impulses of fairness to resist the efforts of others in that direction.³² Any other explanation of the requirement involves marked inconsistencies with related legal propositions, particularly the enabling acts,³³ which have removed the disqualification of witnesses to testify because of interest, and under which a legatee is usually competent to testify in probate proceedings.³⁴ If competency referred only to the testimony of the witnesses, these acts would, therefore, seem to eliminate any requirement that the witnesses be disinterested. The common

30. *In re Lane's Estate*, 265 Mich. 539, 546, 251 N. W. 590, 593 (1933).

31. See, *c.g.*, *Reed v. Roberts*, 26 Ga. 294 (1858).

32. *Hawes v. Humphrey*, 9 Pick. 350, 357 (Mass. 1830), 2 WIGMORE, EVIDENCE (3d ed. 1940) § 582. Lord Camden, in his famous dissent in *Doe dem. Hindson v. Kersey*, 4 Burn, Ecc. Law (5th ed. 1788) 88, 92 (1760), reprinted in 1 Day 41, 56 (Conn. 1802), asks what fraud the witnesses are to prevent, and answers:

"Even that fraud, so commonly practiced upon dying men, whose hands have survived their heads; who have still strength enough to write a name, or make a mark, though the capacity of disposing is dead. What is the condition of such an object, in the power of a few, who are suffered to attend him, wheedled, or teized, into submission, for the sake of a little ease; put to the laborious task of recollecting the full state of all his affairs, and to weigh the just merits, and demerits, of those, who belong to him, by remembering all, and forgetting none!" The emphasis on deathbed dispositions is again apparent.

33. For a general treatment of this matter, see Evans, *The Competency of Testamentary Witnesses* (1927) 25 MICH. L. REV. 238. For a history of the competency of witnesses and the enabling acts, see 2 WIGMORE, EVIDENCE (3d ed. 1940) § 575 *et seq.*

34. *In re Chamber's Estate*, 187 Wash. 417, 60 P. (2d) 41 (1936); *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255 (1894); *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013 (1904).

law rule invalidates the entire will if one of the necessary witnesses is interested. Impressed by the unfairness to the other legatees of this result, however, many states have enacted statutes which purge the interest of the witness by rendering the gift to him void, but preserve the balance of the will. Both of these remedies seek to diminish the possibility of a testator being forced or influenced to execute a will when surrounded only by those who are interested financially in having it executed. Any such possibility seems largely imaginary in terms of a hale and hearty testator making his will in the prime of life; such imposition would probably not be attempted under such circumstances, or successful if attempted, since its consequences could easily be nullified by subsequent revocation of the document unless the testator were kept in some physical or emotional duress vile for the remainder of his days on earth. The situation thus viewed with alarm must, therefore, presumably be that of a failing or decrepit testator, probably bedridden, who finds himself in the hands of a greedy group of malefactors compelling him to sign a will in their favor, and who then conveniently expires before he can call for help. But, while this may conceivably occur, is it not also rather fanciful in terms of general experience? Is there not a greater likelihood of the presence of a doctor, nurses, some members of the family who are normally devoted and, in any event, would probably be disinherited by such a will, or loyal friends? Must we adopt such a pessimistic view of human nature as to assume that many people are so lonely and friendless in dying? The supposed danger really seems largely fictional in terms of general probabilities. The will with a forged signature, supported by perjured testimony, or long established domination which disinterested witnesses could scarcely detect in their brief observation at execution, are more likely vehicles for the prosecution of improper claims. Assuming that the postulated evil is serious enough to require attention, both the common law rule and the purging statutes are primarily retroactive, rather than preventive, in operation. They cancel the legacy of any witness who has placed himself in a position where he might conceivably exert improper influence to his own financial gain. But the reported decisions give the impression that the remedies are employed more frequently against innocent parties who have accidentally transgressed the requirement than against deliberate wrongdoers, and this further confirms the imaginary character of the difficulty sought to be prevented. The deterrent effect of any penalty depends on the extent to which it is generally known to exist. It is extremely improbable that laymen would be aware of the legal rules concerning the competency of attesting witnesses without legal advice, and it may be hoped and expected that relatively few members of the legal profession would aid in a scheme to impose on the testator. If the potential malefactor does not know of the rules, he will not be

deterred. If he does know of them, which is unlikely, he will realize the impossibility of the financial gain supposed to be the motive of the legatee witness, and so will probably escape the operation of the remedy against himself. He may then, if contemplating physical compulsion, conclude a secret agreement to bribe others, not named in the will, to join in his scheme by acting as the attesting witnesses, a situation to which these remedies do not purport to apply. Or, in the more normal course of undue influence, he would simply have secured such emotional domination over the testator that he could take him for execution before innocent and disinterested witnesses who would not detect any imposition. May much be expected of these rules beyond their establishment of a practice in the execution of wills that may prevent the existence of a possible evil which, in itself, is largely hypothetical? The accomplishment of the stated purpose is also defeated in individual states by decisions that, in the absence of a purging statute,³⁵ or of any clause in an existing purging statute applicable to the particular case,³⁶ the enabling act renders a legatee a competent attesting witness, or by a statutory requirement that the operation of the purging statute be determined by whether the will may be proved without the testimony of the witness.³⁷

HOLOGRAPHIC WILLS

The exemption of holographic wills from the usual statutory requirements seems almost exclusively justifiable in terms of the evidentiary function. The requirement that a holographic will be entirely written in the handwriting of the testator furnishes more complete evidence for inspection by handwriting experts than would exist if only the signature were available, and consequently tends to preclude the probate of a forged document.³⁸ While it may be argued that the requirement tends to prevent fraud in the execution,³⁹ since the testator would normally sign the will immediately after he had finished writing it, and, there is, therefore, less likelihood of his signing a different document,

35. *Hudson v. Flood*, 5 Boyce (Del.) 450, 94 Atl. 760 (1915).

36. *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219 (1893).

37. N. Y. DEC. EST. LAW § 27. For examples of the fortuitous operation of this statute see *Matter of Walters*, 285 N. Y. 158, 33 N. E. (2d) 72 (1941); *Du Bois v. Brown*, 1 Dem. Sur. 317 (1882), *aff'd*, *In re Brown*, 31 Hun. 166 (N. Y. 1883); *Caw v. Robertson*, 3 Barb. 410, 5 N. Y. 125 (1851); *Matter of Owen*, 48 App. Div. 507, 62 N. Y. Supp. 919 (2d Dep't 1900); *Matter of Tactkian*, 109 Misc. 519, 179 N. Y. Supp. 188 (Surr. Ct. 1919); *Cornell v. Woolley*, 3 Keyes 378 (N. Y. 1867); Comment (1940) 53 HARV. L. REV. 858; (1941) 50 YALE L. J. 701, (1941) 41 COL. L. REV. 1130.

38. *Estate of Dreyfus*, 175 Cal. 417, 165 Pac. 941, L. R. A. 1917 F 391, 393 (1917) (typewritten will not holographic); *accord*, *Adams v. Beaumont*, 226 Ky. 311, 10 S. W. (2d) 1106 (1928).

39. Compare Comment (1917) 5 CALIF. L. REV. 503.

there seems no substantial guarantee of the performance of the protective function; since no effort is made to prevent other forms of imposition such as undue influence. A holographic will is obtainable by compulsion as easily as a ransom note. While there is a certain ritual value in writing out the document, casual offhand statements are frequently made in letters.⁴⁰ The relative incompleteness of the performance of the functions of the regular statute of wills, and particularly the absence of any ritual value, may account for the fact that holographic wills are not recognized in the majority of the states,⁴¹ and for some decisions, in states recognizing them, requiring the most precise compliance with specified formalities.⁴²

NUNCUPATIVE WILLS

In order to afford a dying man who has no opportunity to make a formal will the privilege of making a last minute oral disposition, many states, following the English Statute of Frauds, have enacted statutes authorizing nuncupative wills in the last illness, provided that numerous detailed requirements are complied with.⁴³ The desirability of attempting to insure compliance with the ritual function seems to justify the requirement that the testator ask some person or persons present to bear testimony to such disposition as his will,⁴⁴ since such a statement indicates that he intends a serious disposition and is not conversing in a purely haphazard manner. The evidentiary function seems responsible for the requirement of a reduction to writing, which tends to prevent a variation between the testator's statement and subsequent testimony owing to lapse of memory, and also for the requirement that the will be proved by more than one witness, which makes it possible for the misinterpretation of one witness to be cleared up by another witness. The protective function is exemplified in statutes requiring the witnesses to be competent and disinterested⁴⁵ and decisions to the same effect in the absence

40. Informal illiterate letters have been admitted to probate as holographic wills. *Estate of Button*, 209 Cal. 325, 287 Pac. 964 (1930); *Kimmel's Estate*, 278 Pa. St. 435, 123 Atl. 405, 31 A. L. R. 678, 682 (1924).

41. ATKINSON, *WILLS* (1937) 305; 1 PAGE, *WILLS* (3d ed. 1941) 695; Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 25.

42. *Estate of Bernard*, 197 Cal. 36, 239 Pac. 404 (1925); *Estate of Vance*, 174 Cal. 122, 162 Pac. 103 (1916); *Estate of Schiffmann*, 16 Cal. App. (2d) 650, 6 P. (2d) 331 (1936); *Succession of Lasseigne*, 181 So. 879 (La. Ct. App. 1938). There are, however, more liberal decisions. *Estate of Hail*, 106 Okla. 124, 235 Pac. 916 (1923); *Estate of Olssen*, 42 Cal. App. 656, 184 Pac. 22 (1919).

43. ATKINSON, *WILLS* (1937) 311; 1 PAGE, *WILLS* (3d ed. 1941) 713; Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 26.

44. *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450 (1905); *Kellner v. Hagood*, 39 Ohio App. 351, 177 N. E. 637 (1930); 2 BL. COMM. *501.

45. See, e.g., OHIO GEN. CODE ANN. (Page, 1938) § 10504-83.

of an expressed statutory requirement.⁴⁶ Because of the detailed requirements for the validity of these nuncupative wills and the restrictions on the type⁴⁷ and value⁴⁸ of the property that may be transferred by them, they are probably rarely employed. There is very little litigation concerning them, and they are, therefore, not of great importance in a general survey of the exercise of the testamentary power in this country.

In view of their very limited operation, no comment need be made on wills of soldiers and sailors, which are generally exempted from all statutory requirements.⁴⁹

THE FUNCTIONS OF THE REQUIREMENTS FOR INTER VIVOS TRANSFERS

The regular forms of inter vivos gratuitous transfer are three: an outright gift; a transfer in trust to another to hold as trustee; and a declaration of trust. The standard method of making a gift of land is, of course, by the delivery of a deed.⁵⁰ Outright gifts of personal property may be effectuated by delivery of either the subject matter or an instrument of gift.⁵¹ The same requirements apply to a transfer in trust,⁵² since the fact that the transferee is to hold the property as a trustee after he has obtained title does not alter the considerations of policy affecting the method of transferring title to him. The theory of a declaration of trust involves a rather marked departure from these requirements, in that no delivery of the subject matter is necessary,⁵³ and, therefore, a gratuitous oral declaration of trust of personal property

46. *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450 (1905). The application of the purging statute to such a witness is doubtful. *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110 (1901); *Vrooman v. Powers*, 47 Ohio St. 191, 24 N. E. 267 (1890).

47. Unless specifically permitted by statute, this type of will cannot pass real property. *Irwin v. Rogers*, 91 Wash. 284, 157 Pac. 690 (1916); ATKINSON, WILLS (1937) 313; 1 PAGE, WILLS (3d ed. 1941) 730; Bordwell, *Statute Law of Wills* (1928) 14 Iowa L. Rev. 1, 30.

48. ATKINSON, WILLS (1937) 317; 1 PAGE, WILLS (3d ed. 1941) 730; Bordwell, *Statute Law of Wills* (1928) 14 Iowa L. Rev. 1, 31.

49. ATKINSON, WILLS (1937) 321; 1 PAGE, WILLS (3d ed. 1941) 743; Bordwell, *Statute Law of Wills* (1928) 14 Iowa L. Rev. 1, 29.

50. An oral gift of land followed by the making of substantial improvements by the donee may also be effective. *Heuer v. Heuer*, 64 N. D. 497, 253 N. W. 856 (1934); 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1236; Pound, *Consideration in Equity* (1918) 13 ILL. L. REV. 667, 672; Comments (1917) 26 YALE L. J. 592, (1902) 15 HARV. L. REV. 659; (1923) 8 IOWA L. BULL. 275, (1936) 101 A. L. R. 923, 985.

51. Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341, 548.

52. 1 BOGERT, TRUSTS (1935) §§ 141, 142, 148; 1 SCOTT, TRUSTS (1939) §§ 32, 32.2; RESTATEMENT, TRUSTS (1935) § 32.

53. *Knagenhjelm v. R. I. Hospital Trust Co.*, 43 R. I. 559, 114 Atl. 5 (1921).

is theoretically valid without delivery.⁵⁴ If a written declaration of trust is used either to fulfill the requirements of the Statute of Frauds for a trust of realty,⁵⁵ or to preserve enduring evidence of the terms of a trust of personalty, there is some controversy in the judicial statements as to whether a delivery of the declaration of trust is necessary, but it seems probable that there must be such "delivery" in the sense of evidence indicating that the settlor intended the instrument to be operative, although no physical handing over of the document is required.⁵⁶

Delivery of a deed or instrument of gift or of a written declaration of trust seems to perform very satisfactorily the ritual and evidentiary functions. In fact, the delivery of such an instrument, under the modern view, is tested more by the criterion of whether the transferor intended it to be legally operative than by any requirement of a physical handing over of the document,⁵⁷ and such a criterion is merely a restatement of the purpose of the ritual function. The fact that the statements of intention of the transferor are contained in a formal written instrument guarantees substantial performance of the evidentiary function, since it eliminates the various difficulties of oral testimony.

As has already been pointed out by Mr. Mechem,⁵⁸ delivery of the subject matter of a gift of personal property performs a ritual function, involving, in his significant phrase, "the wrench of delivery", and also an evidentiary function, since the handing over of the subject matter makes the action of the donor less equivocal to witnesses and furnishes the donee in most cases with a possession that corroborates, although it does not conclusively demonstrate, the conclusion that a gift was intended.

Recognition of the validity of an oral declaration of trust of personal property without delivery does involve an abandonment for that type of transfer of the ritual and evidentiary purposes. It is probable, however, that an oral declaration of trust is rarely employed, since laymen would not normally think of using a declaration of trust unless they had previously consulted an attorney, and, in that event, the attorney

54. 1 SCOTT, TRUSTS (1939) §§ 28, 32.5; 1 BOGERT, TRUSTS (1935) §§ 148, 202; RESTATEMENT, TRUSTS (1935) § 17(a), 28.

55. For a general summary of the statutory provisions, see 1 BOGERT, TRUSTS (1935) § 61 *et seq.*; 1 SCOTT, TRUSTS (1939) § 39 *et seq.*

56. *Knagenhjelm v. R. I. Hospital Trust Co.*, 43 R. I. 559, 114 Atl. 5 (1921); *Govin v. De Miranda*, 76 Hun 414, 27 N. Y. Supp. 1049 (1894), *opinion on second appeal*, 79 Hun 286, 29 N. Y. Supp. 345 (1894); *Estate of Smith*, 144 Pa. 428, 22 Atl. 916 (1891); *Collins v. Steuart*, 58 N. J. Eq. 392, 44 Atl. 467 (1899), *aff'd without opinion sub nom.*, *Collins v. Lewis*, 60 N. J. Eq. 488, 46 Atl. 1098 (1900). *Cf.* *Ambrosius v. Ambrosius*, 239 Fed. 473 (C. C. A. 2d, 1917); *Eschen v. Steers*, 10 Fed. (2d) 739 (C. C. A. 8th, 1926); *Estate of Horkan*, 193 Wis. 286, 214 N. W. 438 (1927).

57. 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1034.

58. Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341.

would probably recommend that the trust be committed to writing in order that its terms might be preserved. If this assumption, which seems corroborated by the relative scarcity of decisions involving oral declarations of trust, is correct, they need not be considered of any marked significance in the gift-making habits of human beings.

CRITERIA OF CLASSIFICATION

It cannot, of course, be assumed that every case will present an opportunity for classification. The factual setting, for example, may compel the conclusion that a will was intended and that it is inoperative for failure to comply with the statute of wills. But there are many more flexible situations in which the result can be determined by classifying the case in one legal category or another. Certain criteria for this classification may now be suggested.

First, and needing particular emphasis, is the proposition that an intended transfer should be sustained if the facts show substantial performance of the ritual and evidentiary functions,⁵⁹ whatever may be the particular method of securing that performance. As shown by the foregoing analysis, it will be secured by compliance with the statutes of wills.⁶⁰ But it will also be secured by compliance with the formalities for inter vivos transfer.⁶¹ And it may be secured, in cases which technically do not satisfy the requirements for either testamentary or inter vivos gratuitous transfers but which do comply with contract doctrines, by the existence of circumstances customarily surrounding the type of transaction involved. If these two functions are performed, the major purposes justifying the existence of the requirements of transfer are satisfied. If so, there is no important reason of general policy for frustrating intent; on the contrary, following the thesis stated at the beginning of this article, the court should strive to effectuate intent by placing the case, if possible, in a legal category imposing no doctrinal barriers. If, on the other hand, these functions are not performed,⁶² our current philosophy requires dismissal of the claim. Such a functional test of the validity of the alleged transfer is surely more fundamental than purely technical criteria. This is the major thesis of this article.

There are also, of course, other factors which may and should influence the result. The equities of the particular case cannot be neglected. These involve the fairness of the disposition and also, in certain cases, the

59. This assumes the propriety of neglecting the protective function in a case permitting classification, for reasons already stated. If the case is clearly within the statute of wills, the operation of its protective provisions cannot be avoided.

60. Except for holographic wills and those of soldiers and sailors, both of rather limited operation.

61. With the relatively unimportant exception of the oral declaration of trust.

62. As in cases showing nothing but an oral statement or an undelivered writing.

physical and mental condition of the transferor. A gift made by a person in a very decrepit state, shortly before his death, to someone who is not a natural object of his bounty will obviously not enlist as sympathetic an attitude as a normal and equitable disposition made in the prime of life. The social importance of the type of transaction involved should also be relevant, in view of the undesirability of casting doubt on the validity of a disposition which represents or is a part of a widespread development of social utility.

Doctrinal barriers to the effectuation of intent are raised most frequently by the requirements of the statutes of wills, because they are more complex and less likely to correspond with instinctive human actions than those for inter vivos transfers. In numerous cases, therefore, the validity of an attempted disposition is dependent on its being classified as inter vivos rather than testamentary. The doctrinal test supposed to determine this choice is extremely flexible and can be manipulated almost at will by the courts. It is stated in terms of the time at which an "interest" is intended to pass to the transferee. Following the usual philosophical description, the transfer is said to be inter vivos if an interest passes during the lifetime of the transferor, but testamentary if no interest passes until at or after his death. But the postulated "interest" is entirely abstract in character. It has no necessary relationship to the physical possession or economic enjoyment of the property, since a right to future possession and enjoyment may be, and frequently is, held to be a present interest. In fact, if the classification of the facts of the execution of a will were tested solely by this criterion, and without reference to existing authorities to the contrary, there would be no intellectual difficulty in holding that the beneficiaries received an inter vivos interest at the time of execution, because of their being named in the document, subject to the condition subsequent of being divested by revocation of the will. If this is true of the facts constituting the disposition which by definition is testamentary, it indicates that the test is not per se determinative in the more marginal cases. It has achieved respectability as the verbal clothing of the result; but the compelling precedent will be the actual decision on similar facts, not judicial reiteration of this vague and abstract criterion.

ILLUSTRATIONS OF THE PROBLEMS OF CLASSIFICATION⁶³

Deeds. The case of *Butler v. Sherwood*⁶⁴ furnishes an example of the inequitable result that may be reached by a technical application

63. Because of limitations of space, it is impossible in this article to attempt an exhaustive survey of the authorities. The purpose is to illustrate.

64. 196 App. Div. 603, 188 N. Y. Supp. 242 (3d Dep't 1921), *aff'd mem.*, 233 N. Y. 655, 135 N. E. 957 (1922).

of the "interest" test.⁶⁵ A wife delivered to her husband a deed purporting to convey to him all of her real and personal property, the deed providing that "this conveyance and transfer are made upon the condition that the party of the second part, my husband, survive me, and the same is intended to vest and take effect only upon my decease and until said time, the same shall be subject to revocation upon the part of the party of the first part." The motive for using a deed instead of a will was the wife's desire to avoid a will contest, because of her previous experience with one. On suit by the brother of the grantor, the deed was held void as being an attempted testamentary disposition not complying with the requirements of the statute of wills. The result of this decision under the intestacy statutes then prevailing⁶⁶ would be that the brother would receive all of the real property as well as the personal property remaining after the husband had taken his intestate share of \$2,000 and one-half of the balance. It was not only quite obviously the intention of the wife that her husband should receive all of her property, but such a result would also, especially in view of the marital relationship and the direct and indirect contributions that a husband is apt to make to his wife's estate, seem to correspond much more with ordinary ideas of fairness than that reached by the court. The decision definitely states that the deed was delivered, and such a delivery, as has already been argued, should be considered to perform substantially the two more important purposes of the statute of wills and to justify upholding the instrument in terms of a functional compliance with its objectives.

Since the basis of this decision is that the language in the deed required a holding that no interest could pass until the death of the grantor, it is material to indicate how the deed could have been sustained in terms of the "interest" test. The court seems to construe the survival clause as making survival of the wife by the husband a condition precedent to the deed having any operative effect. Since such survival could not, of course, be determined until her death, this assumption leads to the conclusion that no interest would pass until then. It is quite possible, however, to construe a provision of this character as making survival a condition precedent only to the enjoyment of the property, thus enabling the court to hold that the deed, notwithstanding this provision, passed a present contingent right to future enjoyment.⁶⁷ The court also

65. Criticisms by a commentator must, of course, usually be based entirely on the summary of the evidence in the decision. This causes hesitancy in making adverse comments, since that summary may be incomplete. The commentator must proceed on the assumption that the decision reveals all relevant facts substantiating the result reached by the court.

66. CAHILL CONS. LAWS N. Y. (1923), c. 13, §§ 81, 87, 93(3), 100.

67. *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155 (1903).

concludes that the provision that the deed should "vest and take effect only upon my decease" made it completely ineffective until her death. Such a clause, however, can readily be construed as applying only to the vesting and taking effect of possession, and therefore as not precluding the passing of a present right to future possession.⁶⁸ The court also emphasizes the reservation of a power of revocation as indicating testamentary character. The existence of a power of revocation may, of course, be used to reinforce the conclusion that an instrument resembles a will because of the fact that wills are revocable. On the other hand, it is possible to argue that the reservation of such a power indicates that the instrument is not testamentary, since such reservation would be superfluous in a will,⁶⁹ which is automatically revocable, and, in any event, the existence of a power of revocation presents no insuperable barrier to sustaining the instrument, since it may be construed merely as a reservation of a power to divest an interest which has already passed.⁷⁰ If it should be argued that a delivered deed does not substantially comply with the purposes of the statute of wills because the doctrine of delivery does not take cognizance of the protective function, it would be anomalous to urge that the existence of a power of revocation should lead to the invalidation of the deed. The very inclusion of such a power is an indication of the absence of any imposition. If a wrongdoer desires to secure the execution of a deed by undue influence, he will certainly attempt to have the deed irrevocable so as to prevent the grantor revoking it as soon as he escapes from the pressure of the influence.

In view of the inequitable character of the result, the compliance with the doctrine of delivery, and the flexibility of the "interest" test, it seems that the deed in this case should have been sustained on the theory that it passed a present contingent interest to take effect in possession on the death of the wife if the husband survived her, this interest being subject to be divested by the exercise of the power of revocation.⁷¹

Deeds may also be attacked as testamentary, even if they are absolute on their face, because the language used by the transferor at the time of delivery of the deed to a third party specifies the death of the transferor as the time of delivery of the deed by the third party to the transferee. The generalizations in this situation are that the fact that the third party is instructed to deliver the deed to the transferee on the

68. *Montgomery v. Reeves*, 167 Ga. 623, 146 S. E. 311 (1929). Contrast with principal case, *Pelt v. Dockery*, 176 Ark. 418, 3 S. W. (2d) 62 (1928).

69. *Mays v. Burlison*, 180 Ala. 396, 61 So. 75 (1913).

70. *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914).

71. On the testamentary character of deeds, see Ballantine, *When are Deeds Testamentary?* (1920) 18 MICH. L. REV. 470; Comment (1917) 30 HARV. L. REV. 508; (1926) 4 WIS. L. REV. 56, (1921) 11 A. L. R. 23, (1932) 76 A. L. R. 636; 4 TIFFANY, REAL PROPERTY (3d ed. 1939) §§ 1070-75.

death of the transferor does not invalidate the transfer,⁷² but that the transfer is inoperative if the third party is also instructed to redeliver the deed to the transferor on demand.⁷³ The propriety of the latter conclusion is open to question. But, in any event, it is not necessary to use the testamentary argument to support the invalidation of the deed. In fact, the power of the transferor to recall the deed does not lead any more definitely to the conclusion that the instrument is testamentary than the express reservation of a power of revocation in the deed itself, since in either case it can be argued that a present interest passes to the transferee subject to be divested by the exercise of the power. The essential difficulty in this situation is that the transfer fails to comply not only with the statute of wills, but also with the requirement of delivery. It may be argued that a tentative deposit of the deed in the hands of another human being with the reservation of complete control over it does not comply with the ritual function, because it does not indicate finality of intent any more fully than the deposit of the deed in the desk drawer of the transferor. As has already been indicated, it is not the contention of this article that all written statements of intention should automatically be upheld, since that would amount to saying that the court should accept as operative any loose, scribbled notes found lying around among the papers of the deceased at the time of his death. If the court does not believe that the transfer was intended to be finally operative, it should, in fairness to the transferor and to those who would take the property after his death in the absence of a transfer, deny effect to the proffered evidence of his intention.

Oral Gifts of Personal Property. It has been held, and it seems properly so, that a donor may make an effective gift of personal property by handing the subject matter to a third party to be delivered on the death of the donor to the donee, the court using the analogy of the deed cases and holding that mere postponement of enjoyment until the death of the donor does not prevent the passing of an immediate right to such postponed enjoyment.⁷⁴ Such cases often turn doctrinally on the argument of whether the third party is the agent of the donor or a trustee for the donee. If the former, the agency is revoked by the death of the donor, and a delivery after his death is therefore inoperative. If the third party is a trustee for the donee, the gift is deemed operative at the time of delivery to the third party. The determination of this question is said to depend upon the amount of control over the

72. *Stalting v. Stalting*, 52 S. D. 309, 217 N. W. 386 (1927).

73. *Weber v. Schafer*, 236 Mich. 345, 210 N. W. 248 (1926). On the present status of the Iowa rule, formerly *contra*, see *Smith v. Fay*, 228 Iowa 868, 293 N. W. 497 (1940).

74. *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604 (1915), 3 A. L. R. 896, 902 (1919); Note (1929) 60 A. L. R. 1054.

subject matter retained by the donor.⁷⁵ This same conception may be expressed in terms of the ritual function, since the greater the control reserved by the donor, the more tentative the expression of intention, and the less likely will a court be to conclude that a finally operative disposition was actually intended. If it can be assumed, however, that delivery of the subject matter of a gift of personal property substantially fulfills the two more important purposes of the statutes of wills, an unequivocal gift complying with the requirement of delivery should not be invalidated as testamentary solely on the ground that the third party is to deliver to the donee on the donor's death.

If the death of the donor is stated as a condition precedent to the operation of a gift accompanied by a delivery of the subject matter directly to the donee, the gift, whether *inter vivos* or *causa mortis*, may be held inoperative without recourse to a testamentary argument on the theory that such a gift cannot be made subject to any type of condition precedent, whether it is the donor's death or some other contingency.⁷⁶ This conception is similar to that prevailing at early common law with reference to transfers by livery of seisin, the analogous form of transfer of real property. A feoffment stated to be subject to a condition precedent was inoperative,⁷⁷ although there was no more objection than there is in the case of a gift of personal property today to a feoffment stated to be subject to a condition subsequent.⁷⁸ This distinction may be the product of the materialistic attitude of the early common law.⁷⁹ If title is identified with physical possession, it must be transferred when the possession is delivered; if the two cannot be separated, an attempt to deliver possession now for the purpose of transferring title in the future is nugatory. On the other hand, it is not incompatible with a materialistic approach to sanction a simultaneous immediate transfer of both possession and title, subject to a condition subsequent, under which title may be regained by retaking possession. This distinction seems extremely technical today, particularly since it is apt to make the validity of a gift of personal property depend on the accidental phraseology of the testimony of a layman about words spoken by another layman and thus

75. *Hudson v. First Trust Co.*, 200 Wis. 220, 228 N. W. 121 (1929); *Bickford v. Mattocks*, 95 Me. 547, 50 Atl. 894 (1901); *Grant Trust Co. v. Tucker*, 49 Ind. App. 345, 96 N. E. 487 (1911).

76. *Van Pelt v. King*, 22 Ohio App. 295, 154 N. E. 163 (1926); *Moore v. Layton*, 147 Md. 244, 127 Atl. 756 (1925); *People's Trust Co. v. Dickson*, 126 Misc. 580, 214 N. Y. Supp. 73 (Sup. Ct. 1926), *aff'd*, 220 App. Div. 742, 221 N. Y. Supp. 888 (2d Dep't 1927); (1932) 18 IOWA L. REV. 95, (1927) 1 U. OF CIN. L. REV. 227.

77. CHALLIS, *LAW OF REAL PROPERTY* (3d ed. 1911) 104; 1 SIMES, *FUTURE INTERESTS* (1936) § 26; 2 TIFFANY, *REAL PROPERTY* (3d ed. 1939) § 356.

78. CHALLIS, *LAW OF REAL PROPERTY* (3d ed. 1911) 219, 261; 1 SIMES, *FUTURE INTERESTS* (1936) § 24; 1 TIFFANY, *REAL PROPERTY* (3d ed. 1939) § 211.

79. Maitland, *The Mystery of Seisin* (1886) 2 L. Q. REV. 481, 489.

places a premium upon the care with which witnesses may be coached in advance of the trial. The distinction, however, may be overlooked or disregarded,⁸⁰ or language that would seem in its usual meaning to impose a condition precedent may, particularly if spoken by a layman unacquainted with nice legal distinctions, be interpreted as not imposing any such condition, and, therefore, as not preventing an immediate transfer of title.⁸¹ If the application of the distinction is sufficiently flexible to leave the invalidation of an alleged gift because of it to the discretion of a court or jury, it may possibly be justifiable as a doctrinal expedient for invalidating a gift made by a decrepit donor⁸² and yet sustaining an eminently equitable one made by a gentleman, who, although threatened with death, appeared from the evidence to be in a very normal and vigorous mental condition.⁸³ Flexibility of construction is probably the most hopeful technique for sustaining a gift in this situation against either the objection of the delivery rule or the testamentary argument. Many of these informal oral gifts purporting to make death a condition precedent are probably made in contemplation of death, and, if the language can be construed as showing an intent to pass title immediately, subject to be divested by the recovery of the donor, the case will fall within the recognized definition of a gift *causa mortis*.⁸⁴ If the language is construed as imposing a condition precedent, it is difficult to use the argument, which may be readily employed in the case of a deed or a delivery of the subject matter to a third party when possession has not yet been given to the donee, that the condition precedent is to enjoyment and possession only and not to the passing of an interest, because, in this situation, it is assumed that immediate possession is given to the donee.

Living Trusts. The courts have been almost unanimous in sustaining against the testamentary argument *inter vivos* transfers in trust which are otherwise valid because of compliance with the doctrine of delivery.⁸⁵

80. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627 (1891).

81. *Elliott's Estate*, 312 Pa. 493, 167 Atl. 289, 90 A. L. R. 360, 366 (1933); cf. *Hudson v. First Trust Co.*, 200 Wis. 220, 228 N. W. 121 (1929).

82. *Van Pelt v. King*, 22 Ohio App. 295, 154 N. E. 163 (1926).

83. *Elliott's Estate*, 312 Pa. 493, 167 Atl. 289, 90 A. L. R. 360, 366 (1933).

84. *Raymond v. Sellick*, 10 Conn. 480 (1835); *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775 (1895); *ATKINSON, WILLS* (1937) 156.

85. *Goodrich v. City Nat. Bank & Trust Co.*, 270 Mich. 222, 258 N. W. 253 (1935); *Scott, Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521; *Leaphart, The Trust as a Substitute for a Will* (1930) 78 U. OF PA. L. REV. 626; *Rowley, Living Testamentary Dispositions and the Hawkins Case* (1929) 3 U. OF CIN. L. REV. 361; *Seftenberg, The Border Lines of Agency, Living Trusts, and Testamentary Disposition* (1930) 5 WIS. L. REV. 321; *Comments* (1929) 38 YALE L. J. 1135, (1932) 26 ILL. L. REV. 821; (1938) 37 MICH. L. REV. 348, (1935) 19 MINN. L. REV. 821, (1931) 73 A. L. R. 209, (1939) 118 A. L. R. 481. See also OHIO GEN. CODE ANN. (Page, 1937) § 8617; WIS. STATS (1939) § 231.205.

The reservation by the settlor of a life estate and a power of revocation, or lesser powers, does not invalidate the trust for failure to comply with the statute of wills, since the beneficiary, whose enjoyment is to commence at the death of the settlor, may be said to receive at the time of the creation of the trust an immediate right to such future enjoyment, subject to be divested by the exercise of the power of revocation. Such a result is certainly eminently desirable. Compliance with the doctrine of delivery is essential to the creation of a transfer in trust, and, since such transactions are usually supervised by attorneys, it is probable that a formal instrument will be prepared and delivered even though it is not doctrinally essential to do so in the case of personal property. Again the two main objectives of the statute of wills seem to be satisfied. It may also be suggested that the substantial unanimity in attitude about this type of transfer may be partly motivated by a realization of the increasingly widespread use of such living trusts and by a consequent reluctance to cast doubt on their validity.

An interesting situation is presented in the case of *Frost v. Frost*.⁸⁶ A husband signed written assignments of all his rights in five insurance policies on his life payable to his estate, the assignees named in the assignments being "the trustees to be named in my will," for the benefit of his wife. The attempted assignments were held inoperative. Since the opinion states that "the papers were all retained by the assignor," and that they were not delivered to the assignees or to anyone else for them, the result seems justifiable on the ground that the assignments not only failed to comply with the statute of wills but also were never delivered. Certain informal conversations among the members of the family, referred to in the opinion, might indicate that the husband intended the assignments to be finally operative, but the facts stated indicate that the ritual function was not adequately complied with. If the assignments had been unequivocally delivered to a third party to be delivered after the death of the assignor to the trustees named in his will, it would be desirable to sustain the attempted assignment. The argument of the court, however, might lead to the opposite conclusion, since it is partly predicated upon the fact that the will referred to was the one which would finally be admitted to probate and that, therefore, the assignees could not be ascertained until after the death of the assignor, thus precluding the possibility of title passing during the life of the assignor. From the point of view of the purposes of the requirements, invalidation of the assignments under those circumstances would seem undesirable, since the statements of intention would be contained in two documents, one of which was a delivered written assignment, and the other a validly executed will, and particularly because the only ambu-

86. 202 Mass. 100, 88 N. E. 446, 27 L. R. A. (N.S.) 184 (1909).

latory element in the transfer would be the possibility of a change of the assignees by the valid execution of a different will. It would seem curious to hold a transfer void for failure to comply with the statute of wills when the only instrument which makes it ambulatory does comply with that statute. Such a transfer might be sustained on the theory that it was intended to pass an interest to the trustees named either in an existing will, or in the first will to be executed by the assignor after the assignment, subject to be divested by the revocation of that will and to shift to the trustees named in the will revoking it, again subject to be divested and to shift by the execution of another will, and so on. This construction would, however, involve a less orthodox interpretation of the language of the assignment than that employed by the court. It would, therefore, seem preferable, as Mr. Bogert⁸⁷ and Mr. Scott⁸⁸ have indicated, to sustain the attempted transfer in trust, under those circumstances, on the theory that a transfer in trust will not fail merely because of the absence of the proper designation of the trustee.⁸⁹

Life Insurance Trusts. In the relatively few decisions to date, it has been held that the type of life insurance trust in which the insurance company agrees to pay the proceeds to an independent trustee, who in turn agrees to hold them in trust, is not invalid as an attempted testamentary disposition.⁹⁰ Any other result would be very surprising, as well as unfortunate. Since the trust agreement is merely one by a third party to hold property when received in trust, it is difficult to see how that element in the transaction contributes anything to a testamentary argument. If this assumption is correct, the invalidation of a life insurance trust as testamentary would have to depend on the conclusion that the designation of the beneficiary of a life insurance policy was testamentary. Any such conclusion would, of course, raise havoc with established practices of life insurance, an extremely widespread and valuable social institution. The various formalities involved in taking out life insurance and naming the beneficiary preclude the idea that the designation of the beneficiary, whether originally or through a change of beneficiary, is a haphazard act and, therefore, seem to perform adequately the ritual function. And the fact that the designation of the beneficiary of the policy and, under current practices, the trust agreement also in the case of a life insurance trust, are committed to writing seems a sufficient compliance with the purpose of the evidentiary function. The doctrinal argument for holding that the designation of the beneficiary of a life

87. 1 BOGERT, TRUSTS (1935) § 105.

88. 1 SCOTT, TRUSTS (1939) § 26.2.

89. Wittmeier v. Heiligenstein, 308 Ill. 434, 139 N. E. 871 (1923); RESTATEMENT, TRUSTS (1935) § 32(2).

90. See, e.g., Sigal v. Hartford Nat. Bank & Trust Co., 119 Conn. 570, 177 Atl. 742 (1935).

insurance policy is not a testamentary transfer by the insured is that such a transaction does not involve a transfer of property by the insured. The policy is a contract by the insurance company in consideration of the receipt of premiums to pay a stipulated sum of money on the death of the insured to the beneficiary. A transfer of property by one person on the death of another is not the testamentary act of that other, nor is an agreement made in advance to do so. An additional argument against the idea that a transfer by the insured is involved can be based on the fact that the proceeds of the policy, while in a sense the product of the payment of premiums, will hardly ever be the same in amount as the premium payments. These arguments seem sufficient to dispose of the contention that the designation of the beneficiary is testamentary because the economic enjoyment of the proceeds commences after the death of the insured and the interest of the beneficiary is destructible by the exercise of the power to change the beneficiary, regularly reserved in standard life insurance policies.

Employees' Stock Purchase Plan. In a few cases the argument has been made that the designation of a beneficiary to receive the stock and cash standing to the credit of an employee in the event of the latter's death during the period of continuance of an employees' stock purchase plan is testamentary and therefore void, because, while the designation is made in a writing filed with the company, that writing does not comply with the requirements of the statute of wills. In *In re Koss*⁹¹ the designation of the beneficiary was held valid against this argument on the theory that it is closely analogous to the designation of the beneficiary of a life insurance policy. This analogy seems clearly proper. The agreement to transfer to the designated beneficiary may be considered a contract in consideration of the contributions made by the employee, and perhaps also in consideration of his services rendered to the corporation. The analogy is reinforced if, as was true in the *Koss* case, the property transferable to such beneficiary would be different and larger in value than that which the employee might withdraw during the running of the plan, since this difference is similar to that between the proceeds and the premiums of a life insurance policy. One decision to the contrary seems clearly dictated by the equities of the particular case.⁹² The propriety of upholding the designation of the beneficiary is further indicated by the formalities and negotiations involved in entering into the stock purchase plan and by the written designation of the beneficiary filed with the company, which seem, as in the case of a life insurance

91. 106 N. J. Eq. 323, 150 Atl. 360 (1930).

92. *Tensfield v. Magnolia Petroleum Co.*, 134 Okla. 38, 272 Pac. 404 (1928) (designation, prior to marriage, of father as beneficiary, held inoperative, stock thus passing by intestacy to wife and posthumous child).

policy, sufficiently to perform the ritual and evidentiary functions. It is also at least arguable that these plans are of social value in encouraging saving by the employees and in stimulating their interest in the business, and that a decision casting doubt on the validity of the established practice in an integral part of the plan is, therefore, unfortunate.

Custodian Accounts. The usual arrangement for the deposit of securities with a bank or trust company in a custodian account may properly be classified as an agency in view of the control over investments retained by the depositor.⁹³ In *Matter of Ihmsen*,⁹⁴ a bank holding securities in a custodian account also agreed that, on the death of the depositor, the bank would hold the securities then in the account in trust for various beneficiaries. This agreement was held inoperative on the theory that the agency relationship terminated on the death of the depositor and that the attempt to set up a trust after his death was void for failure to comply with the statute of wills, since the depositor did not intend that the bank should receive title to any of the property during his lifetime. From the functional point of view this decision seems unfortunate, since the agreement was formal in character and was both signed and acknowledged by the depositor and the bank and would, therefore, seem adequately to comply with the ritual and evidentiary purposes. And, while it would probably correspond with the intention of the depositor to hold that the ordinary custodian account, like other agency relationships, terminates at his death, the agreement in this case shows clearly that it was his intention to have the custodian account changed at his death into a trust which should thereafter continue. The court's conclusion that there was no intent that the bank should have "legal title" to the property in the account during the life of the depositor probably corresponds with the terms of the agreement, since it seems clearly the intention of the parties that the trust should only commence in operation at the depositor's death. It does seem, however, that the court could have upheld the agreement against the testamentary argument, on the theory that, in accordance with the language of the agreement, there was, in addition to the ordinary custodian account, a contract by the bank that it would at the death of the depositor hold the securities in trust, the consideration being either the payments made to the bank by the depositor or the detriment to the depositor in leaving the securities with the bank in reliance on the agreement. This arrangement seems quite similar to the life insurance trust in which a trust company, named as beneficiary of the policy, agrees to hold the proceeds when received in trust, which may also be sustained on the theory that, while the

93. *De Mott v. National Bank of New Jersey*, 118 N. J. Eq. 396, 179 Atl. 470 (Ch. 1935).

94. 253 App. Div. 472, 3 N. Y. S. (2d) 125 (3d Dep't 1938).

trustee has no title to the property until the death of the insured and the trust does not commence in operation until that time, the trust agreement during the life of the insured constitutes an enforceable contract.⁹⁵ If this theory had been adopted in the *Ihmsen* case, the testamentary argument could have been defeated by saying that the beneficiaries during the life of the depositor received a present interest in the form of a contract right against the trust company.⁹⁶

Contracts. A provision in a contract stipulating for performance at or after the death of the promisor need not be held to make the contract void as testamentary, since, as in the other cases, it may be construed as merely postponing the time of performance and as not preventing the immediate creation of a present right to such performance.⁹⁷ In *American University v. Conover*,⁹⁸ however, the court, while recognizing the use of this argument in other states, felt that it should follow the tendency in New Jersey to "treat very strictly agreements which would tend to circumvent the statute of wills" and held void as testamentary a written promise to pay \$5,000 to a University because it included a clause reading "this pledge shall become due upon the day of my decease and shall be paid within one year thereafter by my administrator or executor out of the proceeds of my estate." This result seems unfortunate. It defeats the intention of the promisor to make a contribution for a worthy cause. Since the instrument was a formal one and was both signed and witnessed, it would seem sufficiently to satisfy the ritual and evidentiary functions, even though it did not comply precisely with the requirements of the statute of wills. The court conceded that there was sufficient consideration based upon the promises of other contributors to an endowment fund and also upon the specification that this particular contribution should be used for a particular purpose in the form of a scholarship fund.

95. Grahame, *The Insurance Trust as a Non-Testamentary Disposition* (1934) 18 MINN. L. REV. 391; Phillips, *The Testamentary Character of Personal Unfunded Life Insurance Trusts* (1934) 82 U. OF PA. L. REV. 700; Horton, *The Testamentary Nature of Settlements of Life Insurance Elected by the Beneficiary* (1931) 17 CORN. L. Q. 72; Comment (1933) 46 HARV. L. REV. 818; Note (1936) 102 A. L. R. 588.

96. It is not clear from the report who the remainderman-beneficiaries of the trust were. It is possible that they would be unable to enforce the contract under the New York third party beneficiary rule. See *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918), 2 A. L. R. 1187, 1193 (1919).

97. *Patterson v. Chapman*, 179 Cal. 203, 176 Pac. 37, 2 A. L. R. 1467, 1471 (1918); *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860 (1891); *First Presbyterian Church v. Dennis*, 178 Iowa 1352, 161 N. W. 183, L. R. A. 1917C 1005, 1011 (1917).

98. 115 N. J. L. 468, 180 Atl. 830 (1935), (1936) 16 B. U. L. REV. 269, (1936) 36 COL. L. REV. 834, (1936) 5 FORD. L. REV. 375.

An even more regrettable result was ultimately reached after three hearings in *In Re Murphy's Estate*.⁹⁹ Four years before his death, Mr. Murphy, an attorney, entered into an agreement, designated as a "lease", with the Young Men's Christian Association, which, after his death, sued Murphy's executor to compel him to deliver a deed to the premises pursuant to the terms of the lease. The lease was to run for the period of Mr. Murphy's life or until a guardian or trustee were appointed for his estate. The Young Men's Christian Association occupied the land as lessee during Mr. Murphy's life, making substantial expenditures for improvements, taxes, etc., and was still in possession at the time of this suit. The lease was detailed in its terms and imposed various obligations on the lessee with reference to such matters as payment of taxes and carrying charges, repairs, care of the premises, construction of a sewage system and cabins for boys, etc. The lessor was given the power to terminate the lease on the lessee's breach of any of the provisions. The paragraph of the lease chiefly involved in this litigation read as follows:

"It is further covenanted and agreed that if the said lessee shall fully perform the terms of this lease and the said lease is in good standing at the time of the death, or the appointment of a guardian or trustee, of the lessor's estate, then in that event the said lands and premises shall become the property of the said lessee and if the said lessee is in possession at the time of the death of the said lessor or at the time of the appointment of a guardian or a trustee, it shall be conclusive proof against the lessor, his representatives and his estate that the lease is in good standing. It is understood on behalf of the lessor that the services to be rendered and the work to be performed, and the expenditures to be made by the said lessee in the fulfillment of the provisions in this lease, is a sufficient consideration for the passing of the title of the said lands and premises to the lessee upon the death of the lessor, or sooner upon the appointment of a guardian or a trustee, and said transfer and passing shall not be regarded as a gift or devise, but for a good and sufficient consideration, and the executors or administrators or personal representatives of said lessor are hereby authorized, directed and empowered upon his death, or sooner upon the appointment by his deed or otherwise of a guardian or a trustee to manage his estate, to execute any and all conveyances which may be necessary and proper to vest in the said lessee."^{99a}

In holding that the executor was under no duty to convey the property to the petitioner, the ultimate majority of the court proceeded on the ground that the provision that the land should become the property of

99. 191 Wash. 180, 71 P. (2d) 6 (1937), *rev'd on rehearing*, 193 Wash. 400, 75 P. (2d) 916 (1938), *reversal aff'd on rehearing*, 195 Wash. 695, 81 P. (2d) 779 (1938), 37 MICH. L. REV. 167, 23 MINN. L. REV. 112, 86 U. OF PA. L. REV. 792.

99a. 191 Wash. 180, 186-87, 71 P. (2d) 6, 10 (1937).

the lessee at the death of the lessor passed no interest to the lessee until the lessor's death and was, therefore, an attempted testamentary disposition and void for failure to comply with the statute of wills. This decision not only defeats the intention of Mr. Murphy to make a donation to a very useful organization, with which he had been actively associated as an officer and otherwise for a period of about thirty years, but seems extremely unfair to the Young Men's Christian Association, which had made substantial expenditures of money, time, and effort in improving the premises, undoubtedly in reliance upon the continuity of possession assured, under the terms of the agreement, if it should comply with the provisions of the lease. The ritual and evidentiary functions seem well performed, since the fact that the detailed and formal agreement was not only executed, but also personally prepared by Mr. Murphy, the extended negotiations that must have preceded it, and the substantial operations of the Young Men's Christian Association in reliance on it preclude the idea that it was a casual action, and the incorporation of its terms into a formal writing supplied the court with entirely satisfactory evidence of intention. As is clearly and forcefully pointed out in the able dissenting opinions of Justice Robinson,¹⁰⁰ there was no doctrinal necessity for reaching this unfortunate result, since the agreement could have been held to create, at the time of its execution, a present contract right in the Young Men's Christian Association to receive a deed in the future. The fact that, under the terms of the agreement, the deed was to be due not only on the death of the lessor, but also in the event of his incapacity, should further militate against a testamentary construction, since it shows that the death of the lessor was not the only time fixed for possible performance.

In *McCarthy v. Pieret*,¹⁰¹ a mortgagor and mortgagee, two years after the execution of the bond and mortgage, entered into an agreement extending the due date of payment of the bond and mortgage and also providing that, if the mortgagee should die prior to the new due date, the mortgagor should make payments of interest and principal, one-half to the brother of the mortgagee and one-half to the heirs of a deceased sister of the mortgagee. The mortgagee died five years prior to the new due date, and her brother and nieces and nephews, heirs of the sister, sued the mortgagor and the mortgagee's administrator for a past due interest installment. On appeal from a judgment granting the

100. 193 Wash. 400, 421, 75 P. (2d) 916, 925 (1938); 195 Wash. 695, 696, 81 P. (2d) 779, 780 (1938). Cf. *Re Lewis*, 2 Wash. (2d) 458, 98 P. (2d) 654, 127 A. L. R. 628, 634 (1940).

101. 281 N. Y. 407, 24 N. E. (2d) 102 (1939), *rehearing denied*, 26 N. E. (2d) 837 (1940), *motion for reargument denied*, 282 N. Y. 800, 27 N. E. (2d) 207 (1940), 18 CHI. KENT L. REV. 417, 26 CORN. L. Q. 130, 53 HARV. L. REV. 1060, 38 MICH. L. REV. 900, 24 MINN. L. REV. 1009.

motion of the plaintiff for summary judgment, the Court of Appeals, with two judges dissenting and one not participating, reversed the judgment and dismissed the complaint. This result was reached on the ground that the provision for payment to the brother and the heirs of the deceased sister showed no intention to transfer any interest to them until the death of the mortgagee and was, therefore, void as an attempted testamentary disposition not complying with the statute of wills. Neither the opinion nor the record on appeal disclose in any detail the circumstances surrounding the execution of the extension agreement, it being merely stated that it was "entered into" and was recorded one week after the death of the mortgagee. It is nevertheless probable that it was a sufficiently formal document, deliberately executed by the mortgagee, to assure substantial compliance with the ritual and evidentiary functions. If so, the decision seems unfortunate in defeating the expressed intention of the mortgagee. The pleadings and affidavits upon which the motion for summary judgment was made do not seem to provide sufficient facts upon which to predicate compliance with the doctrine of delivery,¹⁰² and, therefore, the theory of a gift by the mortgagee of her rights under the mortgage is inappropriate. The extension of the time of payment of principal, however, should furnish sufficient consideration for the mortgagee's new promise¹⁰³ and the case would also seem to fit into the category of a novation,¹⁰⁴ the original obligation of the mortgagor to pay to the mortgagee being discharged in consideration of the mortgagor's assuming the alternative duties of making payments to the mortgagee during her life and to the brother and the heirs of the deceased sister if the mortgagee should die before the due date of the mortgage. In most jurisdictions, therefore, it would seem that an arrangement of this character could be sustained on a contract theory. The question of whether the New York rule concerning third party beneficiaries to a contract would prevent a recovery in this case on a contract theory, while argued in the briefs¹⁰⁵ and referred to in the opinions below,¹⁰⁶ is disposed of in the opinion

102. Record on Appeal, pp. 13-21; Defendant-Appellant's Reply Brief, pp. 1-6.

103. 1 WILLISTON, CONTRACTS (rev. ed. 1938) § 122; NEW YORK PERS. PROP. LAW § 33(2); NEW YORK REAL PROP. LAW § 279(1).

104. 6 WILLISTON, CONTRACTS (rev. ed. 1938) §§ 1865 *et seq.*; RESTATEMENT, CONTRACTS (1932) §§ 424 *et seq.*

105. Defendant-Appellant's Brief, pp. 16-27; Plaintiffs-Respondents' Brief, pp. 3-6; Defendant-Appellant's Reply Brief, pp. 6-13.

106. The opinion at Special Term concludes: "the very case upon which the defendant relies, *Seaver v. Ransom* (224 N. Y. 233), holds that nephews and nieces may have a stronger claim than those more closely related to a decedent." N. Y. L. J., Feb. 25, 1938 p. 967, col. 2. The dissenting opinion in the Appellate Division reads in part: "The rule is that a third party may take advantage of a contract made for his benefit when he has furnished a consideration therefor. Such consideration may

of the Court of Appeals with the statement that *Scaver v. Ransom*¹⁰⁷ was not an authority in favor of the plaintiffs because "the decision has nothing to do with attempts to make testamentary dispositions."

Bank Deposits. While there has been much litigation about the various forms of bank deposits,¹⁰⁸ an appropriate analysis may be indicated by the example of a deposit in a savings bank in the name of one person as trustee for another. The most complete development of the legal aspects of this situation has been made by the New York courts in establishing the elusive but nevertheless highly useful concept of the "tentative trust," first definitively enunciated in the leading case of *Matter of Totten* in the following terms:

"A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of a pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."¹⁰⁹

The requirement of a res for a trust presents no obstacle here, since the rights of the depositor against the bank seem an entirely appropriate subject-matter for a declaration of trust by him in favor of the

be his relationship as a natural object of bounty to one of the contracting parties. Here the beneficiaries are a whole class of persons, and there is no indication that the contracting parties, or either of them, was under legal or moral obligation to them." 255 App. Div. 1025, 8 N. Y. S. (2d) 554 (2d Dep't 1938).

107. 224 N. Y. 233, 120 N. E. 639 (1918).

108. Joint deposits have been particularly productive of litigation, and have produced arguments and decisions in terms of a variety of legal categories. For collections of cases on these deposits, see Notes (1927) 48 A. L. R. 189, (1930) 66 A. L. R. 881, (1936) 103 A. L. R. 1123. The situation may be covered by statute. See, e.g., N. Y. Banking Law § 239(3); *Moskowitz v. Marrow*, 251 N. Y. 380, 167 N. E. 506 (1929); *Marrow v. Moskowitz*, 255 N. Y. 219, 174 N. E. 460 (1931); *Matter of Suter*, 258 N. Y. 104, 179 N. E. 310 (1932); *Matter of Leake*, 163 Misc. 285, 296 N. Y. Supp. 720 (Surr. Ct. 1937); *Matter of Juedel*, 280 N. Y. 37, 19 N. E. (2d) 671 (1939). On a functional level, for the reasons stated below in connection with tentative trusts, the claim of the survivor should be sustained if the depositor's intent to give him an interest is sufficiently clear. Even without statutory authorization a recovery may properly be allowed on a contract theory. *Goldston v. Randolph*, 293 Mass. 253, 199 N. E. 896 (1936). A deposit in the sole name of another has raised difficulties in the interpretation of intent. *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940 (1889), 137 N. Y. 59, 32 N. E. 998 (1893); Note (1929) 59 A. L. R. 975.

109. *Matter of Totten*, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904). These deposits are sometimes called "Totten" trusts from the name of this case.

beneficiary; but there are various other doctrinal difficulties. The rebuttable¹¹⁰ presumption that the trust is revocable runs counter to the proposition that an inter vivos trust is irrevocable unless a power of revocation is expressly reserved.¹¹¹ It is a perfectly logical deduction from this proposition that the deposit, reserving no power to revoke, creates a presumption of an irrevocable trust.¹¹² In the *Totten* case the revocable or tentative character of the trust is attributed to the combined evolution of New York case law and human practices, and chiefly to the idea expressed in *Beaver v. Beaver*¹¹³ that a deposit by one person in the sole name of another does not show, without more, an intent to give that other an interest, because of the widespread practice of making deposits in the name of a dummy without any intention to transfer ownership. Since the *Beaver* case denied the existence of any interest in the person named in the account, complete adherence to its reasoning would result in denial of a recovery to the person named as beneficiary of a trust account. Prior to the *Beaver* case, however, beneficiaries of savings bank trust accounts had been allowed to recover the balance remaining in the account at the death of the depositor.¹¹⁴ The change in philosophy manifested in the *Beaver* case is attributed in the *Totten* case to changing practices in making savings bank deposits. The tentative trust doctrine, in permitting recovery by the beneficiary of the balance at the death of the depositor, but allowing the depositor to withdraw the deposit during his lifetime, gives effect to the impact of the *Beaver* case by limiting, rather than reversing, the former decisions.

If the beneficiary predeceases the depositor, the presumption is that the estate of the predeceased beneficiary is not entitled to the balance in the account at the depositor's death, the existence of this presumption being justified in the following terms, after referring to the language from *Matter of Totten* quoted above:¹¹⁵

"As this rule was formulated with great care, we are to assume that the words in which it is couched were advisedly chosen. It will be seen upon a careful reading that the trust is, in the first place, described as a 'tentative trust,' by which we understand a suggested or proposed trust, not completed or consummated. It

110. *Larkin v. Greenwich Sav. Bank*, 244 App. Div. 756, 279 N. Y. Supp. 267 (2d Dep't 1935), *aff'd, mem.*, 271 N. Y. 569, 3 N. E. (2d) 189 (1936); *Hanigan v. Wright*, 233 App. Div. 82, 251 N. Y. Supp. 651 (3d Dep't 1931), *aff'd without opinion*, 257 N. Y. 602, 178 N. E. 813 (1931); RESTATEMENT, TRUSTS (1935) § 58 Comment a.

111. 4 BOGERT, TRUSTS (1935) § 993; 3 SCOTT, TRUSTS (1939) §§ 329A-330.3; RESTATEMENT, TRUSTS (1935) § 330.

112. *Cazallis v. Ingraham*, 119 Me. 240, 110 Atl. 359 (1920).

113. 117 N. Y. 421, 22 N. E. 940 (1889); 137 N. Y. 59, 32 N. E. 998 (1893).

114. *Martin v. Funk*, 75 N. Y. 134 (1878); *Willis v. Smythe*, 91 N. Y. 297 (1883).

115. See note 109 *supra*.

will also be noted that the subject of the trust, when it finally becomes consummate, is the balance on hand at the death of the depositor. It would seem to follow that until the depositor's death the funds on deposit are impressed with no trust in the sense that any title thereto, actual or beneficial, vests in the proposed beneficiary unless the depositor shall have completed the gift in the manner suggested by the case above cited. . . ."116

The court then stated that the beneficiary had no present "title or interest" during his lifetime and that, on his death, the funds on deposit became the sole property of the depositor. In other words, it applied the theory of the doctrine that a legacy lapses if the legatee predeceases the testator, the reasoning there being that a will passes no interest until the testator's death, a dead man cannot take title, and therefore the legatee must be alive at the testator's death to receive any interest under the will. But, as suggested in the dissenting opinion in this case,¹¹⁷ this analogy is technically inappropriate if the deposit is deemed an immediately effective, though revocable, declaration of trust. Under such an interpretation, the theory would be that the beneficiary received an interest at the time of the deposit, if he were then alive, subject to be divested by revocation; and this interest would not, under orthodox doctrines, terminate at his death in the absence of a limitation to that effect in the terms of the trust. This aspect of the tentative trust theory therefore militates against the idea that it is an *inter vivos* transfer.

Yet the claim of the surviving beneficiary is regularly sustained in New York although the deposit does not conform with the statute of wills. In spite of the large number of cases in New York, no clear-cut doctrinal explanation of this result has been found among them. This may be due to the fact that the *Totten* decision did not involve the

116. *Matter of U. S. Trust Co.*, 117 App. Div. 178, 180, 102 N. Y. Supp. 271, 272 (1st Dep't 1907), *aff'd without opinion*, 189 N. Y. 500, 81 N. E. 1177 (1907).

117. "The trust, which is revocable by the trustee or creator of the trust, continues as a valid trust until by some act of the creator of the trust, who reserves the right to revoke it, the trust was revoked. It was not revocable by the act of any person except the creator of the trust, and it was to remain a valid trust if unrevoked at his death. The death of a beneficiary does not revoke a trust of which he is the beneficiary, and if a trust was created by the deposit, in the absence of any act of the testator indicating an intention to revoke, the trust continues, and after the death of the creator of the trust, the beneficiary, or his personal representatives, is entitled to the trust fund. . . . It is said that this trust is tentative, dependent upon the survival of the beneficiary, but there is no evidence to show that such was the intention of the depositor. He undoubtedly reserved the right to revoke it, and to that extent it was tentative, but his failure to revoke it after the death of the beneficiary of which he had knowledge indicated an intention to continue it." *Matter of U. S. Trust Co.*, 117 App. Div. 178, 184, 102 N. Y. Supp. 271, 275 (1st Dep't 1907), *aff'd without opinion*, 189 N. Y. 500, 81 N. E. 1177 (1907).

issue,¹¹⁸ and yet, by way of dicta, made a definite pronouncement, since followed without question by the New York courts,¹¹⁹ of the validity of the trust as to the balance at the death of the depositor. Of course, the traditional doctrinal solution of this issue would be to hold that an interest passed to the beneficiary at the time of the deposit subject to be divested through revocation by withdrawal or otherwise. The inconsistency between this conception and the presumption that the predecease of the beneficiary terminates his interest could be eliminated by rationalizing that presumption in terms of the intent of the depositor. It would be difficult, it is true, to reach a reliable general conclusion as to whether the depositor would intend the interest of the beneficiary to terminate on his prior death, but such a conclusion, one way or the other, would furnish a more satisfactory basis for a presumption than abstract speculation about the time of passing of an interest.

This technique of presuming intent is exemplified by the forthright opinion of Surrogate Wingate in *Matter of Reich*,¹²⁰ holding that, in the absence of other sufficient assets, inter vivos debts¹²¹ and funeral expenses of the deceased depositor could be paid from a tentative trust account. He first made the following interesting comments on the famous enunciation of the doctrine in the *Totten* case:

"While this is the unquestionable law of the State of New York relating to this subject, candor compels the concession that it amounts to a judicial addition to the mode permitted by Section 21 of the Decedent Estate Law for the transmission of property on death. This is not said in disparagement of the rule, since its enunciation is but another evidence of the attempt of the courts to conform the law to the customs of the community. The mere fact that the presumption of trust is created only in respect to the balance on hand in the account at the death of the depositor, demonstrates that the theory of the decision is that the 'trust' springs into being only at the moment of his death. The alternative

118. The Court of Appeals in the *Totten* case affirmed the decree of the Surrogate which dismissed the claim of the surviving beneficiary against the estate of the deceased depositor for amounts withdrawn by the depositor during her lifetime. The decision of the Court of Appeals was based on the theory that the deposit did not create an irrevocable trust and that the depositor might therefore withdraw without liability to the beneficiary. The question of whether the statute of wills would block a recovery by a surviving beneficiary of the amount remaining in the account at the death of the depositor was not raised.

119. For reviews of the cases on this point in New York and elsewhere, see Comments (1928) 37 YALE L. J. 1133, (1939) 87 U. OF PA. L. REV. 847; (1939) 52 HARV. L. REV. 1021, (1938) U. OF PA. L. REV. 321, (1938) 36 MICH. L. REV. 517.

120. 146 Misc. 616, 262 N. Y. Supp. 623 (Surr. Ct. 1933).

121. *Accord*: Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't 1908); cf. later litigation, 139 App. Div. 733, 124 N. Y. Supp. 365 (2d Dep't 1910).

result would establish the existence of the trust from the moment of the original deposit, consequently making the depositor or his estate liable for any moneys withdrawn by him during his lifetime, which, under ordinary circumstances, is not the case. . . . Since any advantage to the tentative beneficiary is to take effect only on the death of the owner of the fund and the possibility of such benefit is revocable up to the moment of death, there is presented an obvious exception to the rule implied in *Gilman v. McArdle* . . . that, for such a transfer, the owner is limited to a testamentary direction.

"In essence it is a legally authorized manner of disposition of the decedent's effects on death to the extent of the property embraced in the account at the time the death occurs in degree equal to a will and is universally so treated in tax laws. . . .

"This court is convinced that in this connection no worth-while object can be gained by a failure, metaphorically speaking, to designate a common excavating implement by its lexicographical appellation. If such a course were adopted, the presently pertinent problem would solve itself in the same manner as if the decedent, instead of opening the bank account 'in trust,' had made a specific bequest of its avails; the balance of the estate would be first called upon to defray debts and funeral and testamentary expenses, but if a deficiency developed for these purposes, the specifically bequeathed bank account would, so far as necessity required, be made available for this purpose. . . .

"For those, however, to whom such a frank recognition of the verities of the nature of the transaction would be abhorrent, the same result is attainable by a more devious process."¹²²

The "devious process," as far as the payment of funeral expenses was concerned, consisted of the perfectly sensible idea that most people would prefer not to have their remains "thrown into the quicklime of a Potter's Field," and that it was therefore proper to presume that the depositor would intend the share of the beneficiary to be reduced by enough to pay for a decent burial. The testamentary interpretation in this opinion appears not only in its express statements but also in its result, since property transferred inter vivos is not usually liable for funeral expenses.

Yet a husband has been permitted to defeat the statutory share of his surviving wife by a series of tentative trust deposits made in favor of others shortly before his death.¹²³ Disregarding the possible equities

122. *Matter of Reich*, 146 Misc. 616, 618, 262 N. Y. Supp. 623, 626 (Surr. Ct. 1933).

123. *Murray v. Brooklyn Sav. Bank*, 258 App. Div. 132, 15 N. Y. S. (2d) 915 (1st Dep't 1939), (1940) 40 Col. L. Rev. 731, (1940) 53 Harv. L. Rev. 691. While this decision has not been expressly reversed or overruled by the Court of Appeals, it seems doubtful that it will ultimately represent the controlling attitude of the New York courts. *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937), 112 A. L. R. 643, 649 (1938); *Krause v. Krause*, 285 N. Y. 27, 32 N. E. (2d) 779 (1941); *Schnakenberg v. Schnakenberg*, 28 N. Y. S. (2d) 841 (App. Div. 2d Dep't 1941).

of the particular case, this is a very unfortunate precedent if there is any genuine desire to protect wives against disinheritance, but adequate treatment of the matter would require too elaborate a discussion to be included here. The relevant point in this context is the court's conclusion that the result was compelled by the wording of the statute¹²⁴ creating the wife's statutory share and particularly the provision that the share exists "where a testator dies . . . and leaves a will."¹²⁵ The court stated that a tentative trust could not be classified as "a will" for this purpose, and that therefore, since no other will was left, no statutory share existed upon which to predicate a remedy for the wife. The inconsistency between the approach of this decision and that of Surrogate Wingate in the *Reich* case is apparent.

To anyone devoted to the "interest" criterion of classification, all of this must be reminiscent of a shell game. Now you see the "interest"; now you don't; sometimes it seems to be here, sometimes there. Such intellectual discomfort could be alleviated by consistent adherence to the theory that an interest passes to the beneficiary at the time of the deposit subject to be divested by total or partial withdrawal of funds or by other revocation. As stated above, this disposes doctrinally of the objection of the statute of wills. It would not preclude protection of the statutory share of the spouse, which can be based on the policy of safeguarding the objective of that statute and should not require classification of the tentative trust as a will. The doctrinal inconsistencies between the theory of an immediate inter vivos declaration of trust and the results reached by the New York courts lie chiefly on the surface. The usual inter vivos trust is customarily set out in a detailed written document, to the content and terms of which the settlor and his attorney will normally have devoted much time and thought. Speaking in terms either of the philosophy of the parol evidence rule or of human probabilities, it is proper to assume that such a trust instrument was deliberately adopted by the settlor as a final and all-inclusive statement of what he intended to be the characteristics of the trust. It is reasonable to assume that the omission of a power of revocation in such a carefully prepared document was intentional, and therefore to adopt a general principle that an inter vivos trust is irrevocable unless a power of revocation is expressly reserved. It is also reasonable to assume that such an instrument would include any intended limitations on the beneficiary's interest, and therefore to hold that, in the absence of any relevant provisions, that interest was not intended to be defeated wholly by his predeceasing the settlor or diminished to meet the latter's funeral expenses. But the situation of a bank deposit is quite different. The trust is not stated in any detail, its express terms being con-

124. N. Y. DEC. EST. LAW § 18.

125. N. Y. DEC. EST. LAW § 18(1).

financed to the form of the account, sometimes expanded briefly in a supplementary agreement with the bank. There is, therefore, not the same factual basis for the application of ordinary doctrines of interpretation of trust instruments, and the court has much more justification for implying terms of the trust. It may reasonably imply from current practices in making such deposits a power to revoke or withdraw, as was done in the *Totten* case. As indicated above, it may solve the issue raised by the prior death of the beneficiary or by a deficiency of other assets to meet funeral expenses in terms of the presumed intent of the depositor. In other words, a trust deposit may be factually distinguished from the more typical living trust in order to reconcile doctrinal differences that appear, on the surface, to be inconsistent.

There is some authority in other states for denying a recovery by the surviving beneficiary on the ground that his designation is a testamentary act of the depositor and therefore void for failure to comply with the statute of wills.¹²⁶ The contrast between this result and the New York approach brings out again the differences between a purely doctrinal and a functional methodology.

A depositor's attempt to give another an interest in a savings bank account, whether as sole owner, co-owner, or beneficiary of a trust, should not, if intent to give be assumed, be nullified for lack of formality. Notwithstanding the argument in the *Beaver* case, it is reasonable to assume an intent to give from the form of the deposit, since that seems the most obvious purpose of including the name of another in the account. This is a rebuttable presumption in the tentative trust doctrine, so that evidence to the contrary may be introduced.¹²⁷ The circumstances surrounding the deposit adequately fulfill the two major purposes of the requirements of transfer. The ritual function is satisfied because a person does not open or transfer a savings account without deliberation. The specification of the form of the account, including the name of the beneficiary, on the passbook and the records of the bank complies

126. *Springvale Nat. Bank v. Ward*, 122 Me. 227, 119 Atl. 529 (1923) (presumption of irrevocability rebutted). For a sequence of the efforts of the New Jersey courts, by denying the claim of the surviving beneficiary on this ground, to frustrate the intent of the depositor, and also, apparently, of the legislature, see *Nicklas v. Parker*, 71 N. J. Eq. 777, 71 Atl. 1135 (1907); *Johnson v. Sav. Inv. & Trust Co.*, 107 N. J. Eq. 547, 153 Atl. 382 (Ch. 1931) (unduly flowery language of brief of defendant beneficiary criticized; although essence of contention of brief seems important), *aff'd*, 110 N. J. Eq. 466, 160 Atl. 371 (1932); *Thatcher v. Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912 (Ch. 1936); *Travers v. Reid*, 119 N. J. Eq. 416, 182 Atl. 908 (Ch. 1936). Cf. *Field v. Fidelity Union Trust Co.*, 108 Fed. (2d) 521 (C. C. A. 3d, 1939), *rev'd*, 311 U. S. 169 (1940), *rehearing denied*, 311 U. S. 730 (1941); *Hickey v. Kahl*, 19 A. (2d) 33 (Del. Ch., 1941). See also Corbin, *The Laws of the Several States* (1941) 50 YALE L. J. 762, 766.

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

sufficiently with the evidentiary function. And the fact that money must be deposited to set up such an account further militates against the possibility of fabrication of a mistaken or dishonest claim after the death of the depositor.

The tentative trust concept, whatever the doctrinal difficulties in its formulation, provides a reliable and convenient vehicle of transfer. It is, as Surrogate Wingate says,¹²⁸ one way of obtaining the effects of a will. Its existence as a supplementary method of transferring economic enjoyment at death seems affirmatively justified by its simplicity and utility for those not in the most affluent class. Attorneys' fees and the expenses and delay of administration are avoided. In the absence of unusual complications, the beneficiary may obtain the funds more rapidly after the death of the depositor than if a will were made, a particularly important factor if the beneficiary is an impecunious dependent in need of immediate continuation of support. To nullify such a useful device because of the conception that no interest passes until death is to make an intellectual exercise of the most abstract character predominant, without justification in policy, over social utility and the desires of the individual.

128. See p. 35 *supra*.